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DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Part 4

[Docket ID OCC–2016–0001]

RIN 1557–AE01

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 211

[Docket No. R–1531]

RIN 7100–AE45

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 337, 347, and 390

RIN 3064–AE42

Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint final rules.

SUMMARY: The OCC, Board, and FDIC (collectively, the agencies) are jointly adopting as final and without change the agencies' interim final rules published in the **Federal Register** on February 29, 2016, that implemented section 83001 of the Fixing America's Surface Transportation Act (FAST Act). Section 83001 of the FAST Act permits the agencies to conduct a full-scope, on-site examination of qualifying insured depository institutions with less than $1 billion in total assets no less than once during each 18-month period. Prior to enactment of the FAST Act, only qualifying insured depository institutions with less than $500 million in total assets were eligible for an 18-month on-site examination cycle. The final rules, like the interim final rules, generally allow well capitalized and well managed institutions with less than $1 billion in total assets to benefit from the extended 18-month examination schedule. In addition, the final rules adopt as final parallel changes to the agencies' regulations governing the on-site examination cycle for U.S. branches and agencies of foreign banks, consistent with the International Banking Act of 1978. Finally, through this rulemaking, the FDIC has integrated its regulations regarding the frequency of safety and soundness examinations for State nonmember banks and State savings associations.

DATES: Effective on January 17, 2017.

FOR FURTHER INFORMATION CONTACT:

OCC: Deborah Katz, Assistant Director, or Melissa J. Lisenbee, Attorney, Legislative and Regulatory Activities Division, (202) 649–5490; Scott Schainost, Midsize and Community Bank Supervision Liaison, Midsize and Community Bank Supervision, (202) 649–8173.

Board: Division of Banking Supervision and Regulation—Richard Naylor, Associate Director, (202) 728–5854; Richard Watkins, Deputy Associate Director, (202) 452–3421; Virginia Gibbs, Manager, (202) 452–2521; or Alexander Kobulsky, Supervisory Financial Analyst, (202) 452–2031; and Legal Division—Laurie Schaffer, Associate General Counsel, (202) 452–2277; Brian Chernoff, Senior Attorney, (202) 452–2952; or Mary Watkins, Attorney, (202) 452–3722.

FDIC: Thomas F. Lyons, Chief, Policy and Program Development, (202) 898–6850, Karen Jones Currie, Senior Examination Specialist, (202) 898–3981 for the Division of Risk Management Supervision; Mark A. Mellon, Counsel, (202) 898–3884 for revisions to 12 CFR part 337; Rodney D. Ray, Counsel, (202) 898–3556 for revisions to 12 CFR part 347; Suzanne J. Dawley, Senior Attorney, (202) 898–6509 for revisions to 12 CFR part 390 for the Legal Division.

SUPPLEMENTARY INFORMATION:

I. Background

Section 10(d) of the Federal Deposit Insurance Act (FDI Act) [1] generally requires the appropriate Federal banking agency for an insured depository institution (IDI) to conduct a full-scope, on-site examination of the institution at least once during each 12-month period. Prior to enactment of section 83001 of the FAST Act,[2] section 10(d)(4) of the FDI Act authorized the appropriate Federal banking agency to extend the on-site examination cycle for an IDI to at least once during an 18-month period if the IDI (1) had total assets of less than $500 million; (2) was well capitalized (as defined in 12 U.S.C. 1831o); (3) was found, at its most recent examination, to be well managed [3] and to have a composite condition of ''outstanding'' or, in the case of an institution that has total assets of not more than $100 million, ''outstanding'' or ''good;'' (4) was not subject to a formal enforcement proceeding or order by the FDIC or its appropriate Federal banking agency; and (5) had not undergone a change in control during the previous 12-month period in which a full-scope, on-site examination otherwise would have been required. Section 10(d)(10) of the FDI Act, prior to the enactment of section 83001 of the FAST Act, also gave the agencies discretionary authority to raise the eligibility size limit for the 18-month examination cycle for otherwise qualifying IDIs with an ''outstanding'' or ''good'' composite rating from $100 million to an amount not to exceed $500 million in total assets if the agencies determined that the higher limit would be consistent with the principles of

[1] 12 U.S.C. 1820(d). Section 10(d) of the FDI Act was added by section 111 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

[2] Public Law 114–94, 129 Stat. 1312 (2015).

[3] Depository institutions are evaluated under the Uniform Financial Institutions Rating System (commonly referred to as ''CAMELS''). CAMELS is an acronym that is drawn from the first letters of the individual components of the rating system: Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk. CAMELS ratings of ''1'' and ''2'' correspond with ratings of ''outstanding'' and ''good.'' In addition to having a CAMELS composite rating of ''1'' or ''2,'' an IDI is considered to be ''well managed'' for the purposes of section 10(d) of the FDI Act only if the IDI also received a rating of ''1'' or ''2'' for the management component of the CAMELS rating at its most recent examination. See 72 FR 17798 (Apr. 10, 2007).

safety and soundness.[4] Under section 10(d)(3), the Board and the FDIC, as the appropriate Federal banking agencies for State-chartered insured banks and savings associations, are permitted to conduct on-site examinations of such IDIs on alternating 12-month or 18-month periods with the institution's State supervisor, if the Board or FDIC, as appropriate, determines that the alternating examination conducted by the State carries out the purposes of section 10(d) of the FDI Act.[5]

Section 7(c)(1)(C) of the International Banking Act (IBA) provides that a Federal or a State branch or agency of a foreign bank shall be subject to on-site examination by its appropriate Federal banking agency or State bank supervisor as frequently as a national or State bank would be subject to such an examination by the agency.[6] The agencies previously adopted regulations to implement the examination cycle requirements of section 10(d) of the FDI Act and section 7(c)(1)(C) of the IBA, including the extended 18-month examination cycle available to qualifying small institutions and U.S. branches and agencies of foreign banks.[7] The agencies have also exercised their discretion, under section 10(d)(10) of the FDI Act, to extend the 18-month examination cycle for otherwise qualifying institutions with ''good'' composite ratings,[8] first, in 1997, for such institutions with total assets of $250 million or less, and, again, in 2007, for such institutions with total assets of $500 million or less.[9]

Section 83001 of the FAST Act, effective on December 4, 2015, amended section 10(d) of the FDI Act to raise, from $500 million to $1 billion, the total asset threshold below which an agency may apply an 18-month (rather than a 12-month) on-site examination cycle for IDIs with ''outstanding'' composite ratings, and to raise, from not more than $100 million to not more than $200 million, the total asset threshold below which an agency may apply an 18-month examination cycle to an institution with an ''outstanding'' or ''good'' composite rating.[10] Section 83001 also amended section 10(d)(10) of the FDI Act to authorize the appropriate Federal banking agency to increase, by regulation, the maximum amount limitation for IDIs with ''outstanding'' or ''good'' composite ratings from not more than $200 million to not more than $1 billion if the appropriate Federal banking agency determines that the higher amount would be consistent with the principles of safety and soundness for IDIs.[11]

These FAST Act amendments reduce regulatory burdens on small, well capitalized, and well managed institutions and allow the agencies to better focus their supervisory resources on those IDIs and U.S. branches and agencies of foreign banks that may present capital, managerial, or other issues of supervisory concern.

II. Discussion of the Final Rules

On February 29, 2016, the agencies published and requested comment on interim final rules to implement the amendments to section 10(d) made by section 83001 of the FAST Act.[12] The agencies are adopting the interim final rules as final without change. In particular, the agencies are adopting as final the increase, from $500 million to $1 billion, in the total asset threshold below which an IDI that meets the criteria in section 10(d) and the agencies' rules may qualify for an 18-month, full-scope, on-site examination cycle. In addition, as authorized by section 83001 of the FAST Act, the agencies have determined that it is consistent with principles of safety and soundness to permit institutions with total assets of $200 million or greater and not exceeding $1 billion that received a composite CAMELS rating of ''1'' or ''2,'' and that meet other qualifying criteria set forth in section 10(d) and the agencies' rules, to qualify for an 18-month examination cycle. Consistent with section 7(c)(1)(C) of the IBA, the agencies also are adopting as final conforming changes to the regulations that govern the on-site examination cycle of a U.S. branch or agency of a foreign bank. These changes permit a U.S. branch or agency of a foreign bank with total assets of less than $1 billion to qualify for an 18-month examination cycle if the U.S. branch or agency of a foreign bank received a composite ROCA rating of ''1'' or ''2'' at its most recent examination and meets the other applicable criteria.

The FDIC analyzed the frequency with which institutions rated a composite CAMELS rating of ''1'' or ''2'' failed within five years, versus the frequency with which institutions rated a composite CAMELS rating of ''3,'' ''4,'' or ''5'' failed within five years. FDIC analysis indicates that between 1985 and 2011,[13] FDIC-insured depository institutions with assets less than $1 billion and a composite CAMELS rating of ''1'' or ''2'' had a five-year failure rate that was one-seventh as high as institutions with a CAMELS rating of ''3,'' ''4,'' or ''5.'' Moreover, the relationship between failure rates in the two ratings groups did not meaningfully change when the analysis was restricted to institutions with assets between $200 million and $500 million compared to institutions with assets between $500 million to $1 billion. This analysis suggests that extending the examination cycle for well-rated institutions with $500 million to $1 billion in assets by an additional six months, combined with the agencies' off-site monitoring activities and ability to examine an institution more frequently as necessary or appropriate, is unlikely to negatively affect the safe and sound operations of qualifying institutions or the ability of the agencies to effectively supervise and protect the safety and soundness of institutions with total assets of less than $1 billion.[14] Furthermore, the agencies note that, in order to qualify for an 18-month examination cycle, any institution with total assets of less than $1 billion—including one with a CAMELS composite rating of ''2''—must meet the other capital, managerial, and supervisory criteria set forth in section 10(d). The agencies estimate that the changes adopted by the final rules will increase the number of institutions that may qualify for an extended 18-month examination cycle by approximately 611 institutions (372 of which are supervised by the FDIC, 142 by the OCC, and 97 by the Board), bringing the total number of institutions that may qualify for an extended 18-month examination cycle to 4,793 IDIs.[15] Approximately 89 U.S. branches and agencies of foreign banks would be eligible for the extended examination cycle based on the final rules, an increase of 30 (one of which is

[4] 12 U.S.C. 1820(d)(10).

[5] 12 U.S.C. 1820(d)(3).

[6] 12 U.S.C. 3105(c)(1)(C).

[7] See 12 CFR 4.6 and 4.7 (OCC), 12 CFR 208.64 and 211.26 (Board), 12 CFR 337.12, 347.211, and 390.351 (FDIC).

[8] Corresponding to a CAMELS or *R*isk management, *O*perational controls, *C*ompliance, and *A*sset quality (ROCA) rating of ''2.''

[9] See 62 FR 6449 (Feb. 12, 1997) (interim final rule); see also 63 FR 16377 (Apr. 2, 1998) (final rule); see also 72 FR 17798 (Apr. 10, 2007) (interim final rule); see also 72 FR 54347 (Sept. 25, 2007) (final rule).

[10] Public Law 114–94, 129 Stat. 1312 (2015).

[11] *Id.*

[12] 81 FR 10063 (Feb. 29, 2016).

[13] A list of failed institutions can be found on the FDIC's Web site at *https://www.fdic.gov/bank/individual/failed/banklist.html.*

[14] The agencies continue to reserve the right in their regulations to examine an IDI or U.S. branch or agency of a foreign bank more frequently than is required by the FDI Act or IBA. See 12 CFR 4.6(c) and 4.7(c) (OCC), 12 CFR 208.64(c) and 211.26(c)(3) (Board), 12 CFR 337.12(c), 347.211(c) (FDIC), and 390.351(c).

[15] Call report data, March 31, 2016.

supervised by the FDIC, four by the OCC, and 25 by the Board).[16]

Finally, the FDIC is adopting as final changes made in the interim final rules to integrate its regulations regarding the frequency of safety and soundness examinations for State nonmember banks and State savings associations. Twelve CFR 390.351 was rescinded and removed because it was substantively identical to 12 CFR 337.12 and, therefore, redundant to section 12 CFR 337.12. Twelve CFR 337.12 was amended to reflect the authority of the FDIC under section 4(a) of the Home Owners' Loan Act to provide for the examination and safe and sound operation of State savings associations. State savings associations now are within the scope of 12 CFR 337.12, and, all FDIC-supervised institutions, including State savings associations, are subject to the requirements of 12 CFR 337.12.

The agencies received three comment letters in response to the interim final rules. Two commenters, both industry trade groups, supported the interim final rules. Both commenters agreed that extending the examination cycle for IDIs that meet the interim final rules' criteria would not negatively affect the safe and sound operations of the institutions or the ability of the agencies to supervise them. The third commenter, an individual, did not support the interim final rules, but offered no specific reasons for that opposition.

For the reasons described in this section, the agencies are adopting these rules as final without change.

Effective Date

The Administrative Procedure Act (APA) generally requires that a final rule be published in the **Federal Register** no less than 30 days before its effective date.[17] Therefore, the final rules will become effective on January 17, 2017. The interim final rules will continue to be in effect until the final rules become effective.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosures, or other requirements on IDIs, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[18] Further, new regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[19] The final rules adopt the interim final rules without change. The RCDRIA does not apply to the final rules because the rules do not impose any additional reporting, disclosures, or other new requirements on IDIs.

III. Regulatory Analysis

A. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[20] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies' staff believe the final rules are presented in a clear and straightforward manner and having received no comments on how to make the interim final rules easier to understand, the agencies adopt the final rules without change.

B. Regulatory Flexibility Act

Board: Regulatory Flexibility Act[21] (RFA) requires an agency to prepare a final regulatory flexibility analysis (FRFA) when an agency promulgates a final rule, unless pursuant to section 605(b) of the RFA, the agency certifies that the final rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. In this context, small entities include banking entities with total assets less than or equal to $550 million.

The final rules do not have a significant impact on a substantial number of small entities. Like the interim final rules, the final rules expand the number of institutions eligible for an extended examination cycle, thus reducing the regulatory burden associated with on-site examinations for these institutions. Further, only 22 of the 122 Board-regulated institutions affected by the final rules have assets between $500 million and $550 million and thus would be considered small entities. These 22 institutions represent a small percentage (3.3 percent) of the 657 Board-supervised institutions with total assets less than $550 million.[22] For these reasons, the Board certifies that the final rules will not have a significant impact on a substantial number of small entities as defined in the RFA,[23] and therefore, a regulatory flexibility analysis is not required.

FDIC: The RFA[24] requires an agency, in connection with a notice of final rulemaking, to prepare a FRFA analysis describing the impact of the rule on small entities (defined by the Small Business Administration for the purposes of the RFA to include banking entities with total assets of $550 million or less) or to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The final rule does not impose any significant economic impact on a substantial number of small entities. The final rule raises the asset eligibility threshold for extended examination cycles from $500 million to $1 billion, expanding the number of qualifying institutions and U.S. branches and agencies of foreign banks, and reduces the regulatory burden associated with on-site examinations. Of the 372 FDIC-supervised institutions that could be impacted by the rule, only 71 of the FDIC-supervised institutions have total assets between $500 million and $550 million which is a very small share (2.5 percent) of the 2,817 FDIC-supervised institutions with total assets less than $550 million.[25] For this reason, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities as defined in the RFA, and therefore, a regulatory flexibility analysis is not required.

OCC: The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). Consistent with section 553(b)(B) of the APA, the agencies determined for good cause that general notice and opportunity for public comment were not necessary and issued an interim final rule rather than a proposed rule. Accordingly, the RFA's requirements relating to initial and final regulatory flexibility analyses do not apply.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995[26] states that no agency may conduct or sponsor, nor is the respondent required to respond to, an

[16] *Id.*

[17] 5 U.S.C. 553(d).

[18] 12 U.S.C. 4802(a).

[19] 12 U.S.C. 4802(b).

[20] Pub. L. 106–102, section 722, 113 Stat. 1338, 1471 (1999).

[21] 5 U.S.C. 601 *et seq.*

[22] Call report data, March 31, 2016.

[23] 5 U.S.C. 601 *et seq.*

[24] Id.

[25] Call report data, March 31, 2016.

[26] 44 U.S.C. 3501–3521.

information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Because the final rules do not create a new, or revise an existing collection of information, no information collection submission needs to be made to OMB.

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA),[27] the agencies are required to conduct a review at least once every 10 years to identify any outdated or otherwise unnecessary regulations. The agencies completed the last comprehensive review of their regulations under EGRPRA in 2006 and are currently conducting the next decennial review. The burden reduction evidenced in these final rules is consistent with the objectives of the EGRPRA review process.

Authority and Issuance

■ For the reasons set forth in the joint preamble, the interim rule published on February 29, 2016 at 81 FR 10063, is adopted as final without change.

Dated: October 19, 2016.

Thomas J. Curry,

Comptroller of the Currency.

Board of Governors of the Federal Reserve System, December 6, 2016.

Robert deV. Frierson,

Secretary of the Board.

Dated at Washington, DC, this 19th day of October 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–30133 Filed 12–15–16; 8:45 am]

BILLING CODE 4810–33–P 6210–01–P 6714–01–P

[27] Public Law 104–208, 110 Stat. 3309 (1996).

FEDERAL RESERVE SYSTEM

12 CFR Part 217 Regulation Q

[Docket No. R–1535; RIN 7100 AE–49]

Regulatory Capital Rules: Implementation of Capital Requirements for Global Systemically Important Bank Holding Companies

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a final rule to make several revisions to its rule regarding risk-based capital surcharges for U.S.-based global systemically important bank holding companies (GSIB surcharge rule). The final rule modifies the GSIB surcharge rule to provide that a bank holding company subject to the rule should continue to calculate its method 1 score and method 2 score under the rule annually using data reported on the firm's Banking Organization Systemic Risk Report (FR Y–15) as of December 31 of the previous calendar year. In addition, the final rule clarifies that a bank holding company subject to the GSIB surcharge rule must calculate its method 2 score using systemic indicator amounts expressed in billions of dollars.

DATES: The final rule is effective January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Anna Lee Hewko, Associate Director, (202) 530–6260, Constance M. Horsley, Assistant Director, (202) 452–5239, Elizabeth MacDonald, Manager, (202) 475–6316, or Sean Healey, Supervisory Financial Analyst, (202) 912–4611, Division of Banking Supervision and Regulation; or Benjamin McDonough, Special Counsel, (202) 452–2036, Mark Buresh, Senior Attorney, (202) 452–5270, or Mary Watkins, Attorney, (202) 452–3722, Legal Division. Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. For the hearing impaired only, Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

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I. Introduction

Section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) authorizes the Board of Governors of the Federal Reserve System (Board) to establish enhanced prudential standards for bank holding companies with $50 billion or more in total consolidated assets and for nonbank financial companies that the Financial Stability Oversight Council has designated for supervision by the Board.[1] These standards must include risk-based capital requirements as well as other enumerated standards. Pursuant to section 165 of the Dodd-Frank Act, the Board adopted a rule regarding risk-based capital surcharges for U.S.-based global systemically important bank holding companies (GSIB surcharge rule) in July 2015 to impose a risk-based-capital surcharge on bank holding companies identified under the rule as global systemically important bank holding companies (GSIBs).[2] In April 2016, the Board invited public comment on a notice of proposed rulemaking (proposal or proposed rule) to make clarifying revisions to the Board's GSIB surcharge rule.[3] The Board now is issuing a final rule implementing the proposal without change (final rule).

II. Background

The GSIB surcharge rule works to mitigate the potential risk that the material financial distress or failure of a GSIB could pose to U.S. financial stability by increasing the stringency of capital standards for GSIBs, thereby increasing the resiliency of these firms. The GSIB surcharge rule establishes a methodology to identify whether a U.S. top-tier bank holding company is a GSIB and imposes a risk-based capital surcharge on such an institution. The GSIB surcharge rule takes into consideration the nature, scope, size, scale, concentration, interconnectedness, and mix of activities of each company subject to the rule in its methodology for determining whether the company is a GSIB and the size of the surcharge. These factors are captured in the GSIB surcharge rule's method 1 and method 2 scores, which use quantitative metrics reported on the FR Y–15 reporting form to measure a firm's systemic footprint.

Specifically, the GSIB surcharge rule requires each U.S. bank holding company that qualifies as an advanced approaches institution under the Board's capital rules to calculate an aggregate systemic indicator score based on five indicators of systemic importance (method 1 score).[4] A bank holding company whose method 1 score exceeds a defined threshold is identified as a GSIB. Advanced approaches institutions must calculate their method 1 scores on an annual basis using data

[1] *See,* 12 U.S.C. 5365.

[2] 80 FR 49082 (August 14, 2015).

[3] 81 FR 20579 (April 8, 2016).

[4] *See,* 12 CFR 217.100(b)(1); 12 CFR part 217, subpart H.

reported on the FR Y–15 reporting form as of December 31 of the prior year.[5]

A bank holding company identified as a GSIB must also calculate a score under method 2. Such a firm must calculate a method 2 score each year using data reported on the firm's FR Y–15 as of December 31 of the prior year. GSIB surcharges are established using the method 1 and method 2 scores, and GSIBs with higher scores are subject to higher GSIB surcharges.

Method 1 uses five equally-weighted categories that are correlated with systemic importance—size, interconnectedness, cross-jurisdictional activity, substitutability, and complexity—as measured by twelve systemic indicators.[6] For each systemic indicator, a firm divides its own measure of the systemic indicator by an aggregate global indicator amount. Each resulting value is then weighted and put onto a standard scale. The firm's method 1 score is the sum of its weighted systemic indicator scores. Method 2 uses similar inputs to those used in method 1, but replaces the substitutability category with a measure of short-term wholesale funding.[7] The GSIB surcharge for the firm is the higher of the two surcharges determined under method 1 and method 2.[8] Method 2 is calibrated differently from method 1 and generally results in a higher GSIB surcharge.

The FR Y–15 reporting form collects systemic risk data from U.S. bank holding companies and covered savings and loan holding companies[9] with total consolidated assets of $50 billion or more. The information reported on the FR Y–15 is used in part in the calculation of a bank holding company's method 1 and method 2 scores under the GSIB surcharge rule.[10]

In April 2016, the Board invited comment on a proposed rule to clarify certain aspects of the GSIB surcharge rule.[11] Because the FR Y–15 had become a quarterly, rather than an annual report, the proposed rule would have clarified that a bank holding company subject to the rule should continue to use the systemic indicator amount from the FR Y–15 regulatory report as of December 31 of the prior calendar year to calculate its method 1 and method 2 scores. The proposal also would have clarified the units used for purposes of the method 2 score calculation under the capital surcharge rule. In connection with these proposed changes, the preamble to the proposal provided clarifying information on how a firm identified as a GSIB should calculate its short-term wholesale funding score for purposes of calculating its method 2 score.

III. Description of the Final Rule

A. Revisions Related to FR Y–15 Reporting Frequency

The FR Y–15, as implemented on December 31, 2012, was an annual report.[12] The Board recently revised the FR Y–15 to require that the FR Y–15 to be filed on a quarterly basis, beginning with the report as of June 30, 2016.[13] Under the GSIB surcharge rule, bank holding companies calculate their method 1 and method 2 scores using data from their most recent FR Y–15.[14] These calculations were intended to be conducted annually using data as of December 31 of the prior calendar year, consistent with the frequency of the FR Y–15 at the time.

The proposed rule sought comment on revising the GSIB surcharge rule to require continued use of a December 31 as-of date for purposes of a bank holding company's calculation of its method 1 and method 2 scores. The proposed revisions to sections 217.404 and 217.405 of the GSIB surcharge rule would provide that the systemic indicator amount used in the calculations would be drawn from a firm's FR Y–15 as of December 31 of the previous calendar year even after the FR Y–15 becomes a quarterly report.

The Board received no comments on this aspect of the proposal and is finalizing this portion of the rule as proposed.

B. Revision To Clarify the Method 2 Score Calculation

The proposed rule also sought to revise section 217.405 of the Board's Regulation Q to clarify that, for purposes of calculating its method 2 score, a GSIB should convert its systemic indicator amounts as reported on the FR Y–15 to billions of dollars. The FR Y–15 requires these data to be reported in thousands of dollars, while the fixed coefficients used in the calculation of a firm's method 2 score are determined using aggregate data expressed in billions of dollars.[15] Therefore, to properly use the fixed coefficients in the method 2 score methodology, a firm should reflect its systemic indicator amounts used in the method 2 score calculation in billions of dollars.

The Board received no comments on this aspect of the proposal and is finalizing this portion of the rule as proposed.

C. Comment Received on the Proposed Rule

The Board received one public comment on the proposed rule. The commenter generally expressed support for the proposed rule, but expressed concerns regarding the interaction of the timing of the FR Y–15 and the Federal Reserve's complex institution liquidity monitoring report, the FR 2052a. The FR Y–15, as noted above, collects data regarding a firm's systemic risk, while the FR 2052a collects data on an institution's overall liquidity profile.[16] The commenter expressed concern that if the initial effective date of Schedule G of the FR Y–15 preceded the initial effective date of the FR 2052a this difference would reduce the time that certain firms have to fully implement the FR 2052a. Specifically, the commenter observed that, because data from the FR 2052a will be used to complete Schedule G of the FR Y–15, it was inconsistent to require firms with total assets of $50 billion or more to file Schedule G of the FR Y–15 as of December 31, 2016, but provide firms with total assets equal to or greater than $50 billion, but less than $250 billion until July 31, 2017 to file the FR 2052a. The commenter therefore argued that firms should be given additional time to complete Schedule G of the FR Y–15 in order to allow them to make use of the

[5] The GSIB surcharge rule includes transition provisions for the first years that it is effective. See 12 CFR 217.400(b)(2).

[6] 12 CFR 217.404.

[7] 12 CFR 217.405.

[8] 12 CFR 217.403.

[9] Covered savings and loan holding companies are those which are not substantially engaged in insurance or commercial activities. For more information, see the definition of ''covered savings and loan holding company'' provided in 12 CFR 217.2.

[10] The FR Y–15 requires reporting of the components used in calculating the method 1 and method 2 scores on the FR Y–15, but does not require reporting of the scores themselves. As of January 1, 2016, a bank holding company that is subject to a GSIB surcharge is required to report its applicable GSIB surcharge on line 67 of the Federal Financial Institutions Examination Council 101 report, Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework.

[11] 81 FR 20579 (April 8, 2016).

[12] *See* 77 FR 76487 (December 28, 2012). The Board subsequently revised the FR Y–15 in December 2013. *See* 78 FR 77128 (December 20, 2013).

[13] 80 FR 77344 (December 14, 2015).

[14] 80 FR 49082 (August 14, 2015).

[15] *See,* 80 FR 49082, 49088.

[16] *See* 77 FR 76487 (December 28, 2012). The Board subsequently revised the FR Y–15 in December 2013. *See* 78 FR 77128 (December 20, 2013). *See* 80 FR 71795 (November, 17, 2015).

full implementation period for the FR 2052a.

In response to the comment, the Board is issuing an interim final rule concurrently with this final rule to provide additional time for certain smaller firms to complete Schedule G of the FR Y–15 for the first time.

V. Regulatory Analysis

A. Paperwork Reduction Act (PRA)

There is no new collection of information pursuant to the PRA (44 U.S.C. 3501 *et seq.*) contained in this final rule.

B. Regulatory Flexibility Act Analysis

The Board is providing a final regulatory flexibility analysis with respect to this final rule. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires that an agency provide a regulatory flexibility analysis in connection with a final rulemaking. This final rule amends the Board's GSIB surcharge rule, which only applies to bank holding companies that are advanced approaches Board-regulated institutions for purposes of the Board's Regulation Q (advanced approaches bank holding companies). Generally, advanced approaches bank holding companies are those that: Have total consolidated assets of $250 billion or more; have total consolidated on-balance sheet foreign exposures of $10 billion or more; have subsidiary depository institutions that are advanced approaches institutions; or elect to use the advanced approaches framework.[17] Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with assets of $550 million or less (small banking organizations).[18] As of June 30, 2016, there were approximately 3,203 top-tier small bank holding companies. Bank holding companies that are subject to the final rule therefore are expected to substantially exceed the $550 million asset threshold at which a banking entity would qualify as a small bank holding company. As a result, the final rule is not expected to apply to any small bank holding company for purposes of the RFA.

Therefore, there are no significant alternatives to the final rule that would have less economic impact on small bank holding companies. As discussed above, there are no projected reporting, recordkeeping, and other compliance requirements of the final rule. The Board does not believe that the final rule duplicates, overlaps, or conflicts with any other Federal rules. In light of the foregoing, the Board does not believe that the final rule would have a significant economic impact on a substantial number of small entities.

The Board sought comment on whether the proposed rule would impose undue burdens on, or have unintended consequences for, small organizations, and received no comments on this aspect of the proposal. In light of the foregoing, the Board does not believe that the final rule will have a significant impact on small entities.

C. Riegle Community Development and Regulatory Improvement Act of 1994

In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on state member banks, the Board is required to consider, consistent with the principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, and the benefits of such regulations.[19] In addition, new regulations that impose additional reporting disclosures or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form.[20]

The final rule is only applicable to advanced approaches bank holding companies. Therefore, the requirements of the Riegle Community Development and Regulatory Improvement Act of 1994 are not applicable to this final rule.

D. Plain Language

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

[17] *See* 12 CFR 217.100.

[18] *See* 13 CFR 121.201. Effective July 14, 2014, the Small Business Administration revised the size standards for banking organizations to $550 million in assets from $500 million in assets. 79 FR 33647 (June 12, 2014). The Small Business Administration's June 12, 2014, interim final rule was adopted without change as a final rule by the Small Business Administration on January 12, 2016. 81 FR 3949 (January 25, 2016).

[19] *See* Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (''RCDRIA''), 12 U.S.C. 4802.

[20] 12 U.S.C. 4802(b).

List of Subjects in 12 CFR Part 217

Administrative practice and procedure, Banks, banking, Holding companies, Reporting and recordkeeping requirements, Securities.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the preamble, the Board amends chapter II of title 12 of the Code of Federal Regulations as follows:

PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS (REGULATION Q)

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–1, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371.

■ 2. In § 217.404, paragraph (b)(1) is revised to read as follows:

§ 217.404 Method 1 score.

* * * * *

(b) * * *

(1) Except as provided in paragraph (b)(2) of this section, the systemic indicator score in basis points for a given systemic indicator is equal to:

(i) The ratio of:

(A) The amount of that systemic indicator, as reported by the bank holding company as of December 31 of the previous calendar year; to

(B) The aggregate global indicator amount for that systemic indicator published by the Board in the fourth quarter of that year;

(ii) Multiplied by 10,000; and

(iii) Multiplied by the indicator weight corresponding to the systemic indicator as set forth in Table 1 of this section.

* * * * *

■ 3. In § 217.405, paragraph (b)(1) is revised to read as follows:

§ 217.405 Method 2 score.

* * * * *

(b) * * *

(1) The amount of the systemic indicator, as reported by the bank holding company as of December 31 of the previous calendar year, expressed in billions of dollars;

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 9, 2016.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2016–29966 Filed 12–14–16; 11:15 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–3142; Directorate Identifier 2015–NM–003–AD; Amendment 39–18725; AD 2016–25–02]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 airplanes. This AD was prompted by reports of the accumulation of very fine particle deposits in the power control unit (PCU) electro-hydraulic servo valves (EHSVs) used in the flight control system; this accumulation caused degraded performance due to reduced EHSV internal hydraulic supply pressures, resulting in the display of PCU fault status messages from the engine indication and crew alerting system (EICAS). This AD requires installing markers to limit the hydraulic system fluid used to a specific brand, doing hydraulic fluid tests of the hydraulic systems, replacing hydraulic system fluid if necessary, and doing all applicable related investigative and corrective actions. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 20, 2017.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3142.

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–2015–3142; 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 Docket 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: Fnu Winarto, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6659; fax: 425–917–6590; email: *fnu.winarto@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 787–8 airplanes. The NPRM published in the **Federal Register** on August 19, 2015 (80 FR 50233) (''the NPRM''). The NPRM was prompted by reports of the accumulation of very fine particle deposits in the PCU EHSVs used in the flight control system; this accumulation caused degraded performance due to reduced EHSV internal hydraulic supply pressures, resulting in the display of PCU fault status messages from the EICAS. The NPRM proposed to require installing markers to limit the hydraulic system fluid used to a specific brand, doing hydraulic fluid tests of the hydraulic systems, replacing hydraulic system fluid if necessary, and doing all applicable related investigative and corrective actions. We are issuing this AD to prevent the failure of flight control hydraulic PCUs, which could lead to reduced controllability of the airplane.

Comments

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

Request To Refer to Revised Service Information

United Airlines (UAL) stated that there are many errors, omissions, and inconsistencies in Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014, and provided examples of those mistakes. UAL asked that this service information be revised to correct these problems.

Boeing has issued Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016. The revised service information corrects typographical errors and makes clarifications to the Accomplishment Instructions in Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014. We have included Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016, in paragraphs (c) and (h) of this AD. We have also included a new paragraph (i) in this AD to provide credit for actions done prior to the effective date of this AD using Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014. The subsequent paragraphs have been redesignated accordingly.

Request To Clarify the Reason for the Unsafe Condition

Boeing asked that we remove all references to hydraulic fluid contamination causing EHSV restriction, in the SUMMARY, the Discussion section of the NPRM, and paragraph (e) of the proposed AD. Boeing stated that the issue is not hydraulic fluid contamination causing EHSV restriction, but the accumulation of very fine particle deposits within the EHSV causing degraded performance due to reduced EHSV internal hydraulic supply pressures. Boeing added that the solution is to change the hydraulic fluid to a specific brand, considering that it has been verified to significantly reduce the rate of accumulation of particles in the EHSVs. Boeing concluded that this would clarify the cause of the EICAS messages.

We agree that the reason for the unsafe condition should be clarified, for the reasons provided. Therefore, we have removed the references to hydraulic fluid contamination causing EHSV restriction and replaced that language with a more accurate reason for the unsafe condition in the **SUMMARY**, the Discussion section of the final rule, and paragraph (e) of this AD.

Request To Issue Global Alternative Method of Compliance (AMOC)

UAL asked that a fleet-wide AMOC be issued for Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, to correct a part number (P/N) reference. Task 1, Figure 1, and Task 2, Figure 1, of Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, identify P/N 710Z7290–9##ALT1 for the left and right engine diagonal braces; however, the correct P/N is 710Z7290–9 with no ##ALT suffix. UAL stated that the correct part number is identified in the Illustrated Parts Catalog (IPC).

We acknowledge the commenter's concern that an incorrect part number for the left and right engine diagonal braces is identified in Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014. We have discussed this error with Boeing, and it was confirmed that the part number in the IPC (as noted by UAL) is correct and should be used. In light of this information, we do not agree that a global AMOC should be issued. However, we have added a new Note 2 to paragraph (g) of this AD to clarify the correct part number.

Request To Change Certain Instructions in the Service Information

UAL stated that Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, includes procedures for the HyJet V marker installation, which is a ''Required for Compliance (RC)'' item in Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014, and must be done before or concurrently with that service information. UAL noted that there is no RC language in Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, which makes the entire service bulletin ''RC.'' UAL asked that the steps that specify access and close be marked as non-RC steps.

We do not agree to change Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, to mark the steps RC and non-RC. However, we do agree to clarify the steps that are required to accomplish the marker installation. Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014, has an RC step that specifies to install markers. That RC step does not specify to perform access and close steps for the marker installation; therefore those access and close steps are not required by this AD. We have not changed this AD in this regard.

UAL also asked we change the procedures in Part 4 of Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014, which specify options for either replacing the hydraulic fluid again, or draining and filling the hydraulic reservoir. UAL stated that if either option is used, then Part 2 of the service information titled ''Cycle Hydraulic Fluid'' must again be done, or the airplane must be flown at least one flight cycle, and then a sample drawn for testing. UAL added that this procedure, done in accordance with the instructions in the referenced service information, results in excessive cycling if the operator needs to only replace a small amount of fluid and chooses the reservoir drain-and-fill option. UAL asked to use a procedure that would specify draining and filling the reservoir, flight control cycling, and taking a fresh sample for testing, all at the same time. UAL noted that Option 10 specifies ''Drain and Fill Hydraulic Reservoir'' and is acceptable to operate the flight controls six to eight times to let the fluid flow through all the systems. UAL stated that this is the procedure used by Boeing before taking fluid samples per the Boeing 787 Airplane Maintenance Manual.

We do not agree to change the procedure for servicing the hydraulic fluid. Although UAL's proposal is an accepted procedure in the Boeing 787 Airplane Maintenance Manual, this procedure does not include operating the other hydraulic-powered subsystems, such as the landing gear, thrust reverser, and brakes. Subsequently, it could result in stagnant fluid measurements not intermixing with other hydraulic system fluid following replacement of the hydraulic system fluid, and could generate fluid test samples that do not include the entire system. In light of these factors, we have not changed this AD in this regard.

Clarification to Paragraph (g) of This AD

We have added a new Note 1 to paragraph (g) of this AD to refer to Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, as an additional source of guidance for installing markers to allow servicing of hydraulic systems with only HyJet V hydraulic fluid.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

We have reviewed Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016. This service information describes procedures for installing markers to limit the hydraulic system fluid used to a specific brand; doing hydraulic fluid tests of the hydraulic systems, replacing the hydraulic system fluid if necessary, and related investigative and corrective actions. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 11 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Install markers	2 work-hours × $85 per hour = $170	$95	$265	$2,915
Test and replace left, center, and right hydraulic system fluid.	104 work-hours × $85 per hour = $8,840	1,020	9,860	108,460

We estimate the following costs to do any necessary replacements that may be required based on the results of the inspection. We have no way of determining the number of aircraft that might need these replacements:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace power control unit of elevator	9 × $85 per hour = $765	$108,000	$108,765
Replace power control unit of aileron	9 × $85 per hour = $765	118,000	118,765

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–25–02 The Boeing Company: Amendment 39–18725; Docket No. FAA–2015–3142; Directorate Identifier 2015–NM–003–AD.

(a) Effective Date

This AD is effective January 20, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Control Systems.

(e) Unsafe Condition

This AD was prompted by reports of the accumulation of very fine particle deposits in the power control unit (PCU) electro-hydraulic servo valves (EHSVs) used in the flight control system; this accumulation caused degraded performance due to reduced EHSV internal hydraulic supply pressures, resulting in the display of PCU fault status messages from the engine indication and crew alerting system (EICAS). We are issuing this AD to prevent failure of flight control hydraulic PCUs, which could lead to reduced controllability of the airplane.

(f) Compliance

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

(g) Marker Installation

Within 36 months after the effective date of this AD, install markers to allow servicing of hydraulic systems with only HyJet V hydraulic fluid, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016.

Note 1 to paragraph (g) of this AD: Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016, refers to Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, as an additional source of guidance for installing markers to allow servicing of hydraulic systems with only HyJet V hydraulic fluid.

Note 2 to paragraph (g) of this AD: Task 1, Figure 1, and Task 2, Figure 1, of Boeing Service Bulletin B787–81205–SB290022–00, Issue 001, dated September 4, 2014, identify P/N 710Z7290–9##ALT1 for the left and right engine diagonal braces; however, the correct P/N is 710Z7290–9 with no ##ALT suffix.

(h) Fluid Tests of the Left, Right, and Center Hydraulic Systems

For airplanes identified in Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016, as Group 1, Configuration 2, Group 2: Within 36 months after the effective date of this AD, do hydraulic fluid tests of the left, right, and center hydraulic systems, replace the hydraulic system fluid, if necessary, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016. Do all applicable related investigative and corrective actions within 36 months after the effective date of this AD.

(i) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 001, dated November 25, 2014.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if

requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

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

(3) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(3)(i) and (j)(3)(ii) apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or sub-step is labeled ''RC Exempt,'' then the RC requirement is removed from that step or sub-step. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(4) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(k) Related Information

(1) For more information about this AD, contact Fnu Winarto, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6659; fax: 425–917–6590; email: *fnu.winarto@faa.gov*.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (l)(4) of this AD.

(l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Boeing Alert Service Bulletin B787–81205–SB270026–00, Issue 002, dated June 13, 2016.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740; telephone 562–797–1717; Internet *https://www.myboeingfleet.com*.

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on November 25, 2016.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29251 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9509; Directorate Identifier 2016–NM–177–AD; Amendment 39–18750; AD 2016–25–24]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus Model A319, A320, and A321 series airplanes. This AD requires repetitive general visual inspections for broken battery retaining rods and replacement if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 3, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 3, 2017.

We must receive comments on this AD by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9509.

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–2016–9509; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1405; fax: 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0204, dated October 13, 2016; corrected October 19, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''); to correct an unsafe condition for certain Airbus Model A319, A320, and A321 series airplanes. The MCAI states:

Several occurrences have been reported of battery [retaining] rod failures on certain Airbus aeroplanes. Subsequent examination of broken [battery retaining] rod parts determined that these failures were due to quality defects of the material used during parts manufacturing. Each battery is secured on an aeroplane by two [battery retaining] rods. Failure of one rod, in case of severe turbulence during flight or hard landing, could lead to battery displacement, or roll on the remaining rod side, up to a point where the remaining rod could be disengaged. The battery could ultimately detach from its housing and damage relays, connectors, contactor boxes, air ducts and surrounding structure.

This condition, if not detected and corrected, could lead to the loss of the normal electrical generation not followed by an automatic recovery of essential network.

To address this potential unsafe condition, Airbus issued Alert Operators Transmission (AOT) A92N001–16 (later revised) to provide instructions for inspection and replacement of battery [retaining] rods.

For the reason described above, this [EASA] AD requires repetitive general visual inspections (GVI) of the four battery [retaining] rods (two per battery), and, in case of findings, replacement of [broken] battery [retaining] rods.

Pending the outcome of the on-going investigation, this [EASA] AD is considered an interim action and further [EASA] AD action may follow.

This [EASA] AD is republished to add two missing models to the applicability (the respective MSN were already listed in the original [EASA] AD) and to correct the battery [retaining] rod Part Number (P/N).

You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9509.

Related Service Information Under 1 CFR Part 51

Airbus has issued Alert Operators Transmission (AOT) A92N001–16, Rev 01, dated October 10, 2016. The service information describes procedures for general visual inspections to look for broken battery retaining rods. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Differences Between This AD and the MCAI or Service Information

The MCAI specifies to replace broken rods in accordance with Airbus AOT A92N001–16, Rev 01, dated October 10, 2016. However, Airbus AOT A92N001–16, Rev 01, dated October 10, 2016, does not include procedures to replace broken rods. This AD requires that broken rods be replaced using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA Design Organization Approval (DOA).

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of these same type designs.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the detachment of a battery from the housing and damage to other electrical equipment and surrounding structure could lead to loss of normal electrical power generation and recovery of essential network and consequential control of the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9509; Directorate Identifier 2016–NM–177–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 330 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $185	$0	$85	$28,050

We estimate the following costs to do any necessary replacements that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need this replacement.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace Battery Rod	1 work-hour × $85 per hour = $85 per battery rod	[1] $0	$85 per battery rod.

[1] Parts costs are not available from the manufacturer.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–25–24 Airbus: Amendment 39–18750; Docket No. FAA–2016–9509; Directorate Identifier 2016–NM–177–AD.

(a) Effective Date

This AD becomes effective January 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A319–111, A319–112, A319–113, A319–114, A319–115, A319–131, A319–132, A319–133, A320–211, A320–212, A320–214, A320–231, A320–232, A320–233, A320–251N, A320–271N, A321–111, A321–112, A321–131, A321–211, A321–212, A321–213, A321–231, and A321–232 airplanes, certificated in any category, manufacturer serial numbers (MSN) 5182, 5295, 5327, 5406, 5470, 5545, 5650, 5656, 5664, 5671, 5679, 5685, 5690, 5700, 5701, 5711, 5717, 5722, 5725, 5731, 5732, 5734, 5738, 5740, 5742, 5744, 5746, 5748, 5750 through 5752 inclusive, 5754 through 5756 inclusive, 5758 through 5760 inclusive, 5762, 5763, 5765 through 6100 inclusive, 6102 through 6285 inclusive, 6287 through 6418 inclusive, 6420 through 6463 inclusive, 6465 through 6619 inclusive, 6621 through 6641 inclusive, 6643 through 6672 inclusive, 6674 through 6719 inclusive, 6721 through 6771 inclusive, 6773 through 6828 inclusive, 6830 through 6832 inclusive, 6834 through 6838 inclusive, 6840 through 6867 inclusive, 6869 through 6903 inclusive, 6905, 6906, 6908 through 6913 inclusive, 6915 through 6919 inclusive, 6921 through 6944 inclusive, 6947 through 6951 inclusive, 6953 through 6966 inclusive, 6968 through 6972 inclusive, 6974, 6976 through 6992 inclusive, 6994 through 7000 inclusive, 7002 through 7010 inclusive, 7012, 7014 through 7032 inclusive, 7034 through 7045 inclusive, 7047 through 7050 inclusive, 7052, 7054 through 7059 inclusive, 7061 through 7071 inclusive, 7073 through 7078 inclusive, 7080, 7081, 7084 through 7093 inclusive, 7095 through 7098 inclusive, 7100, 7101, 7104, 7105, 7108 through 7110 inclusive, 7112 through 7121 inclusive, 7123, 7125, 7127, 7128, 7130, 7132, 7133, 7135, 7136, 7138 through 7140 inclusive, 7142 through 7146 inclusive, 7148, 7149, 7152 through 7156 inclusive, 7158, 7160, 7161, 7163 through 7167 inclusive, 7169 through 7171 inclusive, 7173, 7174, 7176, 7177, 7179, 7180, 7182 through 7184 inclusive, 7187, 7189, 7191, 7194, 7196 through 7200 inclusive, 7203, 7204, 7206, 7207, 7210, 7212 through 7225 inclusive, 7227, 7228, 7230, 7232, 7235, 7238, 7241 through 7244 inclusive, 7248, and 7261.

(d) Subject

Air Transport Association (ATA) of America Code 92, Electrical System Installation.

(e) Reason

This AD was prompted by reports of broken battery retaining rods. We are issuing this AD to detect and correct broken battery retaining rods, which, in the event of a hard landing or severe turbulence, can cause the battery to detach from its housing, resulting in damage to other electrical equipment and surrounding structure. This condition could lead to loss of normal electrical power generation and subsequent inability to restore electrical power to essential airplane systems.

(f) Compliance

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

(g) Repetitive Inspections

Within 4 months after the effective date of this AD, and thereafter at intervals not to exceed 4 months, accomplish a general visual inspection of each battery retaining rod part number (P/N) D9241023700000, in accordance with the instructions of Airbus Alert Operators Transmission (AOT) A92N001–16, Rev 01, dated October 10, 2016.

(h) Additional Inspections After Any Hard Landing or Any Flight in Severe Turbulence

In addition to the inspections required by paragraph (g) of this AD, after any hard landing, or after any flight in severe turbulence: Before further flight, accomplish a general visual inspection of each battery retaining rod P/N D9241023700000, in accordance with the instructions of Airbus AOT A92N001–16, Rev 01, dated October 10, 2016.

(i) Corrective Action

If, during any general visual inspection required by paragraph (g) or (h) of this AD, as applicable, any battery retaining rod is found broken, before further flight, replace each affected battery retaining rod with a serviceable part using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

Note 1 to paragraph (i) of this AD: Additional guidance for the replacement of battery retaining rods can be found in Tasks 24–38–51–000–001–A, Removal of the Batteries, and 24–38–51–400–001–A, Installation of the Batteries, of the Airbus A319/A320/A321 Aircraft Maintenance Manual (AMM).

(j) Provision Regarding Terminating Action

Replacement of failed battery retaining rods on an airplane with serviceable parts, as required by paragraph (i) of this AD, does not constitute terminating action for the repetitive general visual inspections required by paragraphs (g) and (h) of this AD for that airplane.

(k) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Airbus AOT A92N001–16, dated August 25, 2016.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1405; fax: 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(m) Special Flight Permits

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(n) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0204, dated October 13, 2016; corrected October 19, 2016; for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9509.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (o)(3) and (o)(4) of this AD.

(o) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Airbus Alert Operators Transmission (AOT) A92N001–16, Rev 01, dated October 10, 2016.

(ii) Reserved.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office-EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30038 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9503; Directorate Identifier 2016–NM–179–AD; Amendment 39–18744; AD 2016–25–18]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model BD–700–1A10 and BD–700–1A11 airplanes. This AD requires an inspection for discrepancies of the attachment points of the links between the engine rear mount assemblies, and corrective actions if necessary. This AD was prompted by a report indicating that during maintenance, an engine mount pin was found backed out of the rear mount link, and the associated retaining bolt was also found fractured. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 3, 2017.

The Director of the **Federal Register** approved the incorporation by reference of certain publications listed in this AD as of January 3, 2017.

We must receive comments on this AD by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone: 514–855–5000; fax: 514–855–7401; email: *thd.crj@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9503.

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–2016–9503; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Aziz Ahmed, Airframe Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7329; fax: 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority

for Canada, has issued Canadian AD CF–2016–23, dated July 28, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model BD–700–1A10 and BD–700–1A11 airplanes. The MCAI states:

Bombardier reported that during maintenance of a BD–700 aeroplane, the engine mount pin, part number (P/N) BRR15838, was found backed out of the rear mount link. The retaining bolt, P/N AS54020, which passes through the engine mount pin was also found fractured at the groove which holds the locking spring. An investigation revealed the most probable root cause of failure to be a single axial tension static overload, with no evidence of fatigue contributing to the failure.

The above condition if not detected, may result in the loss of engine attachment to the airframe.

Bombardier has issued Service Bulletins (SBs) 700–71–002, 700–71–6002, 700–71–5002 and 700–1A11–71–002 to inspect the attachment points of the links between the engine rear mount assemblies, and installation of replacement hardware if required.

This [Canadian] AD mandates incorporation of the above Bombardier SBs to inspect [for discrepancies (including missing or broken bolts, missing nuts, incorrect torque values, and an incorrect gap between the bushing and washer), noncompliant gaps and torque values, broken or missing attachment hardware; and corrective actions, including installation of replacement hardware if necessary] and maintain integrity of the affected engine rear mount assembly. Bombardier is developing design changes for the parts in question. Further mandatory action may be required when the new parts become available.

You may examine the MCAI on the Internet at *http://www.regulations.gov by* searching for and locating Docket No. FAA–2016–9503.

Related Service Information Under 1 CFR Part 51

We reviewed the following service information:

- Bombardier Service Bulletin 700–71–002, Revision 01, dated June 30, 2016.
- Bombardier Service Bulletin 700–71–6002, Revision 01, dated June 30, 2016.
- Bombardier Service Bulletin 700–71–5002, Revision 01, dated June 30, 2016.
- Bombardier Service Bulletin 700–1A11–71–002, Revision 01, dated June 30, 2016.

The service information describes procedures for an inspection for discrepancies of the attachment points of the links between the engine rear mount assemblies, and corrective actions. These documents are distinct since they apply to different airplane models and serial numbers. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of these same type designs.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because broken engine attachment hardware could result in separation of an engine from the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9503; Directorate Identifier 2016–NM–179–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 97 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $85 per airplane.	$0	$85	$8,245

We estimate the following costs to do any necessary corrective actions that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need these corrective actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Bolt and Nut Replacement	1 work-hour × $85 per hour = $85	$730	$815

ON-CONDITION COSTS—Continued

Action	Labor cost	Parts cost	Cost per product
Torque Change on Affected Bolts	1 work-hour × $85 per hour = $85	0	85

We have received no definitive data that would enable us to provide cost estimates for other on-condition actions specified in this AD.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all available costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–25–18 Bombardier Inc.: Amendment 39–18744; Docket No. FAA–2016–9503; Directorate Identifier 2016–NM–179–AD.

(a) Effective Date

This AD becomes effective January 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier Inc. Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, serial numbers (S/Ns) 9002 through 9763 inclusive, 9765, 9767 through 9770 inclusive, and 9998.

(d) Subject

Air Transport Association (ATA) of America Code 72, Engine.

(e) Reason

This AD was prompted by a report indicating that during maintenance, an engine mount pin was found backed out of the rear mount link, and the associated retaining bolt was also found fractured at the groove that holds the locking spring. We are issuing this AD to detect and correct broken engine attachment hardware, which could result in separation of an engine from the airplane.

(f) Compliance

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

(g) Inspection

Within 500 flight hours or 4 months, whichever occurs first after the effective date of this AD: Do an inspection for discrepancies of the engine rear mount assemblies (including missing or broken bolts, missing nuts, incorrect torque values, and an incorrect gap between the bushing and washer); in accordance with Part A of the Accomplishment Instructions of the applicable service information specified in paragraphs (g)(1) through (g)(4) of this AD.

(1) Bombardier Service Bulletin 700–71–002, Revision 01, dated June 30, 2016 (for Bombardier Model BD–700–1A10 airplanes).

(2) Bombardier Service Bulletin 700–71–6002, Revision 01, dated June 30, 2016 (for Bombardier Model BD–700–1A10 airplanes).

(3) Bombardier Service Bulletin 700–71–5002, Revision 01, dated June 30, 2016 (for Bombardier Model BD–700–1A11 airplanes).

(4) Bombardier Service Bulletin 700–1A11–71–002, Revision 01, dated June 30, 2016 (for Bombardier Model BD–700–1A11 airplanes).

(h) Corrective Action

If any discrepancy is detected during the inspection required by paragraph (g) of this AD, before further flight, replace missing parts and correct noncompliant gaps and bolt torque, as specified in the Accomplishment Instructions of the applicable service information specified in paragraphs (g)(1) through (g)(4) of this AD, except as required by paragraph (i) of this AD.

(i) Exceptions to Service Information Specifications

Where the applicable Bombardier service bulletin provides no instructions for corrective actions, or specifies to contact Bombardier for appropriate action, accomplish corrective actions in accordance with the procedures specified in paragraph (k)(2) of this AD.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD in accordance with the Accomplishment Instructions of the applicable service information specified in paragraphs (j)(1) through (j)(4) of this AD.

(1) Bombardier Service Bulletin 700–71–002, dated May 31, 2016.

(2) Bombardier Service Bulletin 700–71–6002, dated May 31, 2016.

(3) Bombardier Service Bulletin 700–71–5002, dated May 31, 2016.

(4) Bombardier Service Bulletin 700–1A11–71–002, dated May 31, 2016.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this

AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the New York ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2016–23, dated July 28, 2016, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9503.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (m)(4) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Bombardier Service Bulletin 700–71–002, Revision 01, dated June 30, 2016.

(ii) Bombardier Service Bulletin 700–71–6002, Revision 01, dated June 30, 2016.

(iii) Bombardier Service Bulletin 700–71–5002, Revision 01, dated June 30, 2016.

(iv) Bombardier Service Bulletin 700–1A11–71–002, Revision 01, dated June 30, 2016.

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

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29815 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–4228; Directorate Identifier 2015–NM–107–AD; Amendment 39–18734; AD 2016–25–08]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

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

ACTION: Final rule.

SUMMARY: We are superseding Airworthiness Directive (AD) 2014–13–12 for all Airbus Model A318, A319, A320, and A321 series airplanes. AD 2014–13–12 required identifying the part number and serial number of each passenger oxygen container, replacing the oxygen generator manifold of any affected oxygen container with a serviceable manifold, performing an operational check of the manual mask release, and doing corrective actions if necessary. This new AD retains the requirements of AD 2014–13–12, and requires replacing the oxygen generator manifold of any affected DAe oxygen container with a serviceable manifold. This AD was prompted by reports of silicon particles inside the oxygen generator manifolds, which had chafed from the mask hoses during installation onto the generator outlets. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of September 9, 2014 (79 FR 45317, August 5, 2014).

ADDRESSES: For Airbus service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

For B/E AEROSPACE service information identified in this final rule, contact BE Aerospace Systems GmbH, Revalstrasse 1, 23560 Lübeck, Germany; telephone (49) 451 4093–2976; fax (49) 451 4093–4488.

You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4228.

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–2016–4228; 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 (telephone 800–647–5527) is Docket 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2014–13–12, Amendment 39–17888 (79 FR 45317, August 5, 2014) (''AD 2014–13–12''). AD 2014–13–12 applied to all Airbus Model A318, A319, A320, and A321 series airplanes. The NPRM published in the **Federal Register** on March 21, 2016 (81 FR 14990). The NPRM was prompted by reports of silicon particles inside the oxygen generator manifolds, which had chafed from the mask hoses during installation onto the generator outlets. The NPRM proposed to continue to require identifying the part number and

serial number of each passenger oxygen container, replacing the oxygen generator manifold of any affected oxygen container with a serviceable manifold, and performing an operational check of the manual mask release, and doing corrective actions if necessary. The NPRM also proposed to require replacing the oxygen generator manifold of any affected DAe oxygen container with a serviceable manifold. We are issuing this AD to detect and correct nonserviceable oxygen generator manifolds, which could reduce or block the oxygen supply and result in injury to passengers when oxygen supply is needed.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2014–0208, dated September 16, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition. The MCAI states:

During production of passenger oxygen containers, the manufacturer, B/E Aerospace, detected some silicon particles inside the oxygen generator manifolds. Investigation revealed that those particles (chips) had chafed from the mask hoses during installation onto the generator outlets. It was discovered that a defective mask hose installation device had caused the chafing.

This condition, if not detected and corrected, could reduce or block the oxygen supply, possibly resulting in injury to passengers when oxygen supply is needed.

To address this potential unsafe condition, EASA issued AD 2011–0167 to require the identification and modification of the affected oxygen container assemblies. That [EASA] AD also prohibited the installation of the affected containers on any aeroplane as replacement parts. It was subsequently established that Models A318–121 and A318–122 were missing from the Applicability of the [EASA] AD, and clarification was necessary regarding the affected containers.

Consequently, EASA issued AD 2012–0083 [which corresponds to FAA AD 2014–13–12], retaining the requirements of EASA AD 2011–0167, which was superseded, expanded the Applicability by adding two aeroplane models, and provided clarity by providing a list of affected passenger oxygen containers.

Since that [EASA] AD was issued, it was found that the affected containers have not only been marked with company name B/E Aerospace, as was specified, but also, for a brief period, with the former company name DAe Systems.

For the reason described above, this [EASA] AD retains the requirements of EASA AD 2012–0083, which is superseded, and expands the affected group of containers to include those that have the name ''DAe Systems'' on the identification plate.

This [EASA] AD also clearly separates the serial number (s/n) groups of containers into those manufactured by B/E Aerospace and those manufactured by DAe Systems, for which additional compliance time is provided.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4228.

Comments

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

Request To Revise Compliance Time

United Airlines (UAL) requested that we revise the compliance time for DAe Systems units from within ''2,500 flight cycles, or 3,750 flight hours, or 12 months, whichever occurs first, after the effective date of this AD,'' to within ''5,000 flight cycles, or 7,500 flight hours, or 24 months, whichever occurs first after the effective date of this AD.'' UAL stated that this would make both units have the same compliance time. UAL explained that it has inspected 97 out of 152 airplanes in compliance with AD 2014–13–12, and due to the new requirements in the NPRM, it will have to re-start the inspection for the entire UAL Model A319/A320 fleet.

We do not agree with UAL's request. As allowed by the phrase ''unless already done'' in paragraph (f) of this AD, if the inspection required by this AD has already been accomplished, this AD does not require that action to be repeated. The EASA, as the State of Design Authority for Airbus products, has determined this AD's compliance times based on the overall risk to the fleet, including the severity of the failure and the likelihood of the failure's occurrence. We are unaware of any information or data that would substantiate the compliance time change that UAL has requested. UAL did not provide any substantiation to support its request. The EASA works closely with Airbus to ensure that all appropriate actions are taken at the appropriate times to mitigate risk to the fleet to meet our collective safety goals. Under the provisions of paragraph (q)(1) of this AD, we will consider requests for approval of an extension of the compliance time if sufficient data are submitted to substantiate that the change would provide an acceptable level of safety. We have not changed this AD in this regard.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

B/E AEROSPACE has issued Service Bulletins 1XCXX–0100–35–005 and 22CXX–0100–35–003, both Revision 2, both dated July 10, 2014. The service information describes procedures for replacement of the oxygen generator manifold. These service bulletins are distinct since they apply to different products.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 22 airplanes of U.S. registry.

The actions required by AD 2014–13–12, and retained in this AD take about 6 work-hours per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the actions that were required by AD 2014–13–12 is $510 per product.

We also estimate that it takes about 6 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $11,220, or $510 per product.

Authority for This Rulemaking

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

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

products identified in this rulemaking action.

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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) 2014–13–12, Amendment 39–17888 (79 FR 45317, August 5, 2014), and adding the following new AD:

2016–25–08 Airbus: Amendment 39–18734; Docket No. FAA–2016–4228; Directorate Identifier 2015–NM–107–AD.

(a) Effective Date

This AD is effective January 20, 2017.

(b) Affected ADs

This AD replaces AD 2014–13–12, Amendment 39–17888 (79 FR 45317, August 5, 2014) (''AD 2014–13–12'').

(c) Applicability

This AD applies to the Airbus airplanes identified in paragraphs (c)(1) through (c)(4) of this AD, certificated in any category, all manufacturer serial numbers.

(1) Model A318–111, –112, –121, and –122 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Model A320–211, –212, –214, –231, –232, –233, and –271 airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by reports of silicon particles inside the oxygen generator manifolds, which had chafed from the mask hoses during installation onto the generator outlets. We are issuing this AD to detect and correct nonserviceable oxygen generator manifolds, which could reduce or block the oxygen supply and result in injury to passengers when oxygen supply is needed.

(f) Compliance

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

(g) Retained Part Number and Serial Number Identification, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2014–13–12, with no changes. Within 5,000 flight cycles, or 7,500 flight hours, or 24 months, whichever occurs first after September 9, 2014 (the effective date of AD 2014–13–12), identify the part number and serial number of each passenger oxygen container. A review of airplane maintenance records is acceptable in lieu of this identification if the part number and serial number of the oxygen container can be conclusively determined from that review.

(h) Retained Replacement, Check, and Repair, With Paragraph (h)(5) and Note 1 to Paragraph (h) of AD 2014–13–12 Removed, and Revised Repair Instructions

This paragraph restates the requirements of paragraph (h) of AD 2014–13–12, with paragraph (h)(5) and Note 1 to paragraph (h) of AD 2014–13–12 removed, and revised repair instructions. If the part number of the passenger oxygen container is listed in paragraph (h)(1) of this AD and the serial number of the passenger oxygen container is listed in paragraph (h)(2) of this AD: Within the compliance time specified in paragraph (g) of this AD, do the actions specified in paragraphs (h)(3) and (h)(4) of this AD, except as provided by paragraphs (i)(1) through (i)(7) of this AD.

(1) (Type I: 15 and 22 minutes) 12C15Lxxxxx0100, 12C15Rxxxxx0100, 13C15Lxxxxx0100, 13C15Rxxxxx0100, 14C15Lxxxxx0100, 14C15Rxxxxx0100, 12C22Lxxxxx0100, 12C22Rxxxxx0100, 13C22Lxxxxx0100, 13C22Rxxxxx0100, 14C22Lxxxxx0100, and 14C22Rxxxxx0100; and (Type II: 15 and 22 minutes) 22C15Lxxxxx0100, 22C15Rxxxxx0100, 22C22Lxxxxx0100, and 22C22Rxxxxx0100.

(2) ARBA–0000 to ARBA–9999 inclusive, ARBB–0000 to ARBB–9999 inclusive, ARBC–0000 to ARBC–9999 inclusive, ARBD–0000 to ARBD–9999 inclusive, ARBE–0000 to ARBE–9999 inclusive, BEBF–0000 to BEBF–9999 inclusive, BEBH–0000 to BEBH–9999 inclusive, BEBK–0000 to BEBK–9999 inclusive, BEBL–0000 to BEBL–9999 inclusive, and BEBM–0000 to BEBM–9999 inclusive.

(3) Replace the oxygen generator manifold of any affected oxygen passenger container with a serviceable manifold, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011.

(4) Do an operational check of the manual mask release, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011. If the operational check fails, before further flight, repair the manual mask release, using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

(i) Retained Exceptions, With No Changes

This paragraph restates the provisions of paragraph (i) of AD 2014–13–12, with no changes.

(1) Oxygen containers that meet the conditions specified in paragraph (i)(1)(i) or (i)(1)(ii) of this AD are compliant with the requirements of paragraph (h) of this AD.

(i) Oxygen containers Type I having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (h)(2) of this AD, that have been modified prior to September 9, 2014 (the effective date of AD 2014–13–12), as specified in the Accomplishment Instructions of B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 1, dated December 15, 2012.

(ii) Oxygen containers Type II having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (h)(2) of this AD, that have been modified prior to September 9, 2014 (the effective date of AD 2014–13–12), as specified in the Accomplishment Instructions of B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 1, dated December 20, 2011.

(2) Airplanes on which Airbus Modification 150703 or Airbus Modification 150704 has not been embodied in production do not have to comply with the requirements of paragraph (h) of this AD, unless an oxygen container having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (h)(2) of this AD has been installed since the airplane's first flight.

(3) Airplanes on which Airbus Modification 150703 or Airbus Modification 150704 has been embodied in production and which are not listed by model and manufacturer serial number in Airbus Service Bulletin A320–35A1047, dated March 29, 2011, are not subject to the requirements of paragraphs (g) and (h) of this AD, unless an oxygen container having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (h)(2) of this AD has been installed since the airplane's first flight.

(4) Model A319 airplanes that are equipped with a gaseous oxygen system for passengers, installed in production with Airbus

Modification 33125, do not have the affected passenger oxygen containers installed. Unless these airplanes have been modified in service (no approved Airbus modification exists), the requirements of paragraphs (g) and (h) of this AD do not apply to these airplanes.

(5) Airplanes that have already been inspected prior to the effective date of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011, must be inspected and, depending on the findings, corrected, within the compliance time defined in paragraph (g) of this AD, as required by paragraph (h) of this AD, as applicable, except as specified in paragraph (i)(6) of this AD.

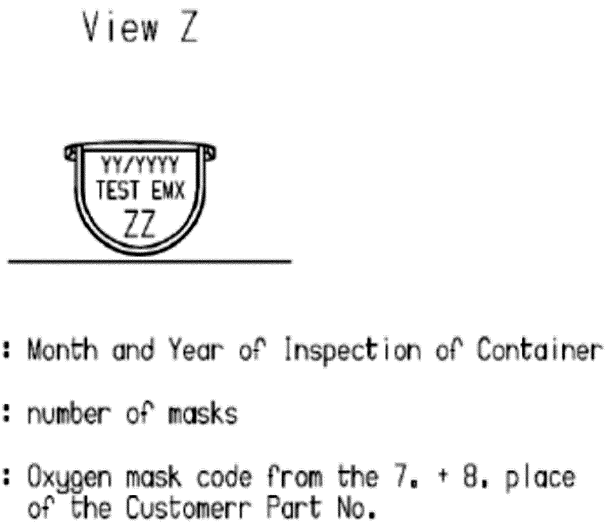
(6) Airplanes on which the passenger oxygen container has been replaced before the effective date of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011, are compliant with the requirements of the paragraph (h) of this AD for that passenger oxygen container.

(7) The requirements of paragraphs (g) and (h) of this AD apply only to passenger oxygen containers that are Design A, as defined in figure 1 to paragraph (i)(7) of this AD.

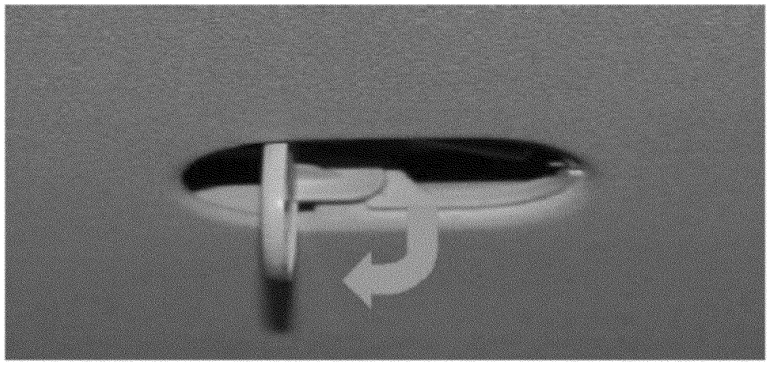
Figure 1 to Paragraph (i)(7) of this AD – Design A of the Passenger Oxygen Containers Affected by this AD

Design A: The placard on the passenger oxygen container test button is as described in Picture A of Appendix 1 of this AD. The Mask configuration ("ZZ" in Picture A) is a number and the test button is as shown in Picture B.

Picture A:



Picture B:



Note 1 to figure 1 to paragraph (i)(7) of this AD: Figure 1 is a reproduction of material from EASA AD 2012–0083, dated May 16, 2012. The words ''Appendix 1 of this AD'' in this figure refer to Appendix 1 of EASA AD 2012–0083, dated May 16, 2012.

Note 2 to figure 1 to paragraph (i)(7) of this AD: For ''Design A,'' the placard on the passenger oxygen container test button is as described in ''Picture A'' in figure 1 to paragraph (i)(7) of this AD. The mask configuration (''ZZ'' in ''Picture A'') is a number, and the test button is as shown in ''Picture B.''

(j) Retained Parts Installation Limitations, With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2014–13–12, with no changes. As of September 9, 2014 (the effective date of AD 2014–13–12), no person may install an oxygen container having a part number specified in paragraph (h)(1) of this AD and having a serial number specified in paragraph (h)(2) of this AD, on any airplane, unless the container has been modified in accordance with the Accomplishment Instructions of any of the service information specified in paragraph (j)(1), (j)(2), or (j)(3) of this AD, as applicable.

(1) Airbus Service Bulletin A320–35A1047, dated March 29, 2011.

(2) B/E AEROSPACE Service Bulletin 1XCXX–0100–35–005, Revision 1, dated December 15, 2012.

(3) B/E AEROSPACE Service Bulletin 22CXX–0100–35–003, Revision 1, dated December 20, 2011.

(k) New Requirement of This AD: Identification of Oxygen Containers

At the applicable time specified in paragraphs (k)(1) and (k)(2) of this AD: Identify the part number and serial number of each passenger oxygen container. A review of airplane maintenance records is acceptable in lieu of this identification if the part number and serial number of the oxygen container can be conclusively determined from that review.

(1) For units with ''B/E AEROSPACE'' on the identification plate: Within 5,000 flight cycles, or 7,500 flight hours, or 24 months, whichever occurs first after the effective date of this AD.

(2) For units with ''DAe Systems'' on the identification plate: Within 2,500 flight cycles, or 3,750 flight hours, or 12 months, whichever occurs first, after the effective date of this AD.

(l) New Requirement of This AD: Modification of Oxygen Containers

If a passenger oxygen container has a part number listed in paragraph (h)(1) of this AD and a serial number listed in paragraph (m)(1) or (m)(2) of this AD: At the applicable time specified in paragraphs (k)(1) and (k)(2) of this AD, do the actions specified in paragraphs (l)(1), (l)(2), and (l)(3) of this AD.

(1) Replace the oxygen generator manifold of any affected oxygen container with a serviceable manifold, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011.

(2) Do an operational check of the manual mask release, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011. If the operational check fails, before further flight, repair the manual mask release, using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA.

(3) Check if the part number of the passenger oxygen container is listed in B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 2, dated July 10, 2014; or B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 2, dated July 10, 2014, as applicable. If the part number is not listed in B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 2, dated July 10, 2014; or B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 2, dated July 10, 2014; within the compliance time specified in paragraphs (k)(1) and (k)(2) of this AD, repair the passenger oxygen container using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA.

(m) New Requirement of This AD: Part Numbers and Serial Numbers for the Parts Affected by Paragraph (l) of This AD Requirements

Affected parts for the actions required by paragraph (l) of this AD are identified in paragraphs (m)(1) and (m)(2) of this AD.

(1) For oxygen containers with ''DAe Systems'' on the identification plate: Units having a part number identified in paragraphs (h)(1) of this AD, where part number ''xxxxx'' stands for any alphanumerical value, and a serial number identified in paragraphs (m)(1)(i) through (m)(1)(vi) of this AD.

(i) ARBA–0000 to ARBA–9999 inclusive.

(ii) ARBB–0000 to ARBB–9999 inclusive.

(iii) ARBC–0000 to ARBC–9999 inclusive.

(iv) ARBD–0000 to ARBD–9999 inclusive.

(v) ARBE–0000 to ARBE–9999 inclusive.

(vi) BEBE–0000 to BEBE–9999 inclusive.

(2) For oxygen containers with ''B/E AEROSPACE'' on the identification plate: Units having a part number identified in paragraphs (h)(1) of this AD, where part number ''xxxxx'' stands for any alphanumerical value, and a serial number identified in paragraphs (m)(2)(i) through (m)(2)(v) of this AD.

(i) BEBF–0000 to BEBF–9999 inclusive.

(ii) BEBH–0000 to BEBH–9999 inclusive.

(iii) BEBK–0000 to BEBK–9999 inclusive.

(iv) BEBL–0000 to BEBL–9999 inclusive.

(v) BEBM–0000 to BEBM–9999 inclusive.

(n) New Requirement of This AD: Exceptions

(1) Oxygen containers that meet the conditions specified in paragraph (n)(1)(i) or (n)(1)(ii) of this AD are compliant with the requirements of paragraph (l) of this AD.

(i) Oxygen containers Type I having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (m)(1) or (m)(2), as applicable, of this AD, that have been modified prior to the effective date of this AD, as specified in the Accomplishment Instructions of B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 1, dated December 15, 2012; or B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 2, dated July 10, 2014.

(ii) Oxygen containers Type II having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (m)(1) or (m)(2) of this AD, as applicable, that have been modified prior to the effective date of this AD, as specified in the Accomplishment Instructions of B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 1, dated December 20, 2011; or B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 2, dated July 10, 2014.

(2) Airplanes on which Airbus Modification 150703 or Airbus Modification 150704 has not been embodied in production do not have to comply with the requirements of paragraph (l) of this AD, unless an oxygen container having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (m)(1) or (m)(2) of this AD, as applicable, of this AD has been installed since the airplane's first flight.

(3) Airplanes on which Airbus Modification 150703 or Airbus Modification 150704 has been embodied in production and which are not listed by model and manufacturer serial number in Airbus Service Bulletin A320–35A1047, dated March 29, 2011, are not subject to the requirements of paragraphs (k) and (l) of this AD, unless an oxygen container having a part number listed in paragraph (h)(1) of this AD and having a serial number listed in paragraph (m)(1) or (m)(2) of this AD, as applicable, of this AD has been installed since the airplane's first flight.

(4) Model A319 airplanes that are equipped with a gaseous oxygen system for passengers, installed in production with Airbus Modification 33125, do not have the affected passenger oxygen containers installed. Unless these airplanes have been modified in service (no approved Airbus modification exists), the requirements of paragraphs (k) and (l) of this AD do not apply to these airplanes.

(5) Airplanes that have already been inspected prior to the effective date of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011, must be inspected and, depending on the findings, corrected, within the compliance time defined in paragraphs (k)(1) and (k)(2) of this AD, as applicable, as required by paragraph (l) of this AD, as applicable, except as specified in paragraph (n)(6) of this AD.

(6) Airplanes on which the passenger oxygen container has been replaced before the effective date of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–35A1047, dated March 29, 2011, are compliant with the requirements of the paragraph (l) of this AD for that passenger oxygen container.

(7) The requirements of paragraphs (k) and (l) of this AD apply only to passenger oxygen containers that are Design A, as defined in figure 1 to paragraph (i)(7) of this AD.

(o) New Requirement of This AD: Parts Installation Limitations

As of the effective date of this AD, no person may install an oxygen container having a part number specified in paragraph (h)(1) of this AD and having a serial number specified in paragraph (m)(1) or (m)(2) of this AD, as applicable, on any airplane, unless the container has been modified in accordance with the Accomplishment Instructions of any of the service information specified in paragraph (o)(1), (o)(2), or (o)(3) of this AD, as applicable to the oxygen container part number.

(1) Airbus Service Bulletin A320–35A1047, dated March 29, 2011.

(2) B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 2, dated July 10, 2014.

(3) B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 2, dated July 10, 2014.

(p) Credit for Previous Actions

(1) This paragraph restates the requirements of paragraph (k) of AD 2014–13–12, with no changes. This paragraph provides credit for the actions required by paragraph (h) of this AD, if those actions were performed before September 9, 2014 (the effective date of AD 2014–13–12) using the service information specified in paragraph (p)(1)(i) or (p)(1)(ii) of this AD, as applicable to the oxygen container part number.

(i) B/E Aerospace Service Bulletin 1XCXX–0100–35–005, dated March 14, 2011, which is not incorporated by reference in this AD.

(ii) B/E Aerospace Service Bulletin 22CXX–0100–35–003, dated March 17, 2011, which is not incorporated by reference in this AD.

(2) This paragraph provides credit for the actions required by paragraphs (l)(3) and (o) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraph (p)(2)(i) or (p)(2)(ii) of this AD, as applicable to the oxygen container part number.

(i) B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 1, dated December 15, 2012, which was incorporated by reference in AD 2014–13–12.

(ii) B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 1, dated December 20, 2011, which was incorporated by reference in AD 2014–13–12.

(q) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax-425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.*

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(ii) AMOCs approved previously for AD 2014–13–12, are approved as AMOCs for the corresponding provisions of paragraphs (g) through (j) of this AD.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(r) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2014–0208, dated September 16, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4228.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (s)(5), (s)(6), and (s)(7) of this AD.

(s) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(3) The following service information was approved for IBR on January 20, 2017.

(i) B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 2, dated July 10, 2014.

(ii) B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 2, dated July 10, 2014.

(4) The following service information was approved for IBR on September 9, 2014 (79 FR 45317, August 5, 2014).

(i) Airbus Service Bulletin A320–35A1047, dated March 29, 2011.

(ii) B/E Aerospace Service Bulletin 1XCXX–0100–35–005, Revision 1, dated December 15, 2012.

(iii) B/E Aerospace Service Bulletin 22CXX–0100–35–003, Revision 1, dated December 20, 2011.

(5) For Airbus service information identified in this AD, contact Airbus service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com*; Internet *http://www.airbus.com.*

(6) For B/E Aerospace service information identified in this AD, contact BE Aerospace Systems GmbH, Revalstrasse 1, 23560 Lübeck, Germany; telephone (49) 451 4093–2976; fax (49) 451 4093–4488.

(7) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on November 25, 2016.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29249 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–7099; Directorate Identifier 2016–NE–15–AD; Amendment 39–18737; AD 2016–25–11]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines AG Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain International Aero Engines AG (IAE) V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, V2533–A5, V2525–D5, V2528–D5, and V2531–E5 turbofan engines. This AD was prompted by nine in-flight shutdowns (IFSDs) that resulted from premature failure of the No. 3 bearing. This AD requires inspections and corrective actions for bearing damage. This AD also requires removal of the No. 3 bearing from service at the next engine shop visit. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 20, 2017.

ADDRESSES: For service information identified in this final rule, contact International Aero Engines AG, 400

Main Street, East Hartford, CT 06118; phone: 860–565–0140; email: *help24@pw.utc.com;* Internet: *http://fleetcare.pw.utc.com.*

You may view this referenced service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–7099.

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–2016–7099; 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: Brian Kierstead, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *brian.kierstead@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain IAE V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, V2533–A5, V2525–D5, V2528–D5, and V2531–E5 turbofan engines. The NPRM published in the **Federal Register** on July 21, 2016 (81 FR 47313). The NPRM was prompted by nine IFSDs resulting from premature failure of the No. 3 bearing. This condition, if not corrected, could result in failure of the No. 3 bearing, failure of one or more engines, loss of thrust control, and loss of the airplane. The NPRM proposed to require removal of the No. 3 bearing from service at the next engine shop visit. We are issuing this AD to prevent failure of the No. 3 bearing, failure of one or more engines, loss of thrust control, and loss of the airplane.

Comments

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

Request To Add Terminating Action

MTU Maintenance Hanover GmbH (MTU) requested that IAE Non Modification Service Bulletin (NMSB) V2500–ENG–72–0673, dated June 3, 2016, be added as a terminating action in this AD. MTU also requested IAE NMSB V2500–ENG–72–0673 be included in credit for previous action. They reason that following the issue of IAE NMSB V2500–ENG–72–0671, dated March 22, 2016, IAE released IAE NMSB V2500–ENG–72–0673, which recommends removal of No. 3 bearing serial numbers (S/Ns) identical to those listed in IAE NMSB V2500–ENG–72–0671.

We partially agree. We agree that the removal of the suspect bearing in accordance with IAE NMSB V2500–ENG–72–0673, dated June 3, 2016 would accomplish both the (e)(3) compliance and (f) terminating action requirements of this AD because both IAE service documents reference identical bearing S/Ns.

We disagree that including IAE NMSB V2500–ENG–72–0673 as a terminating action or listing as credit for previous action is necessary since replacement of a bearing S/N per IAE NMSB V2500–ENG–72–0673, dated June 3, 2016, makes the engine no longer applicable to the AD. We did not change this AD.

Request To Remove Certain Engine Models From Applicability

IAE and MTU request engine models V2525–D5, V2528–D5, and V2531–E5 be removed from the applicability section of this AD. IAE states that the suspect No. 3 bearings referenced by this AD have all been installed in A5 series engines as specified in IAE NMSB V2500–ENG–72–0671, dated March 22, 2016 and requests alignment with the service instructions in order to provide consistency between the IAE NMSB V2500–ENG–72–0671 and this AD. MTU reasons that the IAE NMSBs V2500–ENG–72–0671 and V2500–ENG–72–0673 do not list V2525–D5, V2528–D5, and V2531–E5 engine models, therefore, this AD should not be applicable to these models.

We disagree. The applicability section of this AD identifies all V2500 engine models of the same type design where the suspect bearing could be installed. This AD further refines the applicability section with identification of specific No. 3 bearing S/Ns listed in IAE NMSB V2500–ENG–72–0671, Appendix 1, dated March 22, 2016. We did not change this AD.

Request To Identify Applicability by Either Engine S/N or Bearing S/N

Cathay Pacific Airways (CPA) requests the applicability section be revised to identify either the engine S/N or the No. 3 bearing S/N listed in IAE NMSB V2500–ENG–72–0671, dated March 22, 2016. CPA suggests that operators might identify engine applicability based on the No. 3 bearing S/N or the engine S/N, as both are listed in IAE NMSB V2500–ENG–72–0671, Appendix 1, dated March 22, 2016.

We disagree. Determining applicability by engine S/N in lieu of the No. 3 bearing S/N is not adequate, as the suspect bearing may have been reinstalled in another engine. 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.

Related Service Information Under 1 CFR Part 51

We reviewed IAE NMSB V2500–ENG–72–0671, dated March 22, 2016. The NMSB describes procedures for inspecting the MMCD and further actions if metallic debris is found. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

We reviewed IAE NMSB V2500–ENG–72–0673, dated June 3, 2016. The NMSB describes procedures for removal and replacement of the No. 3 bearing.

Costs of Compliance

We estimate that this AD affects 11 engines installed on airplanes of U.S. registry. We estimate that it would take about 1 hour to perform the inspection. The average labor rate is $85 per hour. We estimate the cost to replace a No. 3 bearing to be $54,510. Based on these figures, we estimate the cost of this AD on U.S. operators to be $600,545.

Authority for This Rulemaking

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

Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–25–11 International Aero Engines AG: Amendment 39–18737; Docket No. FAA–2016–7099; Directorate Identifier 2016–NE–15–AD.

(a) Effective Date

This AD is effective January 20, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to International Aero Engines AG (IAE) V2522–A5, V2524–A5, V2527–A5, V2527E–A5, V2527M–A5, V2530–A5, V2533–A5, V2525–D5, V2528–D5, and V2531–E5 turbofan engines with No. 3 bearing serial numbers (S/Ns) listed in Appendix 1 of IAE Non-Modification Service Bulletin (NMSB) V2500–ENG–72–0671, dated March 22, 2016.

(d) Unsafe Condition

This AD was prompted by several in-flight shutdowns that resulted from premature failure of the No. 3 bearing. We are issuing this AD to correct the unsafe condition on these products.

(e) Compliance

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

(1) Prior to accumulating 125 flight hours (FH) after the effective date of this AD, inspect the master magnetic chip detector (MMCD) for metallic debris. If no metallic debris is found during the MMCD inspection, repeat the inspection within every 125 FH.

(2) If metallic debris is found during the MMCD inspection, evaluate the debris using paragraph 2.B. of the Accomplishment Instructions in IAE NMSB V2500–ENG–72–0671, dated March 22, 2016. Perform additional inspections or remove the engine from service in accordance with the Accomplishment Instructions in IAE NMSB V2500–ENG–72–0671.

(3) Remove the No. 3 bearing from service at the next engine shop visit and replace it with a bearing part/serial number combination not listed in Appendix 1 of IAE NMSB V2500–ENG–72–0671, dated March 22, 2016.

(f) Mandatory Terminating Action

Removal of the No. 3 bearing from service at the next engine shop visit and replacement with a bearing not listed in Appendix 1 of IAE NMSB V2500–ENG–72–0671, dated March 22, 2016, is terminating action to this AD.

(g) Definition

For the purpose of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges, except that the separation of engine flanges solely for the purposes of transportation without subsequent engine maintenance does not constitute an engine shop visit.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(i) Related Information

(1) For more information about this AD, contact Brian Kierstead, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *brian.kierstead@faa.gov.*

(2) IAE NMSB V2500–ENG–72–0673, dated June 3, 2016, can be obtained from IAE using the contact information in paragraph (j)(3) of this AD.

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) International Aero Engines AG (IAE) Non-Modification Service Bulletin V2500–ENG–72–0671, dated March 22, 2016.

(ii) Reserved.

(3) For IAE service information identified in this AD, contact International Aero Engines AG, 400 Main Street, East Hartford, CT 06118; phone: 860–565–0140; email: *help24@pw.utc.com;* Internet: *http://fleetcare.pw.utc.com.*

(4) You may view this service information at FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

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

Issued in Burlington, Massachusetts, on November 28, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–30064 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9515; Directorate Identifier 2016–NM–181–AD; Amendment 39–18749; AD 2016–25–23]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus Model A319–115 and –132 airplanes, and Model A320–214, –232, and –233 airplanes. This AD requires revising the airplane flight manual (AFM) to include information that introduces a fuel limitation for certain types of fuel and a fuel gravity feed ceiling procedure for airplanes equipped with jet pumps. This AD was prompted by a report indicating that certain modified airplanes do not have electrical ground wires on the fuel level sensing control unit (FLSCU), which adversely affects gravity feeding operation. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 3, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 3, 2017.

We must receive comments on this AD by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9515.

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–2016–9515; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1405; fax: 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0205, dated October 13, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus Model A319–115 and –132 airplanes, and Model A320–214, –232, and –233 airplanes. The MCAI states:

> Airbus introduced mod 154327 on A319 and A320 aeroplanes which substituted the pump fuel feed system from the centre fuel tank with a jet pump transfer system, based on the Airbus A321 design.
>
> Following the modification introduction, it was discovered that the modified aeroplanes do not have electrical ground signals that replicate those from the deleted centre tank pump pressure switches. These signals are used as part of the fuel recirculation inhibition request logic.
>
> Subsequent investigation determined that ground wires had not been installed on the Fuel Level Sensing Control Units (FLSCU) of the modified A319 and A320 aeroplanes, due to a drawing error on the fuel system recirculation Principle Diagram. Without these ground wires providing inputs, the FLSCU logic is not correctly implemented for gravity feeding operation.
>
> This condition, if not corrected, could lead to reduced fuel pressure at the engine inlet, possibly resulting in an uncommanded in-flight shut-down when flying at the gravity feed ceiling levels, as defined in the Aircraft Flight Manual (AFM).
>
> To address this potential unsafe condition, Airbus issued AFM Temporary Revision (TR) 695 Issue 1 and AFM TR699 Issue 1 to prohibit the use of Jet B and JP4 fuel and AFM TR700 Issue 1 to provide instructions for amendment of the gravity feed procedure for the other fuels.
>
> For the reasons described above, this [EASA] AD requires amendment of the applicable AFM to include the new gravity feed procedure and reduce the list of authorised fuels.
>
> This [EASA] AD is considered to be an interim measure and further [EASA] AD action may follow.

You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9515.

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information.

- Airbus A318/A319/A320/A321 Temporary Revision TR695, Issue 1.0, dated August 1, 2016; and Airbus A318/A319/A320/A321 Temporary Revision TR699, Issue 1.0, dated August 1, 2016. This service information describes revising the Limitations section of the AFM to include a fuel limitation that removes JET B and JP4 fuels from the list of usable fuels for airplanes equipped with jet pumps. These documents are distinct since they apply to different airplane configurations.
- Airbus A318/A319/A320/A321 Temporary Revision TR700, Issue 1.0, dated August 1, 2016. This service information describes revising the Abnormal Procedures section of the AFM to include information to modify the fuel gravity feed ceiling procedure for airplanes equipped with jet pumps.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Interim Action

We consider this AD interim action. If final action is later identified, we might consider further rulemaking at that time.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice

and comment prior to adoption of this rule because the current AFM procedure may lead to reduced fuel pressure at the engine inlet, possibly resulting in an uncommanded in-flight shutdown when flying at the fuel gravity feed ceiling levels. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9515; Directorate Identifier 2016–NM–181–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 58 airplanes of U.S. registry.

We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $4,930, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–25–23 Airbus: Amendment 39–18749; Docket No. FAA–2016–9515; Directorate Identifier 2016–NM–181–AD.

(a) Effective Date

This AD becomes effective January 3, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A319–115 and –132 airplanes, and Model A320–214, –232, and –233 airplanes, certificated in any category, all manufacturer serial numbers on which Airbus modification 154327 has been embodied in production.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Reason

This AD was prompted by a report indicating that, for airplanes on which Airbus modification 154327 (which substitutes the pump fuel feed system from the center fuel tank with a jet pump transfer system) was done, the modified airplanes do not have electrical ground wires on the fuel level sensing control unit (FLSCU), which adversely affects gravity feeding operation. We are issuing this AD to prevent reduced fuel pressure at the engine inlet, potentially resulting in an uncommanded in-flight shutdown when flying at the fuel gravity feed ceiling levels.

(f) Compliance

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

(g) Revision of the Airplane Flight Manual (AFM)

(1) Within 30 days after the effective date of this AD, revise the Limitations section of the AFM by inserting a copy of Airbus A318/A319/A320/A321 Temporary Revision TR695, Issue 1.0, dated August 1, 2016; or Airbus A318/A319/A320/A321 Temporary Revision TR699, Issue 1.0, dated August 1, 2016; as applicable; and revise the Abnormal Procedures section of the AFM by inserting a copy of Airbus A318/A319/A320/A321 Temporary Revision TR700, Issue 1.0, dated August 1, 2016. These temporary revisions introduce a fuel limitation for certain types of fuel and a fuel gravity feed ceiling procedure for airplanes equipped with jet pumps. Thereafter, operate the airplane according to the limitation and procedure in the applicable temporary revision.

(2) When the information in Airbus A318/A319/A320/A321 Temporary Revision TR695, Issue 1.0, dated August 1, 2016; or Airbus A318/A319/A320/A321 Temporary Revision TR699, Issue 1.0, dated August 1, 2016; as applicable; and Airbus A318/A319/A320/A321 Temporary Revision TR700, Issue 1.0, dated August 1, 2016; has been included in the general revisions of the AFM, the general revisions may be inserted in the AFM, and the temporary revisions may be removed.

(h) Special Flight Permits

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your

request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1405; fax: 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0205, dated October 13, 2016, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9515.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Airbus A318/A319/A320/A321 Temporary Revision TR695, Issue 1.0, dated August 1, 2016.

(ii) Airbus A318/A319/A320/A321 Temporary Revision TR699, Issue 1.0, dated August 1, 2016.

(iii) Airbus A318/A319/A320/A321 Temporary Revision TR700, Issue 1.0, dated August 1, 2016.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30036 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6744; Directorate Identifier 2016–NE–12–AD; Amendment 39–18736; AD 2016–25–10]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Rolls-Royce plc (RR) RB211–Trent 875–17, RB211–Trent 877–17, RB211–Trent 884–17, RB211–Trent 884B–17, RB211–Trent 892–17, RB211–Trent 892B–17, and RB211–Trent 895–17 turbofan engines. This AD requires machining and inspecting parts related to the high-pressure compressor (HPC) and replacing HPC parts found defective. This AD was prompted by inspection of RR Trent 800 engines returned from service that revealed flame erosion and axial cracking on the stage 3 disk rim of the HPC stage 1–4 rotor disks shaft. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD becomes effective January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 20, 2017.

ADDRESSES: For service information identified in this final rule, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE24 8BJ; phone: 011–44–1332–242424; fax: 011–44–1332–249936; email: *http://www.rolls-royce.com/contact/civil_team.jsp;* Internet: *https://customers.rolls-royce.com/public/rollsroycecare.* You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6744.

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–2016–6744; 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 mandatory continuing airworthiness information (MCAI), 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: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to the specified products. The NPRM was published in the **Federal Register** on July 26, 2016 (81 FR 48724). The NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Inspection of Trent 800 engines returned from service revealed flame eroded areas and axial cracking on the rear Stage 3 disc of the High Pressure Compressor (HPC) Stage 1–4 drum. This is considered to be the result of a localised fire originating from an excessive rub at the stage 3–4 forward seal fin.
>
> This condition, if not detected and corrected, could lead to an uncontained engine failure and release of high energy debris, possibly resulting in damage to the aeroplane and injury to occupants.

You may obtain further information by examining the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6744.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Revise Inspection for Wear and Cracks

American Airlines, Inc., (AAL) requested that the requirement in paragraph (e)(1)(i) of this AD be revised

to allow the standards in the RR Trent 800 Engine Manual (EM) to be used in the assessment for wear and cracks. AAL indicated that RR Trent 800 EM task 72–41–31–200–801 addresses the conditions of wear and cracking and provides limits and rejection criteria. AAL commented that RR has noted that the types of damage described in RR Standard Practices Manual 70–01–02–200–000 including the terms ''burned/charred'' and ''eroded'' provide an adequate description of flame erosion.

AAL further indicated that if, based on the proposed requirement in paragraph (e)(1)(ii) of this AD, any wear is found on the forward stage 3–4 seal fin, then the HPC 1–4 rotor would have to be replaced. AAL noted, however, that EM task 72–41–31–200–801 allows the seal fin to exhibit wear within the diametral limits of 23.665 to 23.722 inches.

RR indicated that the requirement in this AD to reject the part for evidence of wear should be eliminated. RR noted that the EM for the affected engines already includes inspections for wear and other damage.

We partially agree. We agree with AAL's assessment that the EM task would allow wear as defined above while paragraph (e)(1)(i) in this AD, as proposed, would not have allowed any wear. We also agree with RR that it is not necessary to specify an inspection for wear.

We disagree that it is necessary to refer to the EM task in the requirements of this AD. We have revised the requirements of this AD to remove the requirement to inspect for ''wear.'' We are removing this requirement because seal tooth wear serviceability limits are already defined in the RR Trent 800 EM.

Request To Revise Requirement to Machine HPC Stage 3 Inner Shroud

RR and AAL requested that the requirement in paragraph (e)(1)(ii) of this AD to machine the HPC stage 3 inner shroud be revised. AAL noted that the HPC 1–4 disks shaft is a life-limited part; therefore, AAL tracks its cycle use, both total part cycles and cycles since last piece-part inspection. There is, however, no mandatory tracking requirement for the HPC stage 3 inner shroud. AAL, therefore, cannot ensure that it can comply with RR Service Bulletin (SB) RB211.72–J195, dated February 26, 2016, before exceeding 5,000 duty cycles since new or since last piece-part inspection of the HPC stage 1–4 rotor disks shaft, as proposed in this AD. AAL and RR suggested that the requirement in paragraph (e)(1)(ii) of this AD become an optional terminating action.

We partially agree. We disagree with revising the requirement in paragraph (e)(1)(ii) in this AD to machine the HPC stage 1–3 shroud because that addresses the unsafe seal clearance condition. We agree, however, that the proposed language in paragraph (e)(1) may be misinterpreted to refer to tracking the cycles on the HPC stage 3 inner shroud. Therefore, we clarified paragraph (e)(1) of this AD to read: ''(1) Before the HPC stage 1–4 rotor disks shaft cyclic life exceeds 5,000 duty cycles since new, or 5,000 duty cycles since last HPC stage 1–4 rotor disks shaft piece-part inspection, whichever occurs later, do the following: . . . .'' This change clarifies that the 5,000 duty cycles since new criterion in this AD applies only to the HPC stage 1–4 rotor disks and not the HPC stage 3 inner shroud.

Support for the NPRM

The Boeing Company, Inc., commented that it supported the proposed rule as written.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

RR has issued SB RB.211–72–J195, dated February 26, 2016. The SB describes procedures to machine the HPC stage 3 inner shroud and to inspect the HPC stage 1–4 rotor disks shaft. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 125 engines installed on airplanes of U.S. registry. We did not estimate any time to machine the HPC stage 3 inner shroud because this is accomplished during routine overhaul. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of the HPC stage 1–4 rotor disks	8 work-hours × $85 per hour = $680	$0	$680	$85,000

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

(3) Will not affect intrastate aviation in Alaska 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 adding the following new airworthiness directive (AD):

2016–25–10 Rolls-Royce plc: Amendment 39–18736; Docket No. FAA–2016–6744; Directorate Identifier 2016–NE–12–AD.

(a) Effective Date

This AD becomes effective January 20, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce plc (RR) RB211–Trent 875–17, RB211–Trent 877–17, RB211–Trent 884–17, RB211–Trent 884B–17, RB211–Trent 892–17, RB211–Trent 892B–17, and RB211–Trent 895–17 turbofan engines that have not incorporated RR modification 72–J195, in production, or RR Service Bulletin RB.211–72–J195, dated February 26, 2016, in service.

(d) Reason

This AD was prompted by inspection of RR Trent 800 model engines returned from service that revealed flame erosion and axial cracking on the aft face of the stage 3 disk rim of the high-pressure compressor (HPC) stage 1–4 rotor disks shaft. We are issuing this AD to correct the unsafe condition on these products.

(e) Actions and Compliance

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

(1) Before the HPC stage 1–4 rotor disks shaft cyclic life exceeds 5,000 duty cycles since new, or 5,000 duty cycles since last HPC stage 1–4 rotor disks shaft piece-part inspection, whichever occurs later, do the following:

(i) Perform fluorescent penetrant and visual inspections of the HPC stage 1–4 rotor disks shaft forward stage 3–4 seal fin and aft face of the stage 3 disk rim for cracks and flame erosion. Any findings of cracks or flame erosion constitute a failure of the HPC stage 1–4 rotor disks shaft.

(ii) Machine the HPC stage 3 inner shroud to the dimensions shown in Figure 1 of RR Service Bulletin (SB) RB.211–72–J195, dated February 26, 2016.

(2) If the HPC stage 1–4 rotor disks shaft fails the inspections required by paragraph (e)(1)(i) of this AD, replace with a part eligible for installation before further flight.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(g) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

(2) Refer to MCAI European Aviation Safety Agency AD 2016–0078, dated April 20, 2016 (corrected April 27, 2016), for more information. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2016–6744.

(h) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Rolls-Royce plc (RR) SB RB.211–72–J195, dated February 26, 2016.

(ii) Reserved.

(3) For RR service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE24 8BJ; phone: 011–44–1332–242424; fax: 011–44–1332–249936; email: *http://www.rolls-royce.com/contact/civil_team.jsp;* Internet: *https://customers.rolls-royce.com/public/rollsroycecare.*

(4) You may view this service information at FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

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

Issued in Burlington, Massachusetts, on November 23, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–30065 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–9375; Airspace Docket No. 16–ASO–16]

Amendment of Class D Airspace for St. Petersburg, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the ceiling of the Class D Airspace area at St. Petersburg-Clearwater International Airport, St. Petersburg, FL. This would allow the Tampa International Airport Air Traffic Control Tower (ATCT) to carry out Letter of Agreement procedures between St. Petersburg Air Traffic Control Tower and Tampa Terminal Radar Approach Control (TRACON) for the safety and management of standard instrument approach procedures (SIAPs), and for Instrument Flight Rule (IFR) operations in the area.

DATES: Effective 0901 UTC, January 5, 2017. 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 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11A, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11A at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

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:

Authority for This Rulemaking

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 amends Class D airspace at St. Petersburg-Clearwater International Airport, St. Petersburg, FL.

History

In a review of the airspace, the FAA found the Class D airspace description for St. Petersburg-Clearwater International Airport, St. Petersburg, FL, published in FAA Order 7400.11A, describes the ceiling as extending upward from the surface to and including 2,500 feet MSL. The Tampa International Airport Class B airspace area has control of aircraft operating at and above 1,800 feet MSL in the St. Petersburg, FL, Class D airspace area.

The FAA is lowering the Class D airspace area to 1,600 feet MSL to avoid the overlap of controlled airspace between the two airports. To avoid confusion on the part of pilots overflying the St. Petersburg, FL, area, the FAA finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest. To be consistent with the FAA's safety mandate when an unsafe condition exists, the FAA finds good cause pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days to promote the safe and efficient handling of air traffic in the area.

Class D airspace designations are published in paragraphs 5000 of FAA Order 7400.11A dated August 3, 2016, and effective September 15, 2016, which is incorporated by reference in 14 CFR part 71.1. The Class D airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, and effective September 15, 2016. FAA Order 7400.11A is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11A lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by lowering the ceiling of the Class D airspace area from 2,500 feet MSL to upward from the surface to and including 1,600 feet MSL at St. Petersburg-Clearwater International Airport, St. Petersburg, FL. The Letter of Agreement between Tampa TRACON and St. Petersburg-Clearwater International Airport ATCT, established February 13, 2015, states that Tampa TRACON shall control aircraft operating at or above 1,800 feet MSL in the St. Petersburg-Clearwater International Airport Class D airspace area. This airspace change eliminates confusion on the part of pilots operating aircraft at or above 1,600 feet MSL in the St. Petersburg-Clearwater International Airport Class D airspace area. Also, an adjustment to the geographic coordinates of St. Petersburg-Clearwater International Airport is made to be in concert with the FAA's aeronautical database.

Regulatory Notices and Analyses

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. 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.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. 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(f), 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 FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, effective September 15, 2016, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO FL D St. Petersburg, FL [Amended]

St. Petersburg-Clearwater International Airport, FL
(Lat. 27°54′31″ N., long. 82°41′11″ W.)

That airspace extending upward from the surface to and including 1,600 feet MSL within a 4.2-mile radius of St. Petersburg-Clearwater International Airport; excluding that portion within the Tampa International Airport, FL, Class B airspace area. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement (previously called Airport/Facility Directory).

Issued in College Park, Georgia, on December 1, 2016.

Ryan W. Almasy,

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

[FR Doc. 2016–29634 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 31111; Amdt. No. 530]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: Effective 0901 UTC, January 5, 2017.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125), telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

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. 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. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on December 2, 2016.

John Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, January 5, 2017.

PART 95 [AMENDED]

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINT

[Amendment 530 Effective Date, January 5, 2017]

From	To	MEA
Color Routes		
§ 95.60 Blue Federal Airway B1 is Amended to Delete		
WOODY ISLAND, AK NDB *9100—MOCA	ILIAMNA, AK NDB/DME	*10000
§ 95.6 Blue Federal Airway B12 is Amended by Adding		
WOODY ISLAND, AK NDB *9300—MOCA	ILIAMNA, AK NDB/DME	*10000
§ 95.6001 Victor Routes—U.S. **§ 95.6052 VOR Federal Airway V52 is Amended to Read in Part**		
CENTRAL CITY, KY VORTAC *11000—MCA	*BOWLING GREEN, KY VORTAC BOWLING GREEN, KY VORTAC, SE BND.	2400
BOWLING GREEN, KY VORTAC	LIVINGSTON, TN VOR/DME	11000
§ 95.6116 VOR Federal Airway V116 is Amended to Read in Part		
ERIE, PA VORTAC *3900—MOCA	BRADFORD, PA VOR/DME	*5000

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINT—Continued

[Amendment 530 Effective Date, January 5, 2017]

From	To	MEA
§ 95.6126 VOR Federal Airway V126 is Amended to Read in Part		
ERIE, PA VORTAC *3900—MOCA	BRADFORD, PA VOR/DME	*5000
§ 95.6140 VOR Federal Airway V140 is Amended to Read in Part		
NASHVILLE, TN VORTAC *2400—MOCA	HARME, TN FIX. E BND W BND	 *3000 *6000
HARME, TN FIX *2900—MOCA	LIVINGSTON, TN VOR/DME	*6000
§ 95.6141 VOR Federal Airway V141 is Amended to Read in Part		
MANCHESTER, NH VOR/DME *2100—MOCA	CONCORD, NH VOR/DME	*2900
CONCORD, NH VOR/DME	KELLI, NH FIX	5000
§ 95.6170 VOR Federal Airway V170 is Amended to Read in Part		
ERIE, PA VORTAC *3900—MOCA	BRADFORD, PA VOR/DME	*5000
§ 95.6321 VOR Federal Airway V321 is Amended to Read in Part		
SHELBYVILLE, TN VOR/DME	LIVINGSTON, TN VOR/DME	3800
§ 95.6384 VOR Federal Airway V384 is Amended to Read in Part		
LIVINGSTON, TN VOR/DME	VOLUNTEER, TN VORTAC	6100
§ 95.6493 VOR Federal Airway V493 is Amended to Read in Part		
LIVINGSTON, TN VOR/DME	LEXINGTON, KY VORTAC	3600
§ 95.6513 VOR Federal Airway V513 is Amended to Read in Part		
LIVINGSTON, TN VOR/DME	NEW HOPE, KY VOR/DME	4000

From	To	Changeover points	
		Distance	From
§ 95.8003 VOR Federal Airway Changeover Point Airway Segment is Amended to Add Changeover Point V321			
SHELBYVILLE, TN VOR/DME	LIVINGSTON, TN VOR/DME	40	SHELBYVILLE

[FR Doc. 2016–29429 Filed 12–15–16; 8:45 a.m.]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No.: FAA–2016–9526; Amdt. No. 121–397]

RIN 2120–AK95

Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers; Related Aircraft Amendment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This rule allows air carriers to seek a deviation from the flight simulation training device (FSTD) requirements for related aircraft proficiency checks. As a result, this rule will eliminate an inconsistency that currently permits carriers that have obtained FAA approval to modify the FSTD requirements for related aircraft differences training, but not for corresponding proficiency checks. In doing so, it corrects an inadvertent omission from the Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers final rule.

DATES: Effective January 17, 2017.

Submit comments on or before February 14, 2017.

ADDRESSES: Send comments identified by docket number FAA–2016–9526 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking

process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sheri Pippin, Air Transportation Division, AFS–200, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8166; email *sheri.pippin@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This rule will allow air carriers to seek a deviation from the FSTD requirements for related aircraft proficiency checks based on a related aircraft designation and determination of an equivalent level of safety. As a result, this rule will eliminate an inconsistency that currently permits carriers that have obtained FAA approval to modify the FSTD requirements for related aircraft differences training, but not for corresponding proficiency checks.

II. Administrative Procedure Act and Legal Authority

A. Good Cause for Immediate Adoption

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 553) authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

The FAA finds that notice and public comment to this final rule are unnecessary. This final rule corrects an inadvertent omission from the Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers (Crewmembers and Aircraft Dispatchers Training) final rule by providing certificate holders additional flexibility in the selection of an FSTD for related aircraft proficiency check maneuvers and procedures based on a determination of an equivalent level of safety. As a result, this rule is relieving for certificate holders. In addition, in the process of drafting and implementing the suite of rules culminating in the Crewmembers and Aircraft Dispatchers Training final rule, the FAA sought comment on, and thoroughly considered, comments regarding related aircraft proficiency checks. The updates to § 121.441(f) contained in this final rule offer additional flexibility; in that, air carrier certificate holders can request permission to deviate from related aircraft proficiency check requirements when the proficiency check is conducted in full, or in part, in an FSTD. Therefore, the FAA has determined that notice and public comment are unnecessary prior to the adoption of this amendment.

B. Comments Invited

The FAA is adopting this final rule without prior notice and public comment because it corrects an inadvertent omission from the Crewmembers and Aircraft Dispatchers Training final rule and the FAA previously sought comment on and considered comments regarding related aircraft proficiency checks. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979), provide that to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, consistent with DOT Regulatory Policies and Procedures and 14 CFR 11.11, the FAA seeks comment on this Final Rule.

C. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. This rulemaking is promulgated under the authority described in 49 U.S.C. 106(f), which vests final authority in the Administrator for carrying out all functions, powers, and duties of the administration relating to the promulgation of regulations and rules, and 49 U.S.C. 44701(a)(5), which requires the Administrator to promulgate regulations and minimum standards for other practices, methods, and procedures necessary for safety in air commerce and national security.

III. Background

On November 12, 2013, the FAA published the Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers final rule (78 FR 67800). In that final rule, effective March 12, 2014, the FAA included opportunities for air carriers to modify training program requirements for flightcrew members when the air carrier operates multiple aircraft types with similar design and flight handling characteristics. The final rule also included opportunities for air carriers to seek a deviation to allow credit for flightcrew member qualification requirements, including proficiency checks, when the air carrier operates multiple aircraft types with similar design and flight handling characteristics.[1]

The final rule explained that due to differences in instrumentation and installed equipment, crewmembers trained on one variation of aircraft type may require additional training to safely and efficiently operate another variation of the same aircraft type. This additional training is identified in regulations as differences training.[2] The final rule further explained that the FAA, through the Flight Standardization Board (FSB), provides an analysis of the differences between variations of an aircraft type, which the FSB documents in an FSB report for a specific aircraft type. This report may include recommendations on reduced training frequency, reduced training elements or events, or use of a lower level FSTD than required by part 121 appendix E (Flight Training Requirements) for a specific maneuver or procedure.

Additionally, the final rule explained the rapid advancement in modern technologies, both in manufacturing techniques and systems design and application, can produce aircraft types of differing models and aerodynamic airframes, with similar handling or flight characteristics. These modern aircraft systems and displays may allow different type certificated aircraft to have common flight deck and systems designs, such that minimal differences training may be warranted. The FAA, through the FSB, can analyze these aircraft with different type certificates which may result in recommendations for training reductions.

[1] As the FAA clarified in its final rule, the agency uses the term ''related aircraft'' when describing two or more aircraft of the same make (with either the same or different type certificates) that have been demonstrated and determined by the Administrator to have commonality to the extent that flightcrew member training, checking, recent experience, operating experience, operating cycles, and line operating flight time for consolidation of knowledge and skills may be reduced while still meeting the training and qualification requirements for service on the other aircraft. 78 FR at 67816.

[2] See §§ 121.400 and 121.418.

Statement of the Problem

In the Crewmembers and Aircraft Dispatchers Training final rule, the FAA intended to extend fully the differences training concept to aircraft with different type certificates within the new provisions for related aircraft differences training. In addition, an air carrier may seek deviations for related aircraft proficiency checks, operating experience, operating cycles, line operating flight time for consolidation of knowledge and skills, and recency of experience.

In the Crewmembers and Aircraft Dispatchers Training final rule, the FAA added paragraph (f) to § 121.441, to allow the Administrator to approve a deviation to the proficiency check requirements based on a designation of related aircraft and after the Administrator determines the certificate holder can demonstrate an equivalent level of safety. Specifically, paragraph (f) allows a deviation from the frequency of proficiency checks and from certain procedures and maneuvers required by appendix F (Proficiency Check Requirements). Paragraph (f) did not, however, include an allowance to obtain a deviation from the FSTD requirements specified in appendix F. As currently written, § 121.441(f) does not allow deviation if the FSB determines that the use of a lower level FSTD for a specific maneuver or procedure may be acceptable on a related aircraft proficiency check. Such a determination by the FSB would foreseeably be based on similarities in design and flight characteristics between the base aircraft and the related aircraft.

IV. Discussion of Final Rule

This final rule will correct an inadvertent omission from the Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers final rule by eliminating an inconsistency that currently permits air carriers (with FAA approval) to modify the FSTD requirements for related aircraft differences training, but not for related aircraft proficiency checks. Because the FAA intended to extend fully the differences training concept to related aircraft differences training and deviations, the FAA is revising § 121.441(f)(2) to allow a certificate holder to request a deviation from the FSTD requirements in paragraph (c) of § 121.441. To receive a deviation, the certificate holder must provide a designation of related aircraft and demonstrate an equivalent level of safety exists to justify the deviation. By this update, the request for deviation must include the level of FSTD to be used for each maneuver and procedure.

Requests for deviation remain voluntary. The FAA has determined this change would not adversely affect safety of aircraft operations. A deviation from any proficiency check requirement under § 121.441(f) is only available if the certificate holder has a designation of related aircraft. Such a designation indicates the base aircraft and designated related aircraft have been demonstrated and determined by the Administrator to have commonality; the certificate holder must be able to demonstrate that it can maintain the equivalent level of safety in obtaining the designation.

V. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this rule. This rule would remove additional requirements with respect to proficiency checks for aircraft of a related type, as long as FAA has made a determination that an equivalent level of safety is maintained. Given the relieving nature of this rule, the economic impact of this rule would be minimal cost.

The FAA has, therefore, determined that this rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This rule would correct an inadvertent omission from the Crewmembers and Aircraft Dispatchers Training final rule and would eliminate an inconsistency that currently permits air carriers (with FAA approval) to modify the FSTD requirements for related aircraft differences training, but not for related aircraft proficiency checks. This action would result in increased flexibility for certificate holders. While the rule would likely impact a substantial number of small

entities,[3] given the relieving nature of this rule, it would have a minimal positive economic impact.

Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this rule and determined that the rule will have the same impact on international and domestic flights and is a safety rule thus is consistent with the Trade Agreements Act.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $155 million in lieu of $100 million. This rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(1)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

The FAA has determined that there is no new information collection associated with this cost relieving amendment to related aircraft proficiency check requirements. The OMB previously approved the collection of such information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and it was assigned OMB Control Number 2120–0739.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6 and involves no extraordinary circumstances.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

VII. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/* or
3. Access the Government Printing Office's Web page at: *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9677.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's 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.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction.

[3] Based on an analysis of publicly available information, the FAA assumed that the Crewmembers and Aircraft Dispatchers Training final rule would have an impact on a substantial number of small entities. We make the same determination in this rulemaking.

A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Aviation safety.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 121 as follows:

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

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

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40119, 41706, 42301 preceding note added by Pub. L. 112–95, sec. 412, 126 Stat. 89, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44729, 44732, 46105; Pub. L. 111–216, 124 Stat. 2348 (49 U.S.C. 44701 note); Pub. L. 112–95, 126 Stat. 62 (49 U.S.C. 44732 note).

■ 2. Amend § 121.441 by revising paragraphs (f)(1), (f)(2) introductory text, and (f)(2)(ii) to read as follows:

§ 121.441 Proficiency checks.

* * * * *

(f) * * *

(1) The Administrator may authorize a deviation from the proficiency check requirements of paragraphs (a), (b)(1), and (c) of this section based upon a designation of related aircraft in accordance with § 121.418(b) of this part and a determination that the certificate holder can demonstrate an equivalent level of safety.

(2) A request for deviation from paragraphs (a), (b)(1), and (c) of this section must be submitted to the Administrator. The request must include the following:

* * * * *

(ii) Based on review of the related aircraft, the operation, and the duty position:

(A) For recurrent proficiency checks, the frequency of the related aircraft proficiency check, the maneuvers and procedures to be included in the related aircraft proficiency check, and the level of FSTD to be used for each maneuver and procedure.

(B) For qualification proficiency checks, the maneuvers and procedures to be included in the related aircraft proficiency check and the level of FSTD to be used for each maneuver and procedure.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f) and 44701(a) in Washington, DC, on December 8, 2016.

Michael P. Huerta,

Administrator.

[FR Doc. 2016–30211 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 160922876–6876–01]

RIN 0694–AH14

Implementation of the February 2016 Australia Group (AG) Intersessional Decisions and the June 2016 AG Plenary Understandings

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) publishes this final rule to amend the Export Administration Regulations (EAR) to implement the recommendations presented at the February 2016 Australia Group (AG) Intersessional Implementation Meeting, and later adopted pursuant to the AG silent approval procedure, and the understandings reached at the June 2016 AG Plenary Implementation Meeting. This rule amends two Commerce Control List (CCL) entries to reflect the February 2016 Intersessional Implementation Meeting recommendations that were adopted by the AG. Specifically, this rule amends the CCL entry that controls certain human and zoonotic pathogens and toxins to reflect the AG updates to the nomenclature for certain bacteria and toxins identified on the AG ''List of Human and Animal Pathogens and Toxins for Export Control.'' In addition, this rule amends the CCL entry that controls equipment capable of handling biological materials to reflect the AG updates to the controls on cross (tangential) flow filtration equipment described on the AG ''Control List of Dual-Use Biological Equipment and Related Technology and Software.''

Consistent with the understandings adopted at the June 2016 AG Plenary Implementation Meeting that updated the AG ''List of Human and Animal Pathogens and Toxins for Export Control,'' this rule amends the CCL entry that controls certain human and zoonotic pathogens and toxins by removing dengue fever virus, updating the nomenclature of the listing for conotoxin, and consolidating the controls for Shiga toxin and Verotoxin (and other Shiga-like ribosome inactivating proteins) under a single listing. This rule also amends the CCL entry that controls equipment capable of handling biological materials by updating the controls on biological containment facilities and related equipment and the controls on fermenters, consistent with the AG Plenary Implementation Meeting updates to the AG ''Control List of Dual-Use Biological Equipment and Related Technology and Software.''

DATES: This rule is effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Richard P. Duncan, Ph.D., Director, Chemical and Biological Controls Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, Telephone: (202) 482–3343, Email: *Richard.Duncan@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) to implement the recommendations presented at the Australia Group (AG) Intersessional Implementation Meeting held in Brussels, Belgium, on February 2, 2016, and adopted pursuant to the AG silent approval procedure in April 2016, and the understandings reached at the Implementation Meeting of the 2016 AG Plenary held in Paris, France, from June 6–10, 2016. The AG is a multilateral forum consisting of 41 participating countries that maintain export controls on a list of chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons program. The AG periodically reviews items on its control list to enhance the effectiveness of participating governments' national controls and to achieve greater harmonization among these controls.

Amendments to the CCL Based on the February 2016 AG Intersessional Recommendations

ECCN 1C351 (Human and Animal Pathogens and ''toxins'')

This final rule amends Export Control Classification Number (ECCN) 1C351 on the CCL to update the nomenclature for two bacteria and five toxins, consistent with the AG Intersessional Implementation Meeting updates to the AG ''List of Human and Animal

Pathogens and Toxins for Export Control.'' Specifically, this rule updates the nomenclature for the bacteria ''Chlamydia pscittaci'' and ''Salmonella typhi'' and the toxin ''Viscum Album Lectin 1'' to reflect current scientific usage. This rule also removes the word ''toxin'' from the listings for ''Diacetoxyscirpenol toxin,'' ''Modeccin toxin,'' and ''Volkensin toxin,'' because it was deemed to be redundant (*i.e.,* the abbreviated nomenclature, absent the word ''toxin,'' adequately identifies these particular toxins). In addition, this rule revises the description for ''Microcystin'' by making it plural, thereby clarifying that ECCN 1C351.d.9 controls all variants of this toxin. Finally, this rule renumbers the listings for ''Viscumin'' and ''Volkensin'' to control these toxins under ECCN 1C351.d.17 and .d.18, respectively, to conform with the June 2016 AG Plenary Implementation Meeting change in which the Shiga toxin and Verotoxin listings (ECCN 1C351.d.13 and .d.17, respectively) were merged into a single listing (ECCN 1C351.d.13). These amendments to ECCN 1C351 are summarized in the following table.

Previous names of AG-controlled bacteria and toxins	Current names of AG-controlled bacteria and toxins	Previous CCL designation	Current CCL designation
Chlamydophila psittaci (formerly known as Chlamydia psittaci).	Chlamydia psittaci (Chlamydophila psittaci)	ECCN 1C351.c.7	No Change.
Salmonella typhi	Salmonella enterica subspecies enterica serovar Typhi (Salmonella typhi).	ECCN 1C351.c.18	No Change.
Diacetoxyscirpenol toxin	Diacetoxyscirpenol	ECCN 1C351.d.7	No Change.
Microcystin (Cyanginosin)	Microcystins (Cyanginosins)	ECCN 1C351.d.9	No Change.
Modeccin toxin	Modeccin	ECCN 1C351.d.10	No Change.
Viscum Album Lectin 1 (Viscumin)	Viscumin (Viscum album lectin 1)	ECCN 1C351.d.18	ECCN 1C351.d.17.
Volkensin toxin	Volkensin	ECCN 1C351.d.19	ECCN 1C351.d.18.

The license requirements applicable to the bacteria and toxins affected by these amendments to ECCN 1C351 remain unchanged. Specifically, all of these items continue to require a license for chemical/biological (CB) reasons to destinations indicated under CB Column 1 on the Commerce Country Chart and for anti-terrorism (AT) reasons to destinations indicated in AT Column 1 on the Commerce Country Chart.

ECCN 2B352 (Equipment Capable of Use in Handling Biological Materials)

This final rule amends ECCN 2B352 on the CCL to reflect changes to the AG ''Control List of Dual-Use Biological Equipment and Related Technology and Software'' based on the February 2016 Intersessional Implementation Meeting recommendations that were adopted by the AG pursuant to its silent approval procedure. Specifically, this rule amends the controls on cross (tangential) flow filtration equipment described in 2B352.d.1 by removing the word ''pathogenic'' from the description of this equipment. This change is made because there is no distinction, with respect to either the technical characteristics or the use of this equipment, between pathogenic and non-pathogenic micro-organisms.

This rule also amends ECCN 2B352, consistent with the AG intersessional recommendations, by revising the Nota Bene to 2B352.d.1 to clarify that the exclusion from the controls on cross (tangential) flow filtration equipment listed in 2B352.d.1 applies to hemodialysis equipment, as specified by the manufacturer, as well as reverse osmosis equipment (*i.e.,* both hemodialysis equipment and reverse osmosis equipment, as specified by the manufacturer, are excluded from control under ECCN 2B252.d.1).

All items controlled under ECCN 2B352 require a license for CB reasons to destinations indicated under CB Column 2 on the Commerce Country Chart and for AT reasons to destinations indicated in AT Column 1 on the Commerce Country Chart.

Amendments to the CCL Based on the June 2016 AG Plenary Understandings

ECCN 1C351 (Human and Animal Pathogens and ''Toxins'')

This final rule amends ECCN 1C351 on the CCL to remove the listing for ''dengue fever virus,'' revise the listing for ''Conotoxin,'' and merge the listings for ''Shiga toxin'' and Verotoxin'' consistent with the AG Plenary Implementation Meeting updates to the AG ''List of Human and Animal Pathogens and Toxins for Export Control.''

The removal of ''dengue fever virus'' from control under ECCN 1C351 is designed to reduce barriers to the export of clinical samples, materials, and ''technology'' required for vaccine development, production, and distribution. To reflect the removal of the ECCN 1C351 controls on ''dengue fever virus,'' which was controlled under ECCN 1C351.a.11 prior to the publication of this final rule, this rule also makes conforming changes to ECCN 1C351.a by renumbering those items previously designated as 1C351.a.12 through .a.58 as 1C351.a.11 through .a 57. Consistent with this renumbering, this rule revises the Technical Note to newly redesignated ECCN 1C351.a.40 (''reconstructed 1918 influenza virus'') to reference the new designation for this listing. In addition, the listing for ''tick-borne encephalitis virus (Siberian subtype)'' in ECCN 1C351.b.3 is amended by revising the parenthetical reference therein to ''tick-borne encephalitis virus (Far Eastern subtype)'' to reflect the new designation for the latter (*i.e.,* ECCN 1C351.a.52).

This rule also revises the description for ''Conotoxin'' by making it plural to clarify that ECCN 1C351.d.6 controls all variants of this toxin.

In addition, the listings for ''Shiga toxin'' and ''Verotoxin'' which, prior to the publication of this final rule, were controlled under ECCN 1C351.d.13 and d.17, respectively, are merged into a single listing under ECCN 1C351.d.13 that also includes some changes in nomenclature to clarify the scope of these controls. The revised listing reads as follows: ''Shiga toxins (shiga-like toxins, verotoxins, and verocytotoxins).''

This rule also makes certain conforming changes to other listings in ECCN 1C351 to reflect the merger of the ''Shiga toxin'' and ''Verotoxin'' listings and the related nomenclature changes described above. First, the Note to ECCN 1C351.c.19 (Shiga-toxin producing Escherichia coli) is revised to read: ''Shiga toxin producing Escherichia coli (STEC) includes, inter alia, enterohaemorrhagic E. coli (EHEC), verotoxin producing E. coli (VTEC) or verocytotoxin producing E. coli (VTEC).'' Specifically, this Note is

revised by adding the ''Verotoxin'' nomenclature and by replacing the phrase ''also known as'' with the phrase ''inter alia,'' thereby clarifying that this Note does not exclude other relevant shiga-toxin producing strains from the scope of ECCN 1C351.c.19. Second (as referenced in the description of the AG intersessional changes, above), this rule renumbers the listings for ''Viscumin'' and ''Volkensin'' to control these toxins under ECCN 1C351.d.17 and .d.18, respectively, to reflect the merger of the Shiga toxin and Verotoxin listings (which were previously designated as ECCN 1C351.d.13 and .d.17, respectively) into a single listing (ECCN 1C351.d.13).

Except for the dengue fever virus, the license requirements applicable to the viruses, bacteria and toxins affected by these amendments to ECCN 1C351 remain unchanged. Specifically, all of these items, except the dengue fever virus, continue to require a license for CB reasons to destinations indicated under CB Column 1 on the Commerce Country Chart and for AT reasons to destinations indicated in AT Column 1 on the Commerce Country Chart. The dengue fever virus is now designated as EAR99 and, as such, no longer requires a license for CB or AT reasons. However, any item that is subject to the EAR, whether or not it is listed on the CCL, may require a license for reasons described elsewhere in the EAR (*e.g.,* the end-user/end-use controls described in part 744 of the EAR or the embargoes and other special controls described in part 746 of the EAR).

ECCN 2B352 (Equipment Capable of Use in Handling Biological Materials)

This final rule also amends ECCN 2B352 on the CCL to reflect changes to the AG ''Control List of Dual-Use Biological Equipment and Related Technology and Software'' based on the understandings reached at the June 2016 AG Plenary Implementation Meeting. Specifically, this rule amends ECCN 2B352.a by expanding the controls on biological containment facilities and related equipment to include the following equipment designed for fixed installation in complete containment facilities at the P3 or P4 containment level: (1) Double-door pass-through decontamination autoclaves; (2) breathing air suit decontamination showers; and (3) mechanical-seal or inflatable-seal walkthrough doors. This change is made in recognition of the fact that such equipment could be acquired, individually, and subsequently assembled into a functional containment facility that would be subject to the controls described in ECCN 2B352.a.

In addition, this rule amends ECCN 2B352.b.1 (fermenters) by removing the word ''pathogenic'' from the description of this equipment. This change is made, because there is no distinction, with respect to either the technical characteristics or the use of this equipment, between pathogenic and non-pathogenic micro-organisms. As revised, ECCN 2B352.b.1 reads: ''Fermenters capable of cultivation of micro-organisms or of live cells for the production of viruses or toxins, without the propagation of aerosols, having a capacity of 20 liters or greater.'' This clarification to ECCN 2B352.b.1 was adopted by the AG, subsequent to the June 2016 AG Plenary Implementation Meeting, pursuant to their silent approval procedure.

All items controlled under ECCN 2B352 require a license for CB reasons to destinations indicated under CB Column 2 on the Commerce Country Chart and for AT reasons to destinations indicated in AT Column 1 on the Commerce Country Chart.

Effect of This Rule on the Scope of the CB Controls in the EAR

The changes made by this rule only marginally affect the scope of the EAR controls on human and animal pathogens/toxins and equipment capable of use in handling biological materials.

The scope of the CCL-based CB controls on human and animal pathogens and toxins was not affected by the nomenclature changes involving the following items in ECCN 1C351: the bacteria listed under ECCN 1C351.c.7 (Chlamydia psittaci) or .c.18 (Salmonella); the toxins listed under ECCN 1C351.d.6 (Conotoxins), .d.7 (Diacetoxyscirpenol), .d.9 (Microcystins), or .d.10 (Modeccin); and the toxins Viscumin and Volkensin (renumbered as ECCN 1C351.d.17 and .d.18, respectively). In addition, the merger of the listings for Shiga toxin and Verotoxin (previously controlled under ECCN 1C351.d.13 and .d.17, respectively) under a single listing (ECCN 1C351.d.13), and the related nomenclature changes involving these toxins, clarified the controls applicable to these toxins, but did not affect the scope of these controls. Furthermore, the removal of the dengue fever virus from ECCN 1C351 is not expected to significantly reduce the number of license applications that will have to be submitted for items controlled under this ECCN. Consequently, none of the changes made by this rule to ECCN 1C351 are expected to have a significant impact on the number of license applications that will have to be submitted for the items controlled under this ECCN.

The updates in this rule to the ECCN 2B352.a controls on biological containment facilities represent an expansion in the number of items that require a license under this ECCN. However, the expanded controls apply to only a relatively small percentage of these types of items that were not controlled under ECCN 2B352 prior to the publication of this rule (*i.e.,* only those double-door pass-through decontamination autoclaves, breathing air suit decontamination showers, and mechanical-seal or inflatable-seal walkthrough doors that are designed for fixed installation in P3 or P4 biological containment facilities). Consequently, any increase in the number of license applications resulting from this change is not expected to be significant, when considered as a percentage of these types of items.

The scope of the CCL-based CB controls on equipment capable of use in handling biological materials was not affected by the clarifications involving fermenters controlled under ECCN 2B352.b or cross (tangential) flow filtration equipment controlled under ECCN 2B352.d. Consequently, none of these changes to ECCN 2B352 are expected to have a significant impact on the number of license applications that will have to be submitted for the items controlled under this ECCN.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 4, 2016 (81 FR 52587 (August 8, 2016)), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*). BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

2. Notwithstanding any other provision of 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 Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule contains a collection of information subject to the requirements of the PRA. This collection has been approved by OMB under Control Number 0694–0088 (Multi-Purpose Application), which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Jasmeet Seehra, Office of Management and Budget, by email to *Jasmeet_K._Seehra@omb.eop.gov* or by fax to (202) 395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th Street & Pennsylvania Avenue NW., Room 2705, Washington, DC 20230 or by email to *RPD2@bis.doc.gov.*

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (see 5 U.S.C. 553(a)(1)). Immediate implementation of these amendments is non-discretionary and fulfills the United States' international obligation to the Australia Group (AG). The AG contributes to international security and regional stability through the harmonization of export controls and seeks to ensure that exports do not contribute to the development of chemical and biological weapons. The AG consists of 41 member countries that act on a consensus basis and the amendments set forth in this rule implement changes made to the AG common control lists (as a result of the adoption of the recommendations made at the February 2016 AG Intersessional Implementation Meeting and the understandings reached at the June 2016 AG Plenary Implementation Meeting) and other changes that are necessary to ensure consistency with the controls maintained by the AG. Because the United States is a significant exporter of the items in this rule, immediate implementation of this provision is necessary for the AG to achieve its purpose. Any delay in implementation will create a disruption in the movement of affected items globally because of disharmony between export control measures implemented by AG members, resulting in tension between member countries. Export controls work best when all countries implement the same export controls in a timely manner.

Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in final form.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, part 774 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 774—[AMENDED]

■ 1. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 4, 2016, 81 FR 52587 (August 8, 2016).

Supplement No. 1 to Part 774—[Amended]

■ 2. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1—Special Materials and Related Equipment, Chemicals, ''Microorganisms'' and ''Toxins,'' ECCN 1C351 is amended in the ''Items'' paragraph under the ''List of Items Controlled'' section:

■ a. By removing paragraph a.11 and redesignating paragraphs a.12 through a.58 as paragraphs a.11 through a.57;
■ b. By revising the Technical Note to newly designated paragraph a.40;
■ c. By revising paragraph b.3;
■ d. By revising paragraphs c.7 and c.18;
■ e. By revising the Note immediately following paragraph c.19;
■ f. By revising paragraphs d.6, d.7, d.9, d.10 and d.13;
■ g. By removing paragraph d.17 and redesignating paragraphs d.18 and d.19 as paragraphs d.17 and d.18, respectively; and
■ h. By revising newly designated paragraphs d.17 and d.18.

The revisions read as follows:

1C351 Human and animal pathogens and ''toxins'', as follows (see List of Items Controlled).

* * * * *

List of Items Controlled

* * * * *

Items:

a. * * *

a.11. Dobrava-Belgrade virus;
a.12. Eastern equine encephalitis virus;
a.13. Ebolavirus (includes all members of the Ebolavirus genus);
a.14. Foot-and-mouth disease virus;
a.15. Goatpox virus;
a.16. Guanarito virus;
a.17. Hantaan virus;
a.18. Hendra virus (Equine morbillivirus);
a.19. Japanese encephalitis virus;
a.20. Junin virus;
a.21. Kyasanur Forest disease virus;
a.22. Laguna Negra virus;
a.23. Lassa virus;
a.24. Louping ill virus;
a.25. Lujo virus;
a.26. Lumpy skin disease virus;
a.27. Lymphocytic choriomeningitis virus;
a.28. Machupo virus;
a.29. Marburgvirus (includes all members of the Marburgvirus genus);
a.30. Monkeypox virus;
a.31. Murray Valley encephalitis virus;
a.32. Newcastle disease virus;
a.33. Nipah virus;
a.34. Omsk hemorrhagic fever virus;
a.35. Oropouche virus;
a.36. Peste-des-petits ruminants virus;
a.37. Porcine Teschovirus;
a.38. Powassan virus;
a.39. Rabies virus and all other members of the Lyssavirus genus;
a.40. Reconstructed 1918 influenza virus;

Technical Note: 1C351.a.40 includes reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight gene segments.

a.41. Rift Valley fever virus;
a.42. Rinderpest virus;
a.43. Rocio virus;

a.44. Sabia virus;
a.45. Seoul virus;
a.46. Severe acute respiratory syndrome-related coronavirus (SARS-related coronavirus);
a.47. Sheeppox virus;
a.48. Sin Nombre virus;
a.49. St. Louis encephalitis virus;
a.50. Suid herpesvirus 1 (Pseudorabies virus; Aujeszky's disease);
a.51. Swine vesicular disease virus;
a.52. Tick-borne encephalitis virus (Far Eastern subtype, formerly known as Russian Spring-Summer encephalitis virus—see 1C351.b.3 for Siberian subtype);
a.53. Variola virus;
a.54. Venezuelan equine encephalitis virus;
a.55. Vesicular stomatitis virus;
a.56. Western equine encephalitis virus; *or*
a.57. Yellow fever virus.
b. * * *
b.3. Tick-borne encephalitis virus (Siberian subtype, formerly West Siberian virus—see 1C351.a.52 for Far Eastern subtype).
c. * * *
c.7. Chlamydia psittaci (Chlamydophila psittaci);
* * * * *
c.18. Salmonella enterica subspecies enterica serovar Typhi (Salmonella typhi);
c.19. * * *
Note: Shiga toxin producing Escherichia coli (STEC) includes, inter alia, enterohaemorrhagic E. coli (EHEC), verotoxin producing E. coli (VTEC) or verocytotoxin producing E. coli (VTEC).
* * * * *
d. * * *
d.6. Conotoxins;
d.7. Diacetoxyscirpenol;
d.8. * * *
d.9. Microcystins (Cyanginosins);
d.10. Modeccin;
* * * * *
d.13. Shiga toxins (shiga-like toxins, verotoxins, and verocytotoxins);
* * * * *
d.17. Viscumin (Viscum album lectin 1); *or*
d.18. Volkensin.
* * * * *

■ 3. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 2—Materials Processing, ECCN 2B352 is amended in the ''Items'' paragraph, under the List of Items Controlled section, by revising paragraph a, by revising paragraph b.1, by revising the introductory text of paragraph d.1, and by revising the nota bene to paragraph d.1, to read as follows:

2B352 Equipment capable of use in handling biological materials, as follows (see List of Items Controlled).
* * * * *

List of Items Controlled

Related Controls: * * *
Related Definition: * * *
Items:

a. Containment facilities and related equipment, as follows:

a.1. Complete containment facilities at P3 or P4 containment level.

Technical Note: P3 or P4 (BL3, BL4, L3, L4) containment levels are as specified in the WHO Laboratory Biosafety Manual (3rd edition, Geneva, 2004).

a.2. Equipment designed for fixed installation in containment facilities specified in paragraph a.1 of this ECCN, as follows:
a.2.a. Double-door pass-through decontamination autoclaves;
a.2.b. Breathing air suit decontamination showers;
a.2.c. Mechanical-seal or inflatable-seal walkthrough doors.
b. * * *
b.1. Fermenters capable of cultivation of micro-organisms or of live cells for the production of viruses or toxins, without the propagation of aerosols, having a capacity of 20 liters or greater.
* * * * *
d. * * *
d.1. Cross (tangential) flow filtration equipment capable of separation of microorganisms, viruses, toxins or cell cultures having all of the following characteristics:
* * * * *
N.B.: 2B352.d.1 does not control reverse osmosis and hemodialysis equipment, as specified by the manufacturer.
* * * * *

Dated: December 7, 2016.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2016–30099 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–33–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 405 and 416

[Docket No. SSA–2014–0052]

RIN 0960–AH71

Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are revising our rules so that more of our procedures at the hearing and Appeals Council levels of our administrative review process are consistent nationwide. We anticipate that these nationally consistent procedures will enable us to administer our disability programs more efficiently and better serve the public.

DATES: This final rule will be effective on January 17, 2017. However, compliance is not required until May 1, 2017.

FOR FURTHER INFORMATION CONTACT: Patrick McGuire, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION

Background

We are revising and making final the rules for creating nationally uniform hearing and Appeals Council procedures, which we proposed in a notice of proposed rulemaking (NPRM) published in the **Federal Register** on July 12, 2016 (81 FR 45079). In the preamble to the NPRM, we discussed the changes we proposed from our current rules and our reasons for proposing those changes. In the NPRM, we proposed revisions to: (1) The time frame for notifying claimants of a hearing date; (2) the information in our hearing notices; (3) the period when we require claimants to inform us about or submit written evidence, written statements, objections to the issues, and subpoena requests; (4) what constitutes the official record; and (5) the manner in which the Appeals Council would consider additional evidence.

As we explained in the preamble to our NPRM, we proposed these changes to ensure national consistency in our policy and procedures and improve accuracy and efficiency in our administrative review process. We expect this final rule will positively affect our ability to manage our workloads and lead to better public service. Interested readers may refer to the preamble to the NPRM, available at *http://www.regulations.gov* under docket number SSA–2014–0052.

What changes are we making from the NPRM?

We are making several changes in this final rule from the NPRM based on some of the public comments we received. We briefly outline those changes here and provide additional detail on the changes in the comment and response section that follows. We are also making minor editorial changes throughout this final rule. For the reader's ease of review, we refer to the general requirement that all evidence, objections, or written statements be submitted at least 5 business days before the date of the hearing as the ''5-day requirement.'' We adopted the following changes from our NPRM in this final rule:

• We lengthened the time frame for notifying claimants of a hearing date in

20 CFR 404.938 and 416.1438 from at least 60 days to at least 75 days;

- In 20 CFR 404.935(b)(3)(iv) and 416.1435(b)(3)(iv), we removed the phrase ''through no fault of your own'' to reduce the evidentiary burden on claimants who are unable to provide evidence;
- We clarified that the circumstances set forth in 20 CFR 404.935(b)(3)(i) to (b)(3)(iv) and 416.1435(b)(3)(i) to (b)(3)(iv) are merely examples and do not constitute an exhaustive list;
- We added the same exceptions to the 5-day requirement that we proposed for the submission of evidence in 20 CFR 404.935 and 416.1435 to the deadlines related to objecting to the issues (20 CFR 404.939 and 416.1439), presenting written statements (20 CFR 404.949 and 416.1449), and submitting subpoenas (20 CFR 404.950(d)(2) and 416.1450(d)(2));
- We added language to 20 CFR 404.949 and 416.1449 to clarify that the 5-day requirement applies only to pre-hearing written statements, not to post-hearing written statements;
- We added an example of an exception for submitting additional evidence to the Appeals Council in 20 CFR 404.970(b)(3)(v) and 416.1470(b)(3)(v);
- We reorganized paragraphs (a)(5) and (b) of 20 CFR 404.970 and 416.1470;
- We removed proposed subsection 20 CFR 404.970(d) and 416.1470(d);
- We added clarifying cross-references to 20 CFR 404.900 and 416.1400 and 20 CFR 404.929 and 416.1429 to place the 5-day requirement in 20 CFR 404.935 and 416.1435 in context; and,
- We broadened the existing cross-reference in 20 CFR 404.968 and 416.1468 and 20 CFR 404.979 and 416.1479 to reference the entire section of 20 CFR 404.970 and 416.1470, and we removed the cross reference to 20 CFR 404.976 and 416.1476 in 20 CFR 404.979 and 416.1479.

Public Comments

We initially provided a 30-day comment period that would have ended on August 11, 2016. We subsequently extended the comment period for an additional 15 days, until August 26, 2016 (81 FR 51412). We received 154 comments on our proposed rule from the public, interested advocacy groups, and several members of Congress. We did not consider six comments because they either came from employees who commented in their official employment capacity, which is a violation of our policy, or they were outside the scope of this rulemaking. We published and carefully considered the remaining 148 comments and, where appropriate, made changes in response to these comments.

Below, we summarize and respond to the comments submitted on the proposed rule, and respond to the significant issues relevant to this rulemaking. We do not respond to comments that are outside the scope of this rulemaking proceeding.

Hearing Notice Requirement

Comment: Several commenters supported our proposal to provide more advance notice of a hearing, but asked that we adopt the 75-day advance notice requirement currently in place in the Boston region, rather than the 60-day advance notice we proposed in the NPRM. Several of the commenters stated that earlier notice would allow claimants to: (1) Obtain and submit the information and evidence, especially when a medical provider is uncooperative; (2) make arrangements for transportation to the hearing; (3) take into account time frames under the regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) that provide an entity up to 60 days before it must produce records (45 CFR 164.524(b)); and (4) avoid a postponement of hearing due to non-receipt of medical records. Several other commenters said that even a 75-day notice requirement is insufficient, and that we should provide notice 90 to 120 days in advance of a hearing.

Response: We recognize that claimants and representatives may sometimes face challenges in acquiring medical records. In response to multiple advocate comments indicating a preference for 75 days' advance notice of a hearing instead of 60 days, we are revising the final rule to provide 75 days' advance notice. Since we already have approximately a decade of experience in using the 75-day advance notice period in the Boston Region, we believe its expansion nationwide is justified.

We proposed a 60-day period in our NPRM because we believed it would promote the efficiency of our hearing process (81 FR at 45081). However, we recognize the concerns that that commenters raised, including stated concerns about the adequacy of a 60-day advance notice requirement in light of the timeframe an entity has to provide evidence to an individual under the HIPAA regulations. In order to minimize the burden on claimants, we have decided to adopt the commenters' suggestion that we continue to provide at least 75-day advance notice of a hearing, as we have done under the rules we have been applying in the Boston region since 2006.

Some commenters requested that we extend the advance notice period to 90 or 120 days instead of the proposed 60-days advance notice. We have decided not to extend the advance notice period to 90 or 120 days, because providing a hearing date this far in advance would increase the likelihood that an adjudicator's schedule will change by the scheduled hearing date. Moreover, in contrast to the 75-day period, we have no current model to support the use of a longer time period.

Exceptions to the 5-Day Requirement

Comment: Several commenters asked that we retain the exception in 20 CFR 404.935(b)(3)(iv) in the final rule because it recognized the difficulties of obtaining medical evidence, while another commenter suggested we eliminate this exception because it was vague and contrary to the intent and purpose of the proposed rule. Several commenters expressed concerns about our exceptions to the 5-day requirement because they were too narrowly defined, too subjective, and would increase our workloads. Other commenters suggested that we add additional exceptions, such as when the claimant is homeless or lacks representation. One commenter requested that the Appeals Council also find good cause for submitting evidence after the 5-day requirement if the claimant was unrepresented or homeless at the hearing level.

Response: We provide examples of exceptions to the 5-day requirement in final 20 CFR 404.935(b)(3) and 416.1435(b)(3) and have clarified that we did not intend for them to be all-inclusive or to exclude other extenuating circumstances that may result in a claimant being unable to meet the 5-day requirement. To clarify this point, we changed the regulatory text to state that ''[e]xamples include, but are not limited to'' the outlined exceptions. Because circumstances vary, we determine whether a claimant qualifies for an exception on a case-by-case basis.

We do not anticipate that evaluating requests for exceptions to the 5-day requirement will increase our workloads. We recognize that compliance with the 5-day requirement will not be possible in all situations; however, based on our experience in the Boston region, we expect that providing at least 75 days' advance notice of a hearing will significantly increase the number of times evidence is obtained and submitted at least 5 business days before the hearing. We also note that in our experience the need to evaluate

requests to submit evidence pursuant to one of the exceptions has not caused workload spikes in our Boston region, where a 5-day requirement has been in place for more than a decade. When a claimant or appointed representative is aware that he or she will need more time to submit evidence in accordance with one of the exceptions, we expect that he or she will provide us with the necessary information in advance. To do so, the claimant or representative should notify the administrative law judge (ALJ) of what the evidence generally consists of and the expected volume of evidence (*e.g.,* one visit to a treating physician or a one-week hospital stay). When the claimant or his or her representative timely provides this information to the ALJ, we expect that evaluating the request for an exception will likely be very simple.

The fact that a claimant is homeless or lacks representation does not automatically excuse him or her from complying with our rules. However, situations such as these may result in circumstances that warrant an exception to the 5-day requirement. We will evaluate these circumstances carefully on a case-by-case basis under the exceptions described in the final rule.

Comment: Commenters who represented advocacy groups noted that our proposed rule did not include exceptions to deadline requirements for objecting to the issues (20 CFR 404.939 and 416.1439), presenting written statements (20 CFR 404.949 and 416.1449), and submitting subpoenas (20 CFR 404.950(d)(2) and 416.950(d)(2)). Some commenters had concerns that the 5-day requirement, as applied to objections to the issues, could force representatives to develop boilerplate notices that list all possible objections in every case.

Response: We agree with the commenters' concerns, and we have added exceptions for the deadlines related to objecting to the issues (20 CFR 404.939 and 416.1439), presenting written statements (20 CFR 404.949 and 416.1449), and submitting subpoenas (20 CFR 404.950(d)(2) and 416.1450(d)(2)). The exceptions in 20 CFR 404.939 and 416.1439 should eliminate the need for representatives to develop boilerplate notices.

Appeals Council Authority

Comment: While one commenter supported the proposal in subsections 20 CFR 404.970(d) and 416.1470(d) that the Appeals Council conduct hearings to develop evidence, other commenters expressed concern about the proposal. A few of these commenters stated it was an expansion of the Appeals Council's authority and was inconsistent with the Administrative Procedure Act. Other commenters stated that we did not provide an adequate explanation of the authority for such hearings.

Response: Since the beginning of our hearing process in 1940, our regulations (currently found in sections 20 CFR 404.956 and 416.1456) have authorized the Appeals Council to remove a hearing request from an ALJ and conduct the hearing proceedings, using the rules that ALJs apply. We proposed to revise sections 20 CFR 404.970 and 416.1470 to clarify the Appeals Council's authority in this area. Although we disagree with some of the comments, including concerns that the proposal lacked legal support, we understand the concerns the commenters raised regarding this proposal. As a result, we have decided to remove the rule we proposed in subsections 404.970(d) and 416.1470(d). The Appeals Council will continue to exercise its authority to develop evidence in accordance with 20 CFR 404.976(b) and 416.1446(b).

''Inform'' Option

Comment: Several commenters stated the proposed rule may have unintended consequences because appointed representatives may rely on the ''inform'' option in 20 CFR 404.935 and 416.1435 and in 20 CFR 404.1512 and 416.912 to avoid developing evidence. A few commenters stated if we retain the ''inform'' option, we should require the claimant to inform the hearing office earlier so there would be time to develop the evidence and avoid unnecessary supplemental hearings.

Response: On April 20, 2015, we implemented a final rule that requires a claimant to ''inform us about or submit all evidence known to you that relates to whether you are blind or disabled.'' 81 FR 14828. As we stated in the preamble to that proposed rule, we specifically added this option because we did not intend to shift our burden to develop the record to claimants. In the proposed rule, as in this final rule, we recognize that some individuals, many of whom do not have appointed representatives, require our assistance in obtaining medical evidence needed to adjudicate their claims. Claimants who are unable to obtain evidence necessary to adjudicate their claims may inform us of this difficulty and we will continue to seek out evidence on their behalf to develop the record for their hearing. By adopting this final rule, we have not changed our longstanding policy of assisting claimants in developing the record. At the hearing level, this policy has been explicitly set forth in our sub-regulatory instructions.

Because most claimants are represented at the hearing level, and because we are providing more advance notice of a hearing than we have in the past, we expect to significantly reduce the number of postponed hearings or supplemental hearings needed based on evidence that was available at least 5 business days before the hearing.

In our experience, the vast majority of representatives act ethically in regard to evidence development and make good faith efforts to assist claimants in obtaining and submitting the required evidence before a hearing, as required under 20 CFR 404.1740(b)(2) and 416.1540(b)(2). Therefore, we do not expect the ''inform'' option to significantly affect our administrative processes.

In those circumstances in which hearing offices assist unrepresented claimants in developing evidence, our sub-regulatory instructions will clarify that employees in our hearing offices should undertake development as early as possible to reduce the number of continuances or postponed hearings.

5-Day Requirement

Comment: Some commenters thought the 5-day requirement in the proposed rules was inconsistent with our duty to make eligibility decisions based on the evidence presented at the hearing.

Response: In developing these rules, we were guided by the two principles that we have always applied when we make decisions regarding our programs: As the Supreme Court has observed, the Social Security system ''must be fair—and it must work.'' [1] These final rules appropriately balance these two guiding principles. These rules are fair because they provide the claimant with more advance notice of his or her hearing, and they provide appropriate exceptions to the 5-day requirement. At the same time, the 5-day requirement promotes the efficiency of our hearings process and allows it to work more effectively by ensuring that ALJs have a more complete evidentiary record when they hold hearings. Striking such a balance in our rules is of paramount importance to us. That balance would not be present if, as some commenters suggested, we merely gave claimants more advance notice of a hearing, without the 5-day requirement. Conversely, that balance would not be present if we simply imposed a 5-day requirement, without giving a claimant more advance notice of a hearing. Given the size of our

[1] *Richardson* v. *Perales,* 402 U.S. 389, 399 (1971).

hearings workloads,[2] where the need for efficiency is ''self-evident,'' [3] these final rules appropriately balance the twin concerns of fairness and efficiency that always guide us.

In publishing this final rule, we do not intend to change the purpose of a hearing, where an ALJ looks fully into the issues and obtains oral testimony from the claimant and witnesses, if any. Additionally, our final rule contemplates that some circumstances may warrant the introduction of new evidence at or after the hearing, and includes appropriate exceptions to accommodate these circumstances. Thus, under our final rule, adjudicators will continue to make decisions based on the evidence of record, including the evidence adduced at the hearing. However, we expect that our final rule will help to ensure that evidentiary records are more complete at the time of the administrative hearing, which should reduce the need for post-hearing proceedings and help us provide better, more timely service to all claimants.

Comment: Some commenters stated that the philosophical underpinnings of the rule in 20 CFR 404.1512 is that ALJs must have all evidence that is available at the time of the hearing so they can reach the correct decision. The commenters thought that the proposed rule conflicted with our rule requiring claimants to submit all evidence. The commenters noted that it would not make sense to place a duty on the claimant to submit evidence when at the same time, rules are created that would allow an ALJ not to consider that evidence.

Response: Our approach with this rule is tied to the ''philosophical underpinnings'' of 20 CFR 404.1512 and 416.912, which describe a claimant's ongoing duty to ''inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled.'' This rule will ensure claimants have the benefit of a fully developed record at the time our ALJs conduct their hearings. We recognize that there will be circumstances in which claimants cannot produce evidence at least 5 business days before the hearing. As stated above, we have included appropriate exceptions to the 5-day requirement to ensure fairness when a claimant or his or her representative actively and diligently seeks evidence but is unable to obtain it. To bolster this point, in 20 CFR 404.935(b)(3)(iv) and 416.1435(b)(3)(iv), we removed the phrase ''through no fault of your own'' to ensure that our adjudicators interpret this exception consistent with our intent. We intend the words ''actively'' and ''diligently'' to be interpreted using their ordinary English usage. When a claimant or representative shows that he or she made a good faith effort to timely request, obtain, and submit evidence, but he or she did not receive the evidence in time to submit it at least 5 business days before the hearing because of circumstances outside his or her control, we expect that our adjudicators would find that this standard is met.

Some commenters perceived this rule as an exclusionary procedure designed to prevent the introduction of medical records at the expense of the claimant's case. Our experience is more consistent with one of the commenters from the Boston region who noted that most ALJs ''effectively draw the line between evidence which had been available but was not submitted, and previously unavailable evidence'' and ''do not use the 5-day rule as a punitive device against claimants or their representatives.'' Further, in those situations in which an ALJ in the Boston region did not correctly find reason to accept evidence outside the 5-day time frame, the Appeals Council granted review in order to consider the information on appeal where the evidence raised a reasonable probability of changing the outcome of the case. This important practice will continue in our final rule.

Comment: Some commenters pointed out that the 5-day requirement would preclude a claimant from submitting evidence at the hearing or Appeals Council level of the administrative process, particularly if a claimant is illiterate or does not speak English, or is without an appointed representative or obtained a representative shortly before the hearing date, and this exclusion was an undue burden, fundamentally unfair, and disadvantaged claimants in favor of adjudicators.

Response: We expect that this final rule will enhance our decision-making process and allow us to provide more timely decisions to claimants. We do not intend to unduly burden claimants with this rule. By asking claimants to inform us about or submit evidence at least 5 business days before the hearing date, we expect that evidentiary records will be more complete and comprehensive at the time of the scheduled hearing. In turn, this should facilitate the ALJ's ability to look fully into the issues at the hearing and produce a timely, accurate decision. As stated above, we will continue our longstanding practice of assisting those individuals who, for various reasons, are unable to develop the record themselves. This rule also incorporates appropriate exceptions to take into account for the needs of individuals who, due to unique circumstances, do not fully understand or are not capable of adhering to our requirements or requests.

Comment: Some commenters said that the proposed rule makes the administrative review process more formal and adversarial. Commenters also asked the agency to clarify that if a claimant informs an ALJ about evidence at least 5 business days before the hearing, the ALJ must consider the evidence regardless of whether an exception exists. Commenters said that the proposed rule overlooked that an ALJ adjudicates a case through the date of his or her decision, and that he or she needs evidence of ongoing treatment to adjudicate the case. Commenters also said the proposed rule did not provide the claimant with an opportunity to submit evidence to rebut other evidence produced at or after the hearing or permit an ALJ to hold the record open when a new issue arises during the hearing.

Response: From our experience, similar rules that applied in the Boston region for approximately a decade have not resulted in a more adversarial process or misunderstandings from the public. Moreover, many of our other rules that apply nationwide impose deadlines or other requirements on the public, such as the deadline to appeal a determination or decision. While processing a case, we frequently request that individuals submit a response or provide us with information within certain timeframes. We have not found that these provisions make our process more adversarial. Rather, like this final rule, they are necessary for efficient administration of our programs.

If a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline.

While it is true that, in many cases, an ALJ adjudicates the case through the date of the hearing decision, our rule is not intended to prevent a claimant from submitting evidence related to ongoing treatment. Rather, we expect that

[2] *See Annual Statistical Supplement to the Social Security Bulletin, 2015,* Table 2.F9, at page 2.81 (April 2016) (setting out the number of hearing level receipts, dispositions, and end-of-year pending cases for fiscal years 012–2014).

[3] *See Barnhart* v. *Thomas,* 540 U.S. 20, 28–29 (2003) (''As we have observed, '[t]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.' . . . The need for efficiency is self-evident.' '") (quoting *Heckler* v. *Campbell,* 461 U.S. 458, 461 n.2 (1983)).

evidence of ongoing treatment, which was unavailable at least 5 business days before the hearing, would qualify under the exception in 20 CFR 404.935(b)(3) and 416.1435(b)(3).

Similarly, if an ALJ introduces new evidence at or after a hearing, the claimant could use the exception in 20 CFR 404.935(b)(3) and 416.1435(b)(3) to submit rebuttal evidence. The claimant could also rebut evidence introduced at or after the hearing by submitting a written statement to the ALJ. As previously mentioned, we added language to 20 CFR 404.949 and 416.1449 to clarify that the 5-day requirement applies only to pre-hearing written statements, not to post-hearing written statements.

Comment: Some commenters stated that the 5-day requirement could affect a representative's ability to prepare useful and persuasive pre-hearing statements, given that the Office of Disability Adjudication and Review (ODAR) frequently exhibits files very close to the hearing date.

Response: For the same reasons we are adopting a 5-day requirement for available evidence, we are adopting this requirement for pre-hearing written statements to ensure that an ALJ has the benefit of reviewing arguments before the hearing. This will allow the ALJ to be fully aware of any unresolved issue(s) that a claimant is raising and which the ALJ may need to address at the hearing. While we are sympathetic to the commenters who noted exhibit numbers were unlikely to be available at least 5 business days before the hearing, we note that this issue existed under our prior rules as well and therefore, this convenience does not outweigh our need for a complete case file before the hearing.

Comment: Some commenters stated that the 5-day requirement could disadvantage claimants who hire representatives shortly before the hearing date.

Response: We reiterate that we expect all appointed representatives to make good faith efforts to assist claimants in obtaining and submitting the required evidence before a hearing, as required under 20 CFR 404.1740(b)(2) and 416.1540(b)(2). However, we have included appropriate exceptions to the 5-day requirement to ensure fairness when a claimant or his or her representative actively and diligently seeks evidence but is unable to obtain it. The appointment of a representative shortly before a hearing may be such an exception, depending on the circumstances surrounding the late appointment. In addition, we note that if a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline.

Representation

Comment: A few commenters argued that when taking a new case, representatives often find that prior counsel was incompetent in obtaining evidence, and this rule, as applied at both the hearing and Appeals Council levels, unjustly harms claimants represented by such individuals.

Response: We reiterate that we expect all appointed representatives to make good faith efforts to assist claimants in obtaining and submitting the required evidence before a hearing, as required under 20 CFR 404.1740(b)(2) and 416.1540(b)(2). Additionally, if a new representative can show that a prior representative did not adequately uphold his or her duty to the claimant, we expect that our adjudicators would find that this would warrant an exception to the 5-day requirement.

Other

Comment: Several commenters stated the new standard at the Appeals Council level would force claimants to choose between filing a new claim and appealing an ALJ's decision to the Appeals Council, which could result in the loss of significant benefits. Another commenter stated it would result in filing more new applications overall or the reopening of prior applications so that a claimant could submit previously excluded evidence.

Response: It bears reiterating that we expect the final rule will help to ensure that evidentiary records are more complete at the time of the scheduled hearing. However, our final rule contemplates that some circumstances may warrant the introduction of new evidence at or after the hearing, and includes an ''inform'' option and broad exceptions to accommodate these circumstances. With the ''inform'' option and the broad exceptions to the 5-day requirement, we do not expect to see a spike in new applications or reopenings.

Moreover, it is already our policy that if a claimant wants to file a new disability application under the same title and for the same benefit type as a disability claim pending at the Appeals Council level, and the claimant does not have evidence of a new critical or disabling condition, the claimant must choose to continue the appeal of the prior claim or file a new application. Nothing in the proposed or final rule substantively changes this policy.

Under our current rules in 20 CFR 404.970 and 416.1470, the Appeals Council considers additional evidence only if it is new, material, and related to the period on or before the date of the ALJ's decision. This does not mean, however, that the Appeals Council grants a claimant's request for review of an ALJ's decision whenever additional evidence meets this criteria. In many cases, the Appeals Council adds evidence that meets the criteria to the record, but denies the request for review of the case. Under our current rules, the Appeals Council will review a case in this situation only if it finds that the ALJ's action, findings, or conclusion is contrary to the weight of the evidence currently of record. This final rule provides more clarity to this procedure. Under this final rule, the Appeals Council will grant review of a case based on the receipt of additional evidence if the evidence is new, material, and related to the period on or before the date of the hearing decision and if there is a reasonable probability that the additional evidence would change the outcome of the decision.

If a claimant submits evidence that the Appeals Council does not consider, the Appeals Council will notify the claimant that if he or she files a new application for disability insurance benefits within 6 months or a new application for Supplemental Security Income within 60 days of the Appeals Council notice, the date of the request for review will constitute a protective filing for a new application.

Comment: One commenter expressed concerns about the proposed language in 20 CFR 404.951(b) and 416.1451(b) because adding the phrase ''appropriate reference'' was insufficient to describe what evidence an ALJ must include in the record.

Response: During the time that substantially the same rule was in place in the Boston region, we did not experience any confusion as to the meaning of the phrase ''appropriate reference.'' Further, this language is consistent with our longstanding sub-regulatory policies and practices nationwide, and adoption of this language does not change our policies regarding what constitutes the official record.

Comment: Many commenters submitted a broad statement that there have been ''serious problems'' and inconsistencies with implementation of the 5-day requirement in the Boston region. The commenters generally presented two main points: (1) There was variance in applying the 5-day requirement between ALJs; and (2) ALJs who did apply the rule varied in when

the 5-day requirement ended and in evaluating whether an exception to the 5-day requirement applied.

Response: We acknowledge that in a report issued by the Administrative Conference of the United States (ACUS) [4] on December 13, 2013, ACUS noted several variances in applying similar rules in the Boston region. However, in response to the ACUS report, we provided additional training to adjudicators and staff regarding application of our Part 405 rules. We also incorporated instructions for processing cases originating in the Boston region into our training materials for all staff, including addressing Part 405 issues in several of our quarterly Videos-On-Demand series that focus on new or problematic areas of adjudication. We updated our sub-regulatory guidance to include references and instructions on how to process cases under Part 405. We will provide the training and instruction necessary to ensure consistent application of our rules nationwide.

Comment: One commenter asked that if we retain the 5-day requirement, we amend the language to require that each party make every reasonable effort to ensure the ALJ receives all the evidence. The commenter noted that proposed 20 CFR 404.935(a) and 416.1435(a) require ''every effort,'' which the commenter believed is an impossible standard to meet.

Response: While our final rule requires a claimant to ''make every effort to ensure that the administrative law judge receives all of the evidence,'' we do not believe the rule creates an ''impossible standard'' because it also includes appropriate exceptions to accommodate circumstances when, despite good faith efforts, the claimant cannot satisfy the 5-day requirement.

Comment: Some commenters stated that 20 CFR 404.944(a)(1) and 416.1444(a)(1) conflict with 20 CFR 404.1512 and 416.912 because one regulation requires an ALJ to ''accept[] as evidence any documents that are material to the issues'' while the other regulation requires a claimant to submit evidence that ''relates to whether or not you are blind or disabled.''

Response: A claimant continues to have a duty to submit all evidence that relates to whether or not he or she is blind or disabled, subject to our other requirements, at the hearing and Appeals Council levels of the administrative process. Whereas 20 CFR 404.1512 and 416.912 explain a claimant's responsibility, 20 CFR 404.944(a)(1) and 416.1444(a)(1) address actions an administrative law judge will take. We expect claimants to submit evidence that relates to whether they are blind or disabled, but our administrative law judges are responsible for making the legal judgment determination whether evidence is ''material to the issues.''

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

Regulatory Flexibility Act

We certify that this final rule would not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules contain reporting requirements in regulation sections §§ 404.968, 404.976, 416.1468, and 416.1476 that require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). SSA will submit separate information collection requests to OMB in the future for these regulations sections. We will not collect the information referenced in these burden sections until we receive OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements; Social Security.

20 CFR Part 405

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Public assistance programs; Reporting and recordkeeping requirements; Social Security; Supplemental Security Income (SSI).

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits, Public assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we amend 20 CFR chapter III, parts 404, 405, and 416 as set forth below:

PART 404—FEDERAL OLD–AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart J—[Amended]

■ 1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. In § 404.900, revise the second sentence of paragraph (b) to read as follows:

§ 404.900 Introduction.

* * * * *

(b) * * * Subject to certain timeframes at the hearing level (see § 404.935) and the limitations on Appeals Council consideration of additional evidence (see § 404.970), we will consider at each step of the review process any information you present as well as all the information in our records.* * *

■ 3. Revise the fifth and eighth sentences in § 404.929 to read as follows:

§ 404.929 Hearing before an administrative law judge-general.

* * * You may submit new evidence (subject to the provisions of § 404.935), examine the evidence used in making the determination or decision under review, and present and question witnesses. * * * If you waive your right to appear at the hearing, in person, by video teleconferencing, or by telephone, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 404.935,

[4] Administrative Conference of the United States, ''SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region I Pilot Program,'' Final Report: December 23, 2013. *https://www.acus.gov/sites/default/files/documents/Assessing%20Impact%20of%20Region%20I%20Pilot%20Program%20Report_12_23_13_final.pdf.*

any new evidence that may have been submitted for consideration.* * *

■ 4. Revise § 404.935 to read as follows:

§ 404.935 Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 404.1512 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence, as required in § 404.1512, no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider or obtain the evidence, unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 404.1512 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing.

■ 5. In § 404.938, revise paragraphs (a) and (b) to read as follows:

§ 404.938 Notice of a hearing before an administrative law judge.

(a) *Issuing the notice.* After we set the time and place of the hearing, we will mail notice of the hearing to you at your last known address, or give the notice to you by personal service, unless you have indicated in writing that you do not wish to receive this notice. We will mail or serve the notice at least 75 days before the date of the hearing.

(b) *Notice information.* The notice of hearing will tell you:

(1) The specific issues to be decided in your case;

(2) That you may designate a person to represent you during the proceedings;

(3) How to request that we change the time or place of your hearing;

(4) That your hearing may be dismissed if neither you nor the person you designate to act as your representative appears at your scheduled hearing without good reason under § 404.957;

(5) Whether your appearance or that of any other party or witness is scheduled to be made in person, by video teleconferencing, or by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

(6) That you must make every effort to inform us about or submit all written evidence that is not already in the record no later than 5 business days before the date of the scheduled hearing, unless you show that your circumstances meet the conditions described in § 404.935(b); and

(7) Any other information about the scheduling and conduct of your hearing.

* * * * *

■ 6. Revise § 404.939 to read as follows:

§ 404.939 Objections to the issues.

If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 404.935(b). You must state the reason(s) for your objection(s). The administrative law judge will make a decision on your objection(s) either at the hearing or in writing before the hearing.

■ 7. Revise § 404.944 to read as follows:

§ 404.944 Administrative law judge hearing procedures—general.

A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and, subject to the provisions of § 404.935: Accepts as evidence any documents that are material to the issues; may stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing; and may reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

■ 8. Revise § 404.949 to read as follows:

§ 404.949 Presenting written statements and oral arguments.

You or a person you designate to act as your representative may appear before the administrative law judge to state your case, present a written summary of your case, or enter written statements about the facts and law material to your case in the record. If presenting written statements prior to hearing, you must provide a copy of your written statements for each party no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 404.935(b).

■ 9. In § 404.950, revise paragraphs (c) and (d) to read as follows:

§ 404.950 Presenting evidence at a hearing before an administrative law judge.

* * * * *

(c) *Admissible evidence.* Subject to the provisions of § 404.935, the administrative law judge may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence used by the court.

(d) *Subpoenas.* (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 10 business days before the hearing date, unless you show that your circumstances meet the conditions described in § 404.935(b). The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important

facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

* * * * *

■ 10. Revise § 404.951 to read as follows:

§ 404.951 Official record.

(a) *Hearing recording.* All hearings will be recorded. The hearing recording will be prepared as a typed copy of the proceedings if—

(1) The case is sent to the Appeals Council without a decision or with a recommended decision by the administrative law judge;

(2) You seek judicial review of your case by filing an action in a Federal district court within the stated time period, unless we request the court to remand the case; or

(3) An administrative law judge or the Appeals Council asks for a written record of the proceedings.

(b) *Contents of the official record.* All evidence upon which the administrative law judge relies for the decision must be contained in the record, either directly or by appropriate reference. The official record will include the applications, written statements, certificates, reports, affidavits, medical records, and other documents that were used in making the decision under review and any additional evidence or written statements that the administrative law judge admits into the record under §§ 404.929 and 404.935. All exhibits introduced as evidence must be marked for identification and incorporated into the record. The official record of your claim will contain all of the marked exhibits and a verbatim recording of all testimony offered at the hearing. It also will include any prior initial determinations or decisions on your claim.

■ 11. In § 404.968, revise the second sentence of paragraph (a) introductory text to read as follows:

§ 404.968 How to request Appeals Council review.

(a) * * * You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 404.970. * * *

* * * * *

■ 12. Revise § 404.970 to read as follows:

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

(b) The Appeals Council will only consider additional evidence under paragraph (a)(5) of this section if you show good cause for not informing us about or submitting the evidence as described in § 404.935 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause;

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing; or

(v) You received a hearing level decision on the record and the Appeals Council reviewed your decision.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (a)(5) of this section, or the Appeals Council does not find you had good cause for missing the deadline to submit the evidence in § 404.935, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of your right to file a new application. The notice will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under § 404.630. If you file a new application within 6 months of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

■ 13. Revise § 404.976 to read as follows:

§ 404.976 Procedures before the Appeals Council on review.

(a) *Limitation of issues.* The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

§ 404.979 [Amended]

■ 14. Revise the first sentence of § 404.979 to read as follows:

After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, subject to the limitations on Appeals Council consideration of additional evidence in § 404.970, the Appeals Council will make a decision or remand the case to an administrative law judge. * * *

PART 405—[REMOVED AND RESERVED]

■ 15. Under the authority of sections 205(a), 702(a)(5), and 1631(d)(1) of the Social Security Act, part 405 is removed and reserved.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 16. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 17. In § 416.1400, revise the second sentence of paragraph (b) to read as follows:

§ 416.1400 Introduction.

* * * * *

(b) * * * Subject to certain timeframes at the hearing level (see § 416.1435) and the limitations on Appeals Council consideration of additional evidence (see § 416.1470), we will consider at each step of the review process any information you present as well as all the information in our records.* * *

■ 18. Revise the fifth and eighth sentences of § 416.1429 to read as follows:

§ 416.1429 Hearing before an administrative law judge-general.

* * * You may submit new evidence (subject to the provisions of § 416.1435), examine the evidence used in making the determination or decision under review, and present and question witnesses. * * * If you waive your right to appear at the hearing, in person, by video teleconferencing, or by telephone, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 416.1435, any new evidence that may have been submitted for consideration.* * *

■ 19. Revise § 416.1435 to read as follows:

§ 416.1435 Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 416.912 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence, as required in § 416.912, no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider or obtain the evidence unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 416.912 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing.

(c) *Claims Not Based on an Application For Benefits.* Notwithstanding the requirements in paragraphs (a)–(b) of this section, for claims that are not based on an application for benefits, the evidentiary requirement to inform us about or submit evidence no later than 5 business days before the date of the scheduled hearing will not apply if our other regulations allow you to submit evidence after the date of an administrative law judge decision.

■ 20. In § 416.1438, revise paragraphs (a) and (b) to read as follows:

§ 416.1438 Notice of a hearing before an administrative law judge.

(a) *Issuing the notice.* After we set the time and place of the hearing, we will mail notice of the hearing to you at your last known address, or give the notice to you by personal service, unless you have indicated in writing that you do not wish to receive this notice. We will mail or serve the notice at least 75 days before the date of the hearing.

(b) *Notice information.* The notice of hearing will tell you:

(1) The specific issues to be decided in your case;

(2) That you may designate a person to represent you during the proceedings;

(3) How to request that we change the time or place of your hearing;

(4) That your hearing may be dismissed if neither you nor the person you designate to act as your representative appears at your scheduled hearing without good reason under § 416.1457;

(5) Whether your appearance or that of any other party or witness is scheduled to be made in person, by video teleconferencing, or by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

(6) That you must make every effort to inform us about or submit all written evidence that is not already in the record no later than 5 business days before the date of the scheduled hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b); and

(7) Any other information about the scheduling and conduct of your hearing.

* * * * *

■ 21. Revise § 416.1439 to read as follows:

§ 416.1439 Objections to the issues.

If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b). You must state the reason(s) for your objection(s). The administrative law judge will make a decision on your objection(s) either at the hearing or in writing before the hearing.

■ 22. Revise § 416.1444 to read as follows:

§ 416.1444 Administrative law judge hearing procedures—general.

A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and, subject to the provisions of § 416.1435: Accepts as evidence any documents that are material to the issues; may stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing; and may reopen the hearing at any time before he or she mails a notice of the decision in order

to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

■ 23. Revise § 416.1449 to read as follows:

§ 416.1449 Presenting written statements and oral arguments.

You or a person you designate to act as your representative may appear before the administrative law judge to state your case, present a written summary of your case, or enter written statements about the facts and law material to your case in the record. If presenting written statements prior to hearing, you must provide a copy of your written statements for each party no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b).

■ 24. In § 416.1450, revise paragraphs (c) and (d) to read as follows:

§ 416.1450 Presenting evidence at a hearing before an administrative law judge.

* * * * *

(c) *Admissible evidence.* Subject to the provisions of § 416.1435, the administrative law judge may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence used by the court.

(d) *Subpoenas.* (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 10 business days before the hearing date, unless you show that your circumstances meet the conditions described in § 416.1435(b). The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

* * * * *

■ 25. Revise § 416.1451 to read as follows:

§ 416.1451 Official record.

(a) *Hearing recording.* All hearings will be recorded. The hearing recording will be prepared as a typed copy of the proceedings if—

(1) The case is sent to the Appeals Council without a decision or with a recommended decision by the administrative law judge;

(2) You seek judicial review of your case by filing an action in a Federal district court within the stated time period, unless we request the court to remand the case; or

(3) An administrative law judge or the Appeals Council asks for a written record of the proceedings.

(b) *Contents of the official record.* All evidence upon which the administrative law judge relies for the decision must be contained in the record, either directly or by appropriate reference. The official record will include the applications, written statements, certificates, reports, affidavits, medical records, and other documents that were used in making the decision under review and any additional evidence or written statements that the administrative law judge admits into the record under §§ 416.1429 and 416.1435. All exhibits introduced as evidence must be marked for identification and incorporated into the record. The official record of your claim will contain all of the marked exhibits and a verbatim recording of all testimony offered at the hearing. It also will include any prior initial determinations or decisions on your claim.

■ 26. In § 416.1468, revise the second sentence of paragraph (a) introductory text to read as follows:

§ 416.1468 How to request Appeals Council review.

(a) * * * You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. * * *

■ 27. Revise § 416.1470 to read as follows:

§ 416.1470 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

(b) In reviewing decisions other than those based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any additional evidence it believes is material to an issue being considered. However, in reviewing decisions based on an application for benefits, the Appeals Council will only consider additional evidence under paragraph (a)(5) of this section if you show good cause for not informing us about or submitting the evidence as described in § 416.1435 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause;

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing; or

(v) You received a hearing level decision on the record and the Appeals Council reviewed your decision.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (a)(5) of this section, or the Appeals Council does not find you had

good cause for missing the deadline to submit the evidence in § 416.1435, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of your right to file a new application. The notice will also advise you that if you file a new application within 60 days after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under § 416.340. If you file a new application within 60 days of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

■ 28. Revise § 416.1476 to read as follows:

§ 416.1476 Procedures before the Appeals Council on review.

(a) *Limitation of issues.* The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

§ 416.1479 [Amended]

■ 29. Revise the first sentence of § 416.1479 to read as follows:

After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, subject to the limitations on Appeals Council consideration of additional evidence in § 416.1470, the Appeals Council will make a decision or remand the case to an administrative law judge. * * *

[FR Doc. 2016–30103 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 91

[Docket No. FR 5891–F–02]

RIN 2506–AC41

Modernizing HUD's Consolidated Planning Process To Narrow the Digital Divide and Increase Resilience to Natural Hazards

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: HUD's Consolidated Plan is a planning mechanism designed to help States and local governments to assess their affordable housing and community development needs and to make data-driven, place-based investment decisions. The Consolidated Planning process serves as the framework for a community-wide dialogue to identify housing and community development priorities that align and focus funding from HUD's formula block grant programs. This rule amends HUD's Consolidated Plan regulations to require that jurisdictions consider two additional concepts in their planning efforts.

The first concept is how to address the need for broadband access for low- and moderate-income residents in the communities they serve. Broadband is the common term used to refer to a high-speed, always-on connection to the Internet. Such connection is also referred to as high-speed broadband or high-speed Internet. Specifically, the rule requires that States and localities that submit a Consolidated Plan describe the broadband access in housing occupied by low- and moderate-income households. If low-income residents in the communities do not have such access, States and jurisdictions must consider providing broadband access to these residents in their decisions on how to invest HUD funds. The second concept added to the Consolidated Plan process requires jurisdictions to consider incorporating resilience to natural hazard risks, taking care to anticipate how risks will increase due to climate change, into development of the plan in order to begin addressing impacts of climate change on low- and moderate-income residents.

DATES: *Effective Date:* January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Lora Routt, Senior Advisor, Office of Community Planning and Development, Department of Housing and Urban Development, Office of Community Planning and Development, 451 7th Street SW., Suite 7204, Washington, DC 20410 at 202–402–4492 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of This Rule

The purpose of this rule is to require States and local governments to evaluate the availability of broadband access and the vulnerability of housing occupied by low- and moderate income households to natural hazard risks, many of which may be increasing due to climate change, in their Consolidated Planning efforts. These evaluations are to be conducted using readily available data sources developed by Federal government agencies, other available data and analyses (including State, Tribal, and local hazard mitigation plans that have been approved by the Federal Emergency Management Agency (FEMA)), and data that State and local government grantees may have available to them. Where access to broadband Internet service is not currently available or is minimally available (such as in certain rural areas), States and local governments must consider ways to bring broadband Internet access to low- and moderate-income residents, including how HUD funds could be used to narrow the digital divide for these residents. Further, where low- and moderate-income communities are at risk of natural hazards, including those that are expected to increase due to climate change, States and local governments must consider ways to incorporate appropriate hazard mitigation and resilience into their community planning and development goals, codes, and standards, including the use of HUD funds to accomplish these objectives. These two planning considerations reflect emerging needs of communities in this changing world. Broadband provides access to a wide range of resources, services, and products, which assist not only individuals and, but also communities, in their efforts to improve their economic outlooks. Analysis of natural hazards, including the anticipated effects of climate change on those hazards, is important to help ensure that jurisdictions are aware of existing and developing vulnerabilities in the geographic areas that they serve that can threaten the health and safety of the populations they serve.

B. Summary of Major Provisions of This Rule

HUD's currently codified Consolidated Plan regulations require that local governments and States consult public and private agencies that provide assisted housing, health services, and social and fair housing services during preparation of the Consolidated Plan. Under these regulations, local governments and States are also required in their citizen participation plan to encourage the participation of local and regional institutions and businesses in the process of developing and implementing their Consolidated Plans. This rule requires States and local governments, in preparing their Consolidated Plan, to add to the list of public and private agencies and entities that they now must consult with for preparation of their plans, to consult with public and private organizations, including broadband internet service providers, organizations engaged in narrowing the digital divide (*e.g.,* schools, digital literacy organizations), and agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies (see §§ 91.100 and 91.110). Jurisdictions must also encourage the participation of these entities in implementing relevant components of the plan (see §§ 91.105 and 91.115).

The rule also requires each jurisdiction to describe broadband needs in housing occupied by low- and moderate-income households based on an analysis of data for its low- and moderate-income neighborhoods for which the source is cited in the jurisdiction's Consolidated Plan. These needs include the need for broadband wiring and for connection to the broadband service in the household units, and the need for increased competition by having more than one broadband Internet service provider serve the jurisdiction (see §§ 91.210 and 91.310). Possible sources of such data include the National Broadband Mapcreated by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce. Grantees may also find broadband availability data in Federal Communications Commission (FCC) Form 477. As discussed later in this preamble, the regulatory text does not include recommended sources of data to avoid any confusion that these are not required sources, only recommended sources.

The rule also requires that jurisdictions provide, as part of their required housing market analysis, an assessment of natural hazard risks to low- and moderate-income residents, including risks expected to increase due to climate change, based on an analysis of data, findings, and methods identified by the jurisdiction, for which a reputable source is cited in the jurisdiction's Consolidated Plan. Possible sources of such data include: (1) The most recent National Climate Assessment, (2) the Climate Resilience Toolkit, (3) the Community Resilience Planning Guide for Buildings and Infrastructure Systems prepared by the National Institute of Standards and Technology (NIST), and, (4) other climate risk-related data published by the Federal government or other State or local government climate risk related data, including FEMA-approved hazard mitigation plans which incorporate climate change data or analysis. For the same reasons discussed above, the regulatory text related to natural hazard risk analysis does not include the recommended sources of data. Prior to implementation of the new requirements established by this rule, HUD will provide additional resources to support grantees in the form of guides and trainings. Grantees may also request Technical Assistance through their HUD Field Office or directly at *www.HUDExchange.info/get-assistance.*

C. Costs and Benefits of This Rule

HUD's Consolidated Plan process, established by regulation in 1995, provides a comprehensive planning process for HUD programs administered by HUD's Office of Community Planning and Development, specifically the Community Development Block Grant (CDBG) program, the HOME Investment Partnerships (HOME) program, the Emergency Solutions Grants (ESG) program and the Housing with Opportunities for Persons With AIDS (HOPWA) program. Comprehensive community planning provides officials with an informative profile of their communities in terms of population, housing, economic base, community facilities, and transportation systems, and such information aids officials in their investment decisions. HUD's Consolidated Planning process assists State and local officials that are recipients of HUD funds under the above-listed programs in determining the housing and community development needs of their respective communities. Requiring Consolidated Plan jurisdictions to consider the broadband and natural hazard resilience needs of their communities helps to ensure a more complete profile of the needs of their communities. As discussed in this preamble, the importance of providing broadband access to all cannot be overstated. Broadband access is not only important for increasing opportunities for individuals' success, but also for the success of a community. Consideration of the impact of natural hazard risks, many of which are anticipated to increase due to climate change, in one's community, and how communities can help mitigate any such adverse impacts, is equally important as it will help to guide the best use of land and orderly and sustainable growth. In brief, the benefits of this rule are to promote a balanced planning process that more fully considers the housing, environmental, and economic needs of communities.

The costs of the revised consultation and reporting requirements are not significant since the regulatory changes proposed by this rule merely build upon similar existing requirements for other elements covered by the Consolidated Planning process rather than mandating completely new procedures. Further, the required assessments are based on data readily available on the Internet, or which the Consolidated Plan jurisdiction may already have available to it, such as its own local data. Therefore, jurisdictions will not have to incur the expense and administrative burdens associated with collecting data. HUD anticipates providing grantees with data early in Federal Fiscal Year 2018. HUD will not require grantees to incorporate these new requirements into their Consolidated Plan process until HUD is able to make the data available to all grantees. To provide such time, the regulatory text provides that the new requirements apply to Consolidated Plans submitted on or after January 1, 2018.

Moreover, this rule does not mandate that actions be taken to address broadband needs or climate change adaptation needs. HUD's Consolidated Plan process has long provided that jurisdictions are in the best position to decide how to expend their HUD funds. The additional analyses required by this rule may highlight areas where expenditure of funds would assist in opening up economic opportunities through increased broadband access or mitigate the impact of possible natural hazards, including those that may be exacerbated due to climate change. But HUD leaves it to jurisdictions to consider any appropriate methods to promote broadband access or protect against the adverse impacts of climate change, taking into account the other

needs of their communities, and available funding, as identified through the Consolidated Planning process.

II. Background

A. Broadband Access

On March 23, 2015, President Obama issued a Presidential Memorandum on ''Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training.'' In this memorandum, the President noted that access to high-speed broadband is no longer a luxury, but a necessity for American families, businesses, and consumers. The President further noted that the Federal government has an important role to play in developing coordinated policies to promote broadband deployment and adoption, including promoting best practices, breaking down regulatory barriers, and encouraging further investment.

On July 15, 2015, HUD launched its Digital Opportunity Demonstration, known as ''ConnectHome,'' in which HUD provided a platform for collaboration among local governments, public housing agencies, Internet service providers, philanthropic foundations, nonprofit organizations and other relevant stakeholders to work together to produce local solutions for narrowing the digital divide in communities across the nation served by HUD. The demonstration, or pilot as it is also called, commenced with the participation of 28 communities. Through contributions made by the Internet service providers and other organizations participating in the pilot, these 28 communities will benefit from the ConnectHome collaboration by receiving, for the residents living in HUD public and assisted housing in these communities, broadband infrastructure, technical assistance, literacy training, and electronic devices that provide for accessing high-speed Internet.

The importance of all Americans having access to the Internet cannot be overstated. As HUD stated in its announcement of the Digital Opportunity Demonstration, published in the **Federal Register** on April 3, 2015, at 80 FR 18248, ''[k]nowledge is a pillar to achieving the American Dream—a catalyst for upward mobility as well as an investment that ensures each generation is as successful as the last.'' [1] Many low-income Americans do not have broadband Internet at home, contributing to the estimated 66 million Americans who are without the most basic digital literacy skills. Without broadband access and connectivity and the skills to use Internet technology at home, children will miss out on the high-value educational, economic, and social impact that high-speed Internet provides. It is for these reasons that HUD is exploring ways, beyond ConnectHome, to narrow the digital divide for the low-income individuals and families served by HUD multifamily rental housing programs. This rule presents one such additional effort.

B. Natural Hazards Resilience

On November 1, 2013, President Obama signed Executive Order 13653, on ''Preparing the United States for the Impacts of Climate Change.'' Executive Order 13653 was subsequently published in the **Federal Register** on November 6, 2013 (78 FR 66819). The Executive Order recognizes that the potential impacts of climate change—including an increase in prolonged periods of excessively high temperatures, more heavy precipitation, an increase in wildfires, more severe droughts, permafrost thawing, ocean acidification, and sea-level rise—are often most significant for communities that already face economic or health-related challenges. Research has bolstered the understanding of the concept of social vulnerability, which describes characteristics (age, gender, socioeconomic status, special needs, race, and ethnicity) of populations that influence their capacity to prepare for, respond to, and recover from hazards and disasters, including the sensitivity of a population to climate change impacts and how different people or groups are more or less vulnerable to those impacts. Social vulnerability and equity in the context of climate change are important because some populations may have less capacity to prepare for, respond to, and recover from climate-related hazards and effects. Executive Order 13653 asserts that managing these risks requires deliberate preparation, close cooperation, and coordinated planning by the Federal government, State, Tribal, and local governments, and stakeholders. Further, the Executive Order calls upon Federal agencies to identify opportunities to support and encourage smarter, more climate-resilient investments by States, local communities, and tribes, through grants and other programs, in the context of infrastructure development.

Section 7 of Executive Order 13653 established the President's State, Local, and Tribal Leaders Task Force on Climate Change Resilience and Preparedness (Task Force). Co-chaired by the Chair of the White House Council on Environmental Quality and the Director of the White House Office of Intergovernmental Affairs, the Task Force consisted of 26 governors, mayors, county officials, and Tribal leaders from across the United States. Members brought first-hand experiences in building climate preparedness and resilience in their communities and conducted broad outreach to thousands of government agencies, trade associations, planning agencies, academic institutions, and other stakeholders, to inform their recommendations to the Administration.

The President charged the Task Force with providing recommendations on how the Federal government can respond to the needs of communities nationwide that are dealing with the impacts of climate change by removing barriers to resilient investments, modernizing Federal grant and loan programs to better support local efforts, and developing the information and tools they need to prepare, among other measures. In November 2014, Task Force members presented their recommendations for the President at a White House meeting with Vice President Biden and other senior Administration officials. Among other actions, the Task Force called on HUD to consider strategies within existing grant programs to facilitate and encourage integrated hazard mitigation approaches that address climate-change related risks, land use, development codes and standards, and capital improvement planning. This final rule represents one step that HUD is taking to implement these recommendations.

HUD's May 2016 Proposed Rule

On May 18, 2016, at 81 FR 31192, HUD published a proposed rule that would require Consolidated Plan jurisdictions to consider broadband Internet access and the natural hazard resilience needs of their communities and to consider whether they should and can take actions to address these needs.

HUD's Consolidated Planning process serves as the framework for a community-wide dialogue to identify housing and community development priorities that align and focus funding from the HUD formula block grant programs: The CDBG program, the HOME program, the ESG program, and the HOPWA program. HUD's regulations for the Consolidated Plan are codified at 24 CFR part 91 (entitled ''Consolidated Submissions for Community Planning and Development Programs''). A Consolidated Plan, which may have a planning duration of

[1] See 80 FR 18248, at 18249.

between 3 and 5 years, is designed to help States and local governments to assess their affordable housing and community development needs, in the context of market conditions at the time of their planning, and to make data-driven, place-based decisions on how to expend HUD funds in their jurisdictions.

In developing their Consolidated Plans, States and local governments are required to engage their communities, both in the process of developing and reviewing the proposed plan, and as partners and stakeholders in the implementation of the plan. By consulting and collaborating with other public and private entities, States and local governments can better align and coordinate community development programs with a range of other plans, programs, and resources to achieve greater impact. A jurisdiction's Consolidated Plan is carried out through annual Action Plans, which provide a concise summary of the actions, activities, and the specific Federal and non-federal resources that will be used each year to address the priority needs and specific goals identified by the Consolidated Plan. States and local governments report on accomplishments and progress toward Consolidated Plan goals in the Consolidated Annual Performance and Evaluation Report (CAPER).

The regulatory amendments proposed by HUD's May 2016 rule would require States and local governments to consider broadband access and natural hazard resilience as part of their Consolidated Planning efforts. Where the required analysis demonstrates that broadband Internet support is not currently available or is minimally available, or the jurisdiction's community is at risk of natural hazards, the jurisdiction should consider ways of addressing those needs.

The public comment period for HUD's May 18, 2016, proposed rule closed on July 18, 2016. HUD received 37 public comments on the proposed rule. The commenters included State and local governments, climate adaptation and environment organizations, public housing agencies (PHAs) and nonprofit organizations. The following Section III discusses the significant comments raised by the commenters and HUD's responses to the comments.

III. Discussion of Public Comments Received on the May 16, 2016, Proposed Rule

This section of the preamble presents a summary of the significant issues and questions raised by the commenters and HUD's responses to these comments. The majority of the commenters supported the inclusion of both assessments in the Consolidated Planning process, but as shown below in the discussion of public comments were concerned about administrative burden. In responding to the comments, HUD has strived to highlight that the burden is minimal. The only change that HUD makes in responses to public comments, as is more fully discussed below, is to remove from the regulatory text specific recommended broadband and risk hazard sources to consult in making the required assessments. There was confusion about whether or when consultation with these sources was required. They are recommended, not required sources. Removing these references from the regulatory text eliminates this confusion.

A. General Comments

Comment: Support for the rule. The majority of commenters supported the proposed rule. These commenters commended HUD on recognizing the importance of requiring jurisdictions to assess broadband access for low-and moderate-income households and to consider how to incorporate resilience to natural hazard risks in their planning efforts.

HUD Response. HUD appreciates the support of the commenters and agrees that these changes to the Consolidated Planning process should aid jurisdictions in addressing two emerging needs of communities in this changing world.

Comment: The rule is an unfunded mandate. Several commenters stated that the proposed rule represented an overreach of HUD's authority and that the changes were an unfunded mandate.

HUD Response. The commenters are not correct that the two new assessments impose an unfunded mandate. As an initial matter, HUD notes that the rule's scope is limited to requiring consideration of the broadband and natural hazards resilience needs of low-income communities. The rule does not mandate that any actions be taken in response to the required assessments. Jurisdictions retain the discretion to consider the most appropriate methods to address their assessments, taking into account other needs identified as part of the Consolidated Planning process as well as financial and other resource constraints. Further, HUD notes that the Consolidated Planning process is required only to the extent jurisdictions voluntarily seek to participate in HUD's community planning and development programs. Accordingly, there is no mandate for jurisdictions choosing not to receive such funding. The concept of unfunded mandates excludes voluntarily-assumed requirements imposed as a condition for receipt of Federal assistance.

Comment: The proposed regulatory changes are administratively and economically burdensome. Several commenters wrote that the proposed rule imposes an administrative burden, especially on smaller communities. The commenters wrote that the financial burden would unduly stretch already limited CDBG and HOME program funding. The commenters also objected that HUD underestimated the administrative burden of complying with the new requirements. Some of these commenters focused on the administrative burden associated with the expanded consultation requirements, which now include broadband internet service providers, organizations engaged in narrowing the digital divide, and agencies engaged in resilience planning. These commenters stated that HUD's estimates of the administrative burden failed to account for the person-hours required to locate, engage, evaluate, and compile recommendations from qualified public and private entities within either content area. The commenters wrote that HUD should refrain from pursuing the changes or make the two new assessments optional.

HUD Response. As noted in the proposed rule, HUD has sought to minimize the costs and burdens imposed on communities by allowing the assessments to be completed using readily available online data sources. HUD further minimizes the burden imposed on jurisdictions by providing an electronic template for completing the Consolidated Plan. This template, first used in 2012, provides a uniform and flexible template that helps ensure the Consolidated Plan is complete per the regulations found in 24 CFR part 91. Many of the data tables within the Consolidated Plan template are pre-populated with the most up-to-date housing and economic data available, and HUD plans to input data for both broadband and resilience assessment requirements. While grantees will need to provide explanations relating their funding priorities to the pre-populated data, they do not need to incur the costs or time of searching for, entering, and compiling the data. HUD also notes that the rule does not require jurisdictions to use the pre-populated data; jurisdictions may opt to use other data of their choice.

HUD anticipates providing grantees with data early in Federal Fiscal Year 2018. HUD will not require grantees to

incorporate these new requirements into their Consolidated Plan process until HUD is able to make the data available to all grantees. To provide such time, the regulatory text provides that the new requirements apply to Consolidated Plans submitted on or after January 1, 2018.

With respect to the consultation requirements, HUD notes the Consolidated Plan has always served as a planning document for the jurisdiction as a whole. Jurisdictions are already required to consult with public and private agencies, business and civic leaders, and units of local government. The inclusion of the newly specified entities does not substantively alter the cost or administration of the already required participatory process.

Comment: The new proposed rule lacks necessary specificity of how the two new assessments are to be conducted. Several commenters wrote that the proposed rule lacked sufficient specificity regarding the required contents of the new assessments and the criteria HUD will use to evaluate the adequacy of the assessment. The commenters wrote that this lack of details would make it difficult for jurisdictions to comply with the new requirements. One of the commenters asked whether the data sources cited by the community would be subject to review by HUD. The commenters urged HUD to provide additional guidance to communities on how it plans to measure compliance with the rule.

HUD Response: As it does on other components of the Consolidated Plan, HUD will provide technical assistance and training materials to assist jurisdictions in meeting the new requirements. However, HUD notes that the requirements of the new rule are not entirely unfamiliar, as the Consolidated Planning process already requires jurisdictions to identify non-housing community development needs that would aid communities in developing viable urban communities, providing a suitable living environment and expanding economic opportunities principally for low-income and moderate-income persons. (See 24 CFR 91.215(f).) With respect to data, as noted in response to an earlier comment, HUD plans to pre-populate data in the electronic Consolidated Plan template. Through the standardized template with prepopulated data tables at the jurisdictional level and providing the ability to map community needs, jurisdictions will be able to ascertain and satisfy HUD's needs assessment expectations. To ensure that jurisdictions have engaged in analysis regarding community broadband and natural hazard resilience needs, plans will be reviewed for compliance with the new requirements. Guidance will be developed for the field staff to support consistent implementation of this policy. In order to aid grantees, HUD will provide in its guidance best practices and examples for incorporating broadband and natural hazards into the Consolidated Plan.

Comment: HUD should first establish eligible activities for the two new assessments, before requiring that such assessments be undertaken. A commenter wrote that the two new assessments do not directly address CDBG's objectives. The commenter stated that before any changes are made to the consultation and citizen participation regulations, HUD should update the eligible activities and guidance regarding these kinds of activities. The commenter stated that, for instance, income payments, including payments for utilities such as Internet, are not considered an eligible CDBG activity. The commenter stated that CDBG funding could be used to make utility payments, including Internet payments, to ensure low- and moderate-income families have access to the Internet. Another commenter asked whether CDBG funds can be used to assist in broadband infrastructure or otherwise connect housing assisted by HUD to broadband.

HUD Response: One of the statutory objectives of the CDBG program is to ''provid[e] . . . [a] suitable living environment,'' which encompasses a range of related goals and activities such as improving the safety and livability of neighborhoods; increasing access to quality public and private facilities and services; and reducing the isolation of income groups within a community or geographical area through the spatial deconcentration of housing opportunities for persons of lower income, the revitalization of deteriorating or deteriorated neighborhoods, and the conservation of energy resources. The two new assessments required under this rule align with this objective. With respect to eligible activities, while HUD does not have regulatory authority to add new eligible activities to the CDBG program beyond those authorized in statute, the CDBG program already includes numerous eligible activities, such as rehabilitation, through which grantees can assist broadband connectivity and natural hazard resilience efforts directly. When determining their public facility, housing rehabilitation, economic development, and infrastructure needs, grantees may wish to consider high performing infrastructure to ameliorate/withstand natural hazards, as well as ways to use eligible activities to meet community broadband needs. HUD has provided guidance on using existing eligible activities for these purposes,[2] and will also be providing additional technical assistance and guidance on how CDBG funds may be used to address both broadband and resilience needs in the community.

Comment: HUD's regulations should be generally stated and guidance should provide the necessary specificity. A commenter wrote that as proposed, HUD requires very specific data sources to be included in the Consolidated Plan. The commenter stated that this is problematic because data sources often change or are renamed. The commenter stated that HUD's regulations should list general information that is required in the Consolidated Plan while HUD guidance and other materials that are regularly updated, such as the ''Consolidated Plan in IDIS Desk Guide,'' should provide recommended data sources. The commenter stated that this will allow HUD to update data sources easily in circumstances where sources change or new sources become available.

HUD Response: HUD appreciates the suggestion made by the commenter, and has revised the rule accordingly. As recommended, the regulation no longer identifies specific recommended sources. These suggested sources of data will now be listed in guidance to facilitate updating as new data becomes available or data sources are re-named. Jurisdictions will still be able to use either the data identified by HUD and pre-populated in the electronic Consolidated Plan template or other data sources of the jurisdiction's choice, for which the source is cited in the jurisdiction's Consolidated Plan.

Comment: The rule includes no mandate thereby providing no assurance goals will be met. A commenter wrote that despite HUD's recognition of the importance of access to broadband and the increasing risk of natural hazards, the proposed rule does not mandate jurisdictions take any action, or even formulate actions steps, to address these needs. The commenter wrote that while is it is often true that ''jurisdictions are in the best position to decide how to expend their HUD funds,'' requiring concrete plans of

[2] Please see the Frequently Asked Questions (FAQs) for the CDBG, HOME, and Housing Trust Fund programs available at the following links: *https://www.hudexchange.info/resource/4891/cdbg-broadband-infrastructure-faqs/ https://www.hudexchange.info/onecpd/assets/File/HOME–FAQs-Broadband.pdf https://www.hudexchange.info/resource/4420/htf-faqs/.*

action instead of just data collection is the only real way to ensure HUD's stated goals are met.

HUD Response: A fundamental principle of the Consolidated Planning process, as well as of HUD's community development formula programs (for which the Consolidated Plan is the submission vehicle) is that grantees have the flexibility and responsibility for developing their own programs and funding priorities, based on their own assessment of their needs. HUD does not mandate what objectives grantees should achieve or what activities grantees are to undertake with their formula funding. It will be up to the jurisdiction through its needs assessment process to determine whether to select activities related to these issues as a priority need. The grantee would identify the financial and organizational resources available to address its priority needs. In the Consolidated Planning process, the level of resources available will play a key role in determining strategies and goals. Once broadband or increasing resilience have been selected as a priority need, grantees would then develop a set of goals based on the availability of resources, and local organizational capacity.

Comment: The new assessments are already made by agencies within each State tasked with such assessments. A commenter stated that new assessments should not be required of State housing agencies. The commenter stated that these assessments are already made by those State agencies charged with technology authority or charged with emergency management. The commenter stated that generally, for each State, these assessments are made through programs that are not part of the Consolidated Planning process.

HUD Response: HUD agrees that jurisdictions often already have assessments undertaken by other agencies regarding both broadband access and natural hazard resiliency. HUD is encouraging through its Consolidated Planning process a collaborative consultation process. HUD also encourages jurisdictions to use these plans developed by other agencies in identifying community needs and priorities. The Consolidated Planning process provides the opportunity for jurisdictions to reference existing plans and HUD is not requiring a separate, distinct study to be undertaken. It is up to each jurisdiction to determine which agencies or departments will be responsible for developing its Consolidated Plan and for administering the HUD community development formula funding received through each block grant program. All other jurisdictions (including States) are encouraged to ensure collaboration among internal and external agencies and staff to take full advantage of relevant expertise. Ideally, State agencies would develop these plans in alignment with each other, not only to reduce duplication of work but also to ensure that Federal investments are more aligned throughout the State and in their communities.

Comment: Consider requiring assessments for broadband adoption and increasing resilience to natural hazards beyond the context of housing needs. Several commenters wrote that HUD should consider requiring assessments in Consolidated Plans beyond just housing needs. The commenter stated that even though Consolidated Plans are focused on housing needs, communities would benefit if jurisdictions are required to at least analyze how funds could be used for broadband adoption and enhancing resilience to natural hazard risks for communities as a whole.

HUD Response: The Consolidated Plan is not exclusively concerned with housing needs. HUD's Consolidated Plan regulations include both a housing needs assessment and a non-housing community development plan. Specifically, under 24 CFR 91.215 (for local governments) and 24 CFR 92.315 (for States), jurisdictions must provide a description of priority non-housing community development needs eligible for assistance under HUD's community development programs. In line with the goals of this rulemaking, HUD strongly encourages jurisdictions to consider implementing actions to support broadband access and adoption and increase resilience in their non-housing community development efforts, but such decisions on priorities are determined by grantees.

Comment: These two new Consolidated Plan assessments require input by the residents of the community. A commenter stated that assessing broadband and natural hazards concerns of the community beyond the data points and institutional input required in the proposed rule is essential for local governments and States in assessing the true needs of the community. The commenter stated that without direct communication with the households that are affected by these issues, States and localities cannot properly assess the full needs of the communities they serve. The commenter urged HUD to require jurisdictions to create a public process where members of the community have opportunity to comment on Consolidated Plans, and that HUD should consider a community participation structure similar to the requirement under HUD's Affirmatively Furthering Fair Housing (AFFH) regulation.

HUD Response: HUD's Consolidated Plan regulations already require jurisdictions to undertake a citizen participation and consultation process (see, subpart B of the Consolidated Plan regulations at 24 CFR part 91, entitled ''Citizen Participation and Consultation''). The AFFH citizen participation process was modeled on the citizen participation and consultation process required by HUD's Consolidated Plan regulations. HUD does not believe that a separate citizen participation and consultation process is required for the two new assessments established by this rule, as was established under the AFFH rule. HUD's AFFH rule implemented a requirement, affirmatively furthering fair housing, under a separate statute, the Fair Housing Act. That is not the case here.

Comment: Broadband access and natural hazard risk resilience should be included in the jurisdictions' Assessment of Fair Housing required by HUD's Affirmatively Furthering Fair Housing regulation. A commenter wrote that in addition to addressing concerns about broadband access and resilience to natural hazard risks in their Consolidated Plans, HUD should require jurisdictions to incorporate these assessments into their Assessment of Fair Housing required under HUD's AFFH rule. The commenter stated that HUD's AFFH rule aims to aide States and local governments ''in taking a meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.'' The commenter stated that under the AFFH rule, jurisdictions are charged with taking meaningful actions that ''transform racially and ethnically concentrated areas of poverty into areas of opportunity.''

HUD Response: While HUD, in this rule, is not mandating inclusion of the broadband access and resilience assessments in the Assessment of Fair Housing required under HUD's AFFH rule, jurisdictions may voluntarily elect to include them in their assessment required under the AFFH rule. As noted, HUD encourages jurisdictions to ensure collaboration among State and local agencies and staff to take full advantage of relevant expertise among all agencies and employees, be they internal or external to the jurisdiction.

The suggestion made by the commenter may be one possible way of achieving that goal.

B. Specific Comments on Narrowing the Digital Divide

Comment: The National Broadband Map and Form 477 do not provide current data and HUD should therefore allow use of State and local data. Several commenters objected to use of National Broadband Map and Form 477 data to determine broadband availability. A commenter questioned the accuracy of data quality and accuracy within the broadband services sector. Another commenter wrote that Federally collected data on broadband access and adoption is often of inconsistent quality, unverified, not released in a timely manner, and insufficient for the planning needs of many communities. Commenters stated that the National Broadband Map has not been updated or maintained and currently shows data from the fall of 2014, and this outdated resource could lead to confusion and inaccurate information. A commenter requested that HUD, in partnership with the Department of Commerce's National Telecommunications and Information Administration (NITA), pre-certify broadband coverage data and maps that communities could use.

With respect to the Form 477, commenters wrote that the data has not been mapped and is difficult to access. To address these concerns, the commenters suggested that HUD allow Consolidated Plans to include data on broadband access collected directly through State and local broadband efforts. A commenter wrote that currently 37 States still have active broadband planning teams with data and resources that are likely more up-to-date than current federal data. Another commenter wrote that few communities have the ability and knowledge base to ''consult with . . . broadband internet service providers'' as would be required in proposed revisions to the consultation and citizen participation requirements. The commenter stated that HUD would need to provide substantial levels of policy and practical guidance to enable local staff to determine broadband ''needs'' for a specific subset of the overall population within each community.

HUD Response: While HUD does not agree with the commenters' objections to use of the National Broadband Map and Form 477, it is sympathetic to the general concerns expressed regarding the need to ensure that data sources are accurate and up-to-date. As noted in response to an earlier comment, this final rule does not codify specific recommended data sources. These will now be listed in guidance to facilitate updating as new data becomes available or data sources are re-named. It was not HUD's intent to mandate use of the National Broadband Map or Form 477. While HUD plans to provide pre-populated data in the electronic Consolidated Plan template, jurisdictions are not required to use such data and may use alternative data. The template's default data can be replaced or complemented by other data identified by the jurisdiction, for which the source is cited in the jurisdiction's Consolidated Plan. Further, HUD is committed to aiding jurisdictions with meeting the new requirements contained in this rule, and will supplement the rule with guidance as may be needed. As it does on other components of the Consolidated Plan, HUD will provide technical assistance and training materials to assist jurisdictions in meeting these new requirements.

Comment: The rule offers no suggested sources for States and communities to assess the extent to which the need for connection to the broadband service in the household units is being met. A commenter wrote that the data sources identified in the rule are not adequate to permit jurisdictions to assess the extent to which broadband services have actually penetrated the market of low-to-moderate income households in a given community. This commenter suggested two readily available federal sources for actual household connection data which should be suggested, but not required, by the rule. In contrast to commenters that submitted concerns about the data in the immediately preceding comment, the first source recommended by the commenter is FCC's Form 477 Census Tract Data on Internet Access Services, which the commenter stated provides a summary of reported connections for each tract and compares the total to the tract's total Census households. The commenter stated that this form, along with the FCC's national interactive color-coded map, make it reasonably easy to rank or map a state or community's Census tracts by household broadband penetration and have an easy first look at their tracts' penetration levels. The second source recommended by the commenter is the American Community Survey (ACS) data on household computer ownership and Internet access.

HUD Response: HUD appreciates the suggestions of additional data sources that may be useful to jurisdictions in preparing the required broadband assessment. HUD notes that the Form 477 is already included as a suggested data source. As previously addressed in this preamble, jurisdictions may either use the data sources suggested by HUD or other data identified by the jurisdiction, for which the source is cited in the jurisdiction's Consolidated Plan.

Comment: Do not ignore other causes of digital exclusion other than availability in the housing market analysis. A commenter stated that in creating a framework through its Consolidated Plan process for community dialogue leading to possible action toward greater digital access and inclusion, HUD should recognize that low rates of household Internet access among low- and moderate-income residents can be the result of many causes other than physical availability of service, including the following: Unaffordability of available Internet services to low-income residents; a lack of convenient opportunities for residents to gain digital literacy skills; a failure to communicate the value of available Internet services and tools; and other factors specific to communities, such as language, cultural barriers, etc.

HUD Response: HUD appreciates the concerns raised by the commenter. The Consolidated Plan contains both a housing need assessment and a non-housing community plan development component. HUD encourages jurisdictions to look at their broadband and resiliency needs across all components of the Consolidated Planning process. The jurisdiction has the ability to include an infrastructure assessment as well as public services assessment as part of its non-housing community development plan. HUD is cognizant that the adoption of broadband internet is an equally critical component of closing the digital divide and is contingent on many factors other than the availability of internet service. This rule, however, is but one part of HUD's broader efforts to expand the access and use of broadband internet. HUD also notes that the jurisdictions are free to expand their broadband assessment to include the types of issues listed by the commenter, based on their identification of local needs and circumstances.

Comment: Consultation requirements should include other identified stakeholders. Several commenters expressed support for the proposed rule requiring the consultation of broadband stakeholders in preparation for creating Consolidated Plans. The commenters suggested additional stakeholders that should be included in the consultation

process. One commenter specifically recommended that State planning programs be identified as possible partners in the locations they are available. Another commenter suggested that HUD clarify that public-private initiatives or partnerships (like a local community technology planning team or task force, which might not have a formal legal identity or corporate status) will qualify as an ''organization engaged in narrowing the digital divide.'' The commenter stated that the needs of often-voiceless, low-income communities with low adoption rates will not always register with broadband providers, but allowing these public-private organizations to voice the needs of low-income communities can help establish a business case for improved service offerings and options. Yet another commenter suggested adding language to include ''local social service and public agencies providing digital literacy, public internet access, or other broadband adoption programs.'' The commenter stated that these may include, but are not limited to: Adult literacy and education providers; K–20 schools; youth program providers; libraries; and small business and workforce training program providers.

HUD Response: The purpose of the Consolidated Planning process is to aid jurisdictions, as a whole, in identifying their housing and community development needs and funding priorities. The Consolidated Plan builds on a participatory process that includes citizens, organizations, businesses, and other stakeholders. In carrying out these already required consultations, HUD encourages jurisdictions to conduct the broadest possible outreach, including State and local agencies and other entities identified by the commenters.

Comment: Require grantees to submit progress reports in closing the digital divide. A commenter recommended that HUD revise the language at the final rule stage to state that after submission and acceptance of the Consolidated Plan, communities are expected to develop a reasonable and achievable strategy for closing the digital divide. The commenter stated that this language should leave no doubt as to the expectation that progress will begin immediately. The commenter stated that HUD should mandate that communities provide regular progress reports as they take their first steps into closing the digital divide.

HUD Response: Grantees are currently required to submit progress reports on the priority needs and goals they select during the Consolidated Planning process. Under HUD's Consolidated Plan regulations, within 90 days after the end of its program year, a grantee must submit a Consolidated Annual Performance and Evaluation Report (CAPER) to HUD. The primary purpose of the CAPER is to report on accomplishments of funded activities within the program year and to evaluate the grantee's progress in meeting one-year goals it has described in the Annual Action Plan and long-term goals it has described in the Consolidated Plan.

Comment: Encourage jurisdictions to partner with successful ConnectHome communities. A commenter stated that to ease and facilitate the assessment of broadband needs as part of the Consolidated Planning process, HUD should recommend and/or establish connections between applicants and successful ConnectHome communities that have developed and implemented their own connection plans. The commenter stated that this additional resource would dramatically increase the information available to each community while further reducing administrative and financial costs as communities share best practices. Another commenter suggested that HUD document and widely share data and promising practices from the 28 ConnectHome pilot communities, and assess what strategies have been most (and least) successful in supporting broadband access and adoption. The commenter encouraged HUD to regularly undertake and make public an analysis of findings from broadband access and adoption strategies jurisdictions reported in their Consolidated Annual Performance and Evaluation Report or other relevant reporting processes. The commenter also requested that HUD establish a single-stop data center that contains links to all relevant resources.

HUD Response: HUD agrees that ConnectHome communities could be a valuable resource for other jurisdictions. HUD encourages collaboration, where possible, between jurisdictions in developing and implementing their plans to expand access to broadband internet. As the commenter notes, such collaboration can be a cost-effective way to share successful strategies and best practices. HUD will seek ways to facilitate sharing of best practices of the ConnectHome communities. For example, HUD is developing playbook that provides suggestions and best practices for communities seeking to expand digital inclusion. The suggestions identified in the playbook are based on HUD's experience and expertise developed during implementation of the ConnectHome initiative.

Comment: Examine how HUD programs may limit the ability of grantees to invest funds in broadband access and adoption. A commenter suggested that HUD assess how existing rules and legislation governing HUD programs may limit the ability of grantee governments to invest funds in broadband access and adoption. The commenter offered as an example of such limitation the ''public services cap'' on grantees' permissible use of CDGB grant funds. The commenter stated that any local investment of CDBG funds in digital literacy training, technical assistance or even consumer premises equipment to support household internet adoption is currently classified as a public service expenditure and limited by the cap, which means it competes for a fixed pool of dollars with all kinds of ongoing community needs such as emergency homeless shelters.

HUD Response: As with all its programs and initiatives, HUD will, on an ongoing basis, review and assess the impact of legislative and regulatory requirements on program participants. Where appropriate or necessary to policy goals, HUD will seek changes through the appropriate vehicle, rulemaking, legislation or other policy action that may facilitate a change. However, HUD does not agree with the commenter that the CDBG program unduly limits activities to expand access and adoption of broadband internet. The CDBG regulations allow the use of grant funds for a wide range of eligible activities including public services, which is not the only activity a community can use to address its broadband needs. Grantees have the flexibility and responsibility for developing their own programs and funding priorities, based on their own assessment of their needs. Additionally, other funding associated with the Consolidated Plan, such as HOME and Housing Trust Fund funds, may be used for the actual costs of constructing or rehabilitating single family or multifamily housing, including the costs to wire the property for broadband internet, which could help address a community's broadband needs.

C. Specific Comments on Increasing Resilience to Natural Hazards

Comment: Include a definition of resilience. A commenter stated that resilience is a term that means many things to many people. The commenter recommended that a definition of resiliency be included in HUD's regulations in 24 CFR part 91.

HUD Response: HUD will provide technical assistance and training

materials to assist jurisdictions in meeting the new requirements. This will include guidance to communities on how to assess their resilience to natural hazard risk. As a guide, HUD points to the definition of the term ''resilience'' used by HUD for the National Disaster Resilience Competition, which is already familiar to HUD grantees and communities participating in HUD programs. Specifically, in that notice of funding availability, HUD defined resilience to mean ''the ability to anticipate, prepare for, and adapt to changing conditions and withstand, respond to, and recover rapidly from disruptions.''

Comment: For consistent evaluation of resilience, HUD should work with other Federal agencies to develop guidance and tools that support communities and practitioners. A commenter encouraged HUD to work with other Federal agencies to develop guidance and tools that support communities and practitioners, and noted that several tools already exist and were identified in the proposed rule. The commenter specifically noted as helpful tools the Integrated Rapid Visual Screening (IRVS) Tool, the Community Resilience Planning Guide, and Hazus MH FEMA. The commenter stated that to the extent practical, the resilience evaluations required within the Consolidated Plan should mirror requirements contained in other hazard identification and mitigation plans conducted at the State and local level. The commenter stated that this should include at a minimum the State Hazard Mitigation Plan required to receive certain funding from the Federal Emergency Management Agency (FEMA), the Threat and Hazard Identification and Risk Assessment (THIRA) process, and planning and assessment requirements associated with Department of Transportation, Economic Development Administration and other Federal programs. The commenter also stated that the rule should require consultation with additional community resources such as geological and meteorological agencies, energy and sustainability offices, and building code departments. Another commenter urged HUD to include academic institutions as resources that should be consulted. Yet another commenter stated that in addition to supporting communities' access to critical governmental resources for assessing resilience to natural hazards, HUD should convene a group of expert stakeholders from the non-governmental organization community to strategize how to implement effective resilience tactics, as well as hosting a broader clearinghouse of readily available online data sources—including those available in the private sector and nongovernmental organizations—to achieve resilience solutions.

HUD Response: HUD notes that the final rule already provides jurisdictions with the flexibility to consult with community resources such as those identified by the commenter. HUD also strongly encourages jurisdictions to leverage and integrate existing assessments of climate and hazard related risks into their Consolidated Plan analysis where the jurisdiction deems appropriate. With regard to the suggestion that HUD work with other Federal agencies, HUD notes that it currently works with other agencies to develop guidance and tools that support communities and practitioners. For example, HUD conferred with various Federal agencies in the development of this rule. More recently, HUD has worked collaboratively with a group of expert stakeholders from non-governmental organizations to strategize about the implementation of effective resilience tactics to achieve resilience solutions through its National Disaster Resilience Competition (NDRC).

Comment: Establish minimum investment requirements. A commenter stated that while the identification of hazards and opportunities to mitigate them is an important step to making communities more resilient, once such efforts are institutionalized, the commenter expressed hope that HUD will establish requirements that communities invest in a minimum level of mitigation before Federal investments are made within the community. The commenter stated that such requirements will enhance the community and assure limited federal funds are used responsibly.

HUD Response: HUD agrees with the commenter that identification of hazards and opportunities to mitigate them is an important first step, and appreciates the suggestion for establishing minimum investment requirements. However, such a mandate runs contrary to the approach HUD has taken with its Consolidated Planning regulations.

Comment: Expand the organizations with which jurisdictions should consult. A commenter stated that the proposed rule is a step in the right direction, but that to further this important work, jurisdictions should be required to consult not only with the list of proposed agencies, but also with a wide range of organizations working on adaption to the decline of cheap fossil fuel energy, the depletion of fresh water, access to fresh food, complex environmental crises like climate change and biodiversity loss, and the issues of social, economic and health equity. The commenter stated that such information is consistent with HUD's new AFFH Data and Mapping Tool and could be included as part of the assessment of fair housing. The commenter stated that limiting mandatory consultation to ''agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies'' is too narrow for a full evaluation of vulnerability to natural hazards and ensuring resilience of low- and moderate-income households.

The commenter stated that a number of public and private organizations not listed in the proposed rule are immersed in activities that enhance community resilience. For example, organizations promoting home weatherization engage in energy conservation, help prepare communities for a decline in cheap energy, and contribute to efforts to improve neighborhood conditions; organizations that focus on public health are able to provide local data and findings on health inequity, such as asthma rates and food deserts; and community organizations, colleges/universities, and other non-profits are currently looking at and responding to the climate crisis. The commenter stated that without casting a broad net, planning efforts will be incomplete and continue the ill-suited forms of planning for the new realities our communities face. Another commenter stated that it was important for HUD grantees to consult with agencies responsible for economic development and housing in the private sector. The commenter stated that it is important to add this additional category because the current HUD proposal seems to only cover agencies responsible for ''public land and water resources,'' which would exclude the many low- and moderate-income facilities regulated and affected by local agencies responsible for economic development and housing in the private sector.

HUD Response: The commenters offer very good suggestions on agencies with whom to consult with respect to resilience. However, HUD does not mandate consultation with these entities. As already noted in this preamble, the approach taken in the Consolidated Plan is for jurisdictions to determine their needs, decide which needs to fund, conduct outreach to residents in their communities, and consult with individuals and agencies that will aid them in good community

planning. The citizen participation and consultation process provides the opportunity for a wide variety of stakeholders to participate the in the Consolidated Planning process. As mentioned previously, the Consolidated Plan includes a non-housing community development plan that provides opportunity for a jurisdiction to assess its neighborhood conditions, including economic needs, in its efforts to develop viable communities.

Comment: Natural hazard risks should be assessed by the appropriate government agency, not the government's housing and/or economic development agency, and be done on a project-level basis. A commenter that is a government economic development agency stated that it is not the appropriate agency to assess natural hazard risks for low- and moderate-income households, and that there are other governmental organizations charged with assessing mitigating these risks. The commenter stated that it can consult with the governmental agency charged with assessing and mitigating risks and seek their input on Consolidated Planning, but that it would not be appropriate for the economic development agency to have a directive or management role in this effort. The commenter also stated it is more impactful for this type of review to take place at the project level. Once funded, each project goes through an environmental review process. Many hazards are assessed, ranging from hazardous waste and radiation to floodplain analysis. The commenter stated that if a project site is in the floodplain, it must go through a potentially lengthy and burdensome process to determine if they can move the project or mitigate the impact.

HUD Response: HUD addressed a similar comment early on in this Section of the preamble that requested that HUD not mandate broadband or natural hazards risk resilience assessments by a housing and/or economic development agency when a State or local government has other agencies charged to address these matters. As noted by HUD in response to that earlier comment, HUD agrees that jurisdictions often already have assessments undertaken by other agencies regarding both broadband and resiliency. This final rule directs agencies to existing resources to guide them in these two areas. Through its Consolidated Planning process, HUD encourages a collaborative consultation process instead of duplication of efforts. Given that HUD also encourages jurisdictions to use other plans that identify community needs and priorities, the Consolidated Planning process provides the opportunity for jurisdictions to reference existing plans and is not requiring a separate, distinct study to be undertaken. It is up to each State or local government to determine which agencies or departments will be responsible for developing its Consolidated Plan and for administering the different HUD funding covered by HUD's Consolidated Plan regulations. All jurisdictions (including States) are certainly encouraged to ensure collaboration among internal and external agencies and staff to take full advantage of all relevant expertise.

Comment: The National Climate Assessment and the Climate Resilience Toolkit are confusing. A commenter stated that the National Climate Assessment and the Climate Resilience Toolkit are very confusing. The commenter stated that it was hard to understand how a State could use this toolkit in a meaningful way in developing its Consolidated Plan. The commenter stated that it shares data from its State's Homeland Security and Emergency Management Department in its plans and then relies on site-specific environmental reviews once projects are funded. The commenter stated that these would seem to be better approaches to assessing natural hazard risks to low-and moderate households for States. In contrast to this comment, another commenter stated that the Climate Resilience Toolkit is useful for screening and planning purposes. This commenter also stated that while GIS tools that integrate topography, hydrology, and social science are readily available on the Internet, these tools are not likely to be commonly used by housing programs. The commenter suggested that HUD provide technical assistance in the form of webinars and workshops to train housing staff on the use of these tools, and stated that training programs are readily available through NOAA and EPA.

Another commenter stated that many of the natural hazard resources named in HUD's proposed rule are not data sources, but instead are plans and toolkits with already-made strategies [§ 91.210(a)(5)(i), § 91.210(a)(5)(ii), and § 91.210(a)(5)(iii)]. The commenter stated that the housing market analysis section of the Consolidated Plan is intended to contain data with analysis that will inform the later sections which include strategies and goals. The commenter stated that because HUD is regulating the use of plans and strategies in this data section of the Consolidated Plan, HUD is taking away the grantee's efforts to create place-based strategies based on current data.

HUD Response: By referring to resources, plans, and toolkits, HUD is encouraging jurisdictions to review what's been proposed and discussed, and see whether it fits into the Consolidated Planning efforts. HUD is developing guidance, resources, and tools to help grantees work with these sources. Further, as already noted in this section, HUD plans to provide pre-populated data in both CPD Maps and the eCon Planning Suite template. Jurisdictions may use alternative data in the Consolidated Planning process and are not required to use the default data provided by the system. Default data can be replaced or complemented by specifying a survey or administrative data source. If an alternative source is specified, the jurisdiction will be required to identify the source and provide basic information on how the data was collected. The jurisdiction also has the option of providing notes under each table in which alternate data is used to indicate what was changed or why the change was necessary. Because the public can view much of the default data in CPD Maps, these notes may be useful to avoid confusion during the citizen participation process.

Comment: Expand approved sources of data to be made available to jurisdictions for use, and require use of local data. A commenter stated that jurisdictions should be required to both identify and include local data when describing vulnerabilities of housing occupied by low- and moderate-income households due to increased natural hazards. The commenter stated that, for example, local data regarding the quality of a jurisdiction's housing stock should be considered in the planning process, and similarly, geographic location of the low- and moderate-income households (which is available through HUD's AFFH Assessment Tool Map) should be addressed in planning with regard to vulnerabilities of housing.

HUD Response: As noted earlier, jurisdictions are already able to use alternative data. While HUD plans to prepopulate data in both CPD Maps and the eCon Planning Suite template, jurisdictions may use alternative data in the Consolidated Planning process and are not required to use the default data provided by the system. If an alternative source is specified, the jurisdiction will be asked to identify the source and provide basic information on how the data was collected.

Comment: Issue guidance on how to undertake the required analysis. A commenter strongly encouraged HUD to establish more specific guidance for jurisdictions on how to complete the

required analysis. The commenter stated that such guidance should not only include a step-by-step process for assessing community vulnerability to climate change and natural hazard risks but also should facilitate the identification and incorporation of actions that build resilience to these risks in the Consolidated Planning process. The commenter stated that developing more detailed guidance also would reduce the burden placed on jurisdictions by providing greater clarity on how to conduct a robust resiliency analysis, and would enhance consistency among and improve confidence in resiliency analyses as well as facilitate the review and approval of Consolidated Plans by HUD.

HUD Response: HUD plans to provide further guidance once the rule is implemented, but since the Consolidated Plan is completed through the e-Con Planning Suite template, the template provides a uniform and flexible template that helps ensure the Consolidated Plan is complete per the regulations found in 24 CFR part 91. Each screen in the template cites the specific section(s) of the regulations that the screen is designed to capture. Each screen includes a combination of prepopulated data tables and narrative sections that set a baseline for HUD's expectations for the amount of information required. HUD anticipates providing this same format for both broadband and resilience assessment requirements.

Comment: Ensure that grantees take steps to reduce the risks of natural hazards. A commenter stated that HUD's proposed rule does not ensure that grantees will take steps to reduce these risks or disparities. The commenter stated that, as written, the proposed rule explicitly, ''does not mandate that actions be taken to address . . . climate change adaptation needs'' and requires nothing of grantees beyond gaining knowledge of climate change risks. The commenter stated that HUD's rule should ensure that grantees take reasonable and adequate steps to both assess climate change risks and develop and incorporate reasonable and effective climate change risk mitigation strategies into their Consolidated Plans and project designs. The commenter stated that without such strategies, the rule would continue to allow HUD to invest in community development projects that may not be resilient to the effects of climate change and could put communities at risk. This commenter also stated that to ensure some level of accountability HUD's final rule should state that if grantees invest HUD funds in community development projects that do not include designs and/or strategies to reduce identified climate risks, HUD could reduce funding to that grantee in the future.

HUD Response: Through the Consolidated Planning process, jurisdictions will continue to have the flexibility to determine their own needs and priorities for distributing HUD funds. The rule provides for the incorporation of broadband and resilience to natural hazard risks into the existing needs assessment and market analysis required under the Consolidated Planning process. However, it is up to the jurisdiction through its needs assessment process to determine whether to select either of these issues as a priority need. The grantee would identify the financial and organizational resources available to address its priority needs. In the Consolidated Planning process, the level of resources available will play a key role in determining strategies and goals. Once broadband access or increasing resilience have been selected as a priority need, grantees would then develop a set of goals based on the availability of resources, and local organizational capacity. However, the statutory authority for the Consolidated Plan process and the formula funding programs remain the same. HUD has no authority to require that grantees carry out certain types of activities or to achieve specific objectives.

Comment: Look at climate risk between disasters, not just risk post-disaster. A commenter stated that it is essential that jurisdictions look at climate risk between disasters, not just in a post-disaster context. The commenter stated that identifying vulnerabilities during calmer times gives the jurisdiction the opportunity to address those challenges before the next disaster. The commenter stated that HUD should be mindful that pre-disaster planning is a preferable process, as post-disaster—when communities are in crisis—is an incredibly difficult time to be strategic. In response to HUD's specific inquiry regarding post-disaster reviews, another commenter stated that it strongly believes that jurisdictions should be required to conduct reviews and revisions of their resilience analysis following any major disaster. The commenter stated that this post-disaster review would not only enable jurisdictions to determine if the disaster introduced new hazard risks, but would also serve an important function in forcing jurisdictions to face and reconcile weaknesses and oversights within their previous plans.

HUD Response: HUD agrees that it is important to review needs not only in a post-disaster context but also between disasters. The inclusion of an assessment of resilience in the Consolidated Plan is not intended to apply to the post-disaster context, but rather is designed to help all grantees be better prepared if a disaster were to occur in the future. The Consolidated Plan is based on a community's strategic plan over the next 3–5 years. The use of climate resilience data will help a community identify its vulnerabilities and determine whether there are priorities that the jurisdiction can address, as well as develop preventive measures to address known issues in advance of a disaster occurring. HUD appreciates the commenter responding to its specific inquiry about post-disaster reviews. HUD is not mandating such review in this final rule but encourages jurisdictions to undertake these types of assessments.

Comment: Ensure communities are aware of local hazard mitigation plans. A commenter stated that guiding communities to consider and integrate this information into their Consolidated Plans is an excellent move by HUD, assuring that risk reduction dovetails with a community's economic and social development goals. The commenter stated that its concern is that communities may not be aware of the existence of local hazard mitigation plans, and may unfortunately duplicate efforts that have already been expended on their behalf. The commenter stated that its hope is that in the guidance for the rule, HUD would direct communities to explore with local emergency managers and planners the existence of current local hard mitigation plans, consider the content of those plans (which often includes information about low-income areas and vulnerability), and then use the information to inform decisions made in the Consolidated Plans, referring to the mitigation plan documents for justification or further data. The commenter stated that in this way, there will be no duplication of effort, no confusion as to valid risk assessment data, and the integration of mitigation measures, policies and programs will be a seamless practice across a community's planning portfolio.

HUD Response: HUD's rule addresses the commenter's concern by requiring jurisdictions to consult with State and local emergency managers (who are responsible for developing the State and local hazard mitigation plans).

Comment: Coordinate and align with existing Federal, State and local natural hazard risk management plans. A commenter stated that while it understands HUD's intent to ensure that

communities consider resilience to natural hazard risks as a part of the Consolidated Plan, the proposal goes about it in the wrong way. The commenter stated that instead of asking communities to undertake potentially new, unnecessary, and duplicative analysis, HUD should focus on encouraging coordination and alignment with the pre-existing Federal, State, and local plans that they already follow to comply with the various programs that focus on resilience and natural hazard planning. The commenter stated that it is concerned by the list of resources in the rule and cites to the ''Impact of Climate Change and Population Growth on the National Flood Insurance Program Through 2100'' as an example of such concern. The commenter expressed concerns that the implication that this study could be included as the basis of specific management decisions at a community level, since it would seem to run counter to the scope and objectives of the study. The commenter stated that the uncertainty that remains in accounting for mapping future conditions, such as risks due to changes caused by climate change, is the very reason that multiple segments of the National Flood Insurance Program (NFIP) continue to examine the issue and how it might best be addressed. The commenter stated that given that it is an ongoing topic currently being studied by issue area experts such as the Technical Mapping Advisory Council (TMAC), this is not something that individual communities should be expected to get out in front of. The commenter further stated that as the NFIP falls completely outside the jurisdiction and expertise of HUD, the potential unintended consequences may not be fully understood. The commenter stated that if HUD chooses to move forward with promulgation of this rulemaking and provide communities with a list of suggested resources for them to consider, HUD should concentrate on more practical planning resources which will still provide communities flexibility such as the Community Resilience Planning Guide for Buildings and Infrastructure Systems prepared by the National Institute of Standards and Technology (NIST)

HUD Response: HUD agrees that it will continue to encourage coordination and alignment with the pre-existing Federal, State, and local plans that focus on resilience and natural hazard planning is a benefit to the jurisdiction.

Comment: Require States and local jurisdictions to take action to improve natural hazard resilience to protect Federal taxpayer investments. A commenter expressed strong support for the rule but expressed disappointment that the rule does not require actions to be taken. The commenter stated that it believes that there should be a much stronger attempt to compel States and communities to take action to improve natural hazard resilience to protect federal taxpayer investments—not merely just require an assessment of it.

HUD Response: HUD reiterates that the Consolidated Planning process provides States and local government the flexibility and responsibility to determine where HUD funding should be expended. Through the Consolidated Planning process, jurisdictions will continue to have the flexibility to determine their own needs and priorities for distributing funds covered by the Consolidated Plan process. It will be up to a jurisdiction through its needs assessment process to determine whether to select either of these issues as a priority need. HUD has no authority to require that grantees carry out certain types of activities or to achieve specific objectives.

Comment: Ensure that jurisdictions comply with the Federal Flood Risk Management Standard (FFRMS). A commenter stated that HUD must ensure that jurisdictions funded by HUD comply with the FFRMS, established by Executive Order 13690 (E.O. 13690) and Executive Order 11988 (E.O. 11988). The commenter stated that the FFRMS not only reinforces the original intent of E.O. 11988—''to avoid to the extent possible the long and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative,'' but expands upon it by requiring the federal government to ''take action, informed by the best-available and actionable [climate] science,'' to improve the nation's resilience to flooding.

The commenter stated that the importance of transitioning from an emphasis on flood protection to a broader focus on flood risk management cannot be overstated because floodwaters can never be completely controlled, nor the risks associated with flooding completely eliminated. This is especially true when the impacts of climate change are considered.

HUD Response: HUD is addressing this issue through separate rulemaking.

IV. This Final Rule

As noted in Section III of this preamble, this final rule makes one change from the proposed rule. In response to public comment, HUD no longer identifies in the regulatory text specific recommended sources for Consolidated Plan jurisdictions to consult for both assessments. When included in the regulatory text, commenters thought these were required sources to consult, rather than recommended sources. HUD agrees with the commenters that such sources may change over time or their names may change, or new sources will be introduced. HUD agreed with the commenters that the better approach is to list these sources outside of the regulation, in guidance.

Consultation and citizen participation requirements (§§ 91.100, 91.105, 91.110, 91.115). HUD's currently codified Consolidated Plan regulations require that local governments and States consult public and private agencies that provide assisted housing, health services, and social and fair housing services during preparation of the Consolidated Plan. Under the currently codified regulations, local governments and States are also required, in their citizen participation plan, to encourage the participation of local and regional institutions and businesses in the process of developing and implementing their Consolidated Plans. This rule amends these requirements to specify that local governments and States must consult with public and private organizations, including broadband internet service providers, and other organizations engaged in narrowing the digital divide. Further, the citizen participation plan must encourage their participation in implementing any components of the plan designed to narrow the digital divide for low-income residents. The rule also requires local governments and States to consult with agencies whose primary responsibilities include the management of flood prone areas, public land, or water resources, and emergency management agencies in the process of developing the Consolidated Plan.

Contents of Consolidated Plan (§§ 91.5, 91.200, 9.200, 91.210, 91.300, 91.310). The rule makes several changes to these sections in subparts C and D of HUD's regulations 24 CFR part 91, which establish the required contents of the Consolidated Plan.

First, the rule requires that, in describing their consultation efforts, local governments and States describe their consultations with public and private organizations, including broadband internet service providers, other organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies.

Second, the jurisdiction must also describe broadband needs in housing occupied by low- and moderate-income households based on an analysis of data, identified by the jurisdiction, for its low- and moderate-income neighborhoods.

Third, the rule requires the jurisdiction to provide an assessment of natural hazard risk to low- and moderate-income residents based on an analysis of data identified by the jurisdiction. Possible sources of such data include (1) the most recent National Climate Assessment, (2) the Climate Resilience Toolkit, (3) the Community Resilience Planning Guide for Buildings and Infrastructure Systems prepared by the National Institute of Standards and Technology (NIST), or (4) other climate risk-related data published by the Federal government or other State or local government climate risk related data, including FEMA-approved hazard mitigation plans which incorporate climate change. HUD encourages the use of other plans, including a jurisdiction's hazard mitigation plan, in identifying community needs and priorities.

By undertaking these two analyses as part of their Consolidated Planning, HUD believes that jurisdictions become better informed of two emerging community needs in the world today: (1) The importance of broadband access, which opens up opportunity to a wide range of services, markets, jobs, educational, cultural and recreational opportunities; and (2) the importance of being cognizant and prepared for environmental and geographical conditions that may threaten the health and safety of communities. As noted earlier in this preamble, HUD is not mandating that jurisdictions take actions in either of these areas, but HUD believes that these are two areas that must be taken into consideration in a jurisdiction's planning for its expenditure of HUD funds.

V. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of the Executive Order (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

As noted, the regulatory amendments are designed to assist Consolidated Plan jurisdictions in assessing two emerging needs of communities in this changing world. Specifically, the final rule directs States and local governments to consider broadband access and natural hazard resilience in their consolidated planning efforts by using readily available data sources. Where access to broadband Internet service is either not currently available or only minimally available, jurisdictions will be required to consider ways to bring broadband Internet access to low- and moderate-income residents, including how HUD funds could be used to narrow the digital divide for these residents. Further, where low- and moderate-income communities are at risk of natural hazards, including those that may be exacerbated due to climate change, States and local governments must consider ways to incorporate hazard mitigation and resilience into their community planning and development goals, including the use of HUD funds.

Benefits and Costs of the Final Rule

A. Benefits

The Consolidated Planning process benefits jurisdictions by establishing the framework for a community-wide dialogue to identify housing and community development needs for 1,255 jurisdictions, including 1,205 localities and all 50 States. Rather than a piecemeal approach to planning based on differing program requirements, the Consolidated Plan enables a holistic approach to the assessment of affordable housing and community development needs and market conditions. HUD established the Consolidated Plan, through a 1994 final rule, for the explicit purpose of linking disparate program planning requirements, thereby ensuring ''that the needs and resources of . . . [jurisdictions] are included in a comprehensive planning effort to revitalize distressed neighborhoods and help low-income residents locally.'' [3] The Consolidated Plan replaced a dozen separate planning mechanisms with a unified approach enabling communities to make data-driven, place-based investment decisions.

New housing and community development needs have arisen in the 21 years since the Consolidated Plan was created. Two of the most pressing emerging needs facing communities in the twenty-first century are the digital divide and climate change. Despite the benefits described above of a comprehensive approach to planning and the allocation of scarce Federal dollars, jurisdictions are not currently required to consider either the digital divide or climate change resilience in development of their Consolidated Plans. Jurisdictions may therefore place a low priority on assessing, and using Federal dollars to address, these critical issues relative to other needs included in the Consolidated Plan. As a worst-case scenario, omitting these needs from the consolidated planning process could mean that communities elect to defer considering these needs.

The direct benefits provided by the final rule are, therefore, to help ensure that Consolidated Plan jurisdictions consider broadband access and natural hazard resilience as part of their comprehensive assessment and planning efforts, including their determination of the most effective use of HUD grant funds.

B. Costs

The costs of the revised consultation and reporting requirements will not be substantial since the regulatory changes made by this final rule build upon similar existing requirements for other elements covered by the consolidated planning process rather than mandating completely new procedures.

A complete Consolidated Plan that contains both a Strategic Plan and Annual Action Plan is submitted once every 3 to 5 years. An Annual Action Plan is submitted once a year. HUD data indicate that the cost of preparing the Strategic Plan for a locality is $5,236, and for a State is $14,382. The cost of preparing the Annual Action Plan is $1,904 for a locality and $6,392 for each State. HUD estimates that the increase in costs resulting from addressing the new elements under the new rule will be minimal. Specifically, HUD estimates that cost to a locality of preparing the Strategic Plan will increase to $5,406, while the cost to a State will increase to $14,552. This represents an increase of $170 per locality as well as per State.

[3] 60 FR 1878 (January 5, 1994).

The cost of preparing the Annual Action Plan will also increase by the same amount, to $2,074 for a locality and $6,562 for a State. While these are not trivial amounts, they are not substantial when considered in proportion to HUD grant funding (for example, the average CDBG grant to entitlement communities in FY 2012 was approximately $1.7 million).[4]

The amounts of the increased costs are based on HUD's estimate of the increased number of hours it will take jurisdiction to complete the new assessments. The table below summarizes the cost of the increased burden hours across all jurisdiction that submit a Consolidated Plan.

Consolidated plan tasks	Number of respondents	Increased burden hours	Cost per hour[5]	Completed consolidated plan
Localities				
Strategic Plan Development	1205	5	34	$204,850
Action Plan Development	1205	5	34	204,850
States				
Strategic Plan Development	50	5	34	8,500
Action Plan Development	50	5	34	8,500
Total				*$426,700*

Further, and as noted elsewhere in this preamble, HUD has taken several actions to further mitigate the cost of the regulatory changes. Jurisdictions will be able to base the required assessments on data that are already readily available on the Internet, and provided to grantees via the eCon Planning Suite. Therefore, jurisdictions will not have to incur the expense and administrative burdens associated with collecting data. Moreover, the proposed rule does not mandate that actions be taken to address broadband needs or climate change needs. Consolidated plan jurisdictions are in the best position to decide how to expend their HUD funds. However, HUD believes that the additional analyses required by this proposed rule may highlight areas where expenditure of funds would assist in opening up economic opportunities through increased broadband access or mitigate the impact of possible natural hazard risks and climate change impacts. HUD leaves it to jurisdictions to consider any appropriate methods to promote broadband access or protect against the adverse impacts of climate change, taking into account the other needs of their communities, and available funding, as identified through the consolidated planning process.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulation Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339.

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned an OMB control number 2506–0117.

Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The rule will amend the Consolidated Plan regulations to require that States and local governments consider (1) broadband Internet service access for low- and moderate-income households to; and (2) the risk of potential natural hazards, including those that may be exacerbated due to climate change, to low- and moderate-income residents in their jurisdictions. As noted above under the heading ''Regulatory Review'' in the ''Findings and Certifications'' section of this preamble, HUD's analysis of the economic costs associated with the new regulatory requirements indicate that the final rule will not impose significant economic burdens on HUD grantees, irrespective of their size.

The RFA defines small governmental jurisdictions as those with a population of less than 50,000 persons.[6] As discussed above, the Consolidated Planning process establishes the framework for identifying housing and community development needs for 1,255 jurisdictions, including 1,205 localities and all 50 States. Although HUD does not have precise data indicating the number of small Consolidated Plan localities as defined by the RFA, data from the Decennial census indicates that there are 758 large incorporated places.[7] This leaves an estimated 447 small Consolidated Planning jurisdictions. This number represents a minority of 37 percent of all jurisdictions. As noted above, HUD estimates that cost to a locality of preparing the Strategic Plan (which is submitted once every 3 to 5 years) will increase by $170 per locality. The cost of preparing the Annual Action Plan will also increase by the same amount. Assuming submission of the Strategic Plan on 3-year cycle, the total annual costs directly attributable to this rule is $270 per locality.[8] The increased costs are minimal when considered in proportion to HUD grant funding. For example, and as noted above, the average CDBG grant to entitlement

[4] Eugene Boyd, *Community Development Block Grants: Recent Funding History* (Congressional Research Service, February 6, 2014), available online at: *https://www.hsdl.org/?view&did=750383*.

[5] Assumes a blended hourly rate that is equivalent to a GS–12, Step 5 Federal Government Employee

[6] 5 U.S.C. 601(5).

[7] *https://www.census.gov/popest/data/cities/totals/2015/*.

[8] Diving the increased cost of preparing the Strategic Plan by three to arrive at an annual figure ($170/3 = $57), and adding to the $170 increased cost of preparing the Annual Action Plan. $57 + $170 = $270.

communities in FY 2012 was approximately $1.7 million).

Moreover, HUD has taken several measures to even further minimize the costs associated with complying with the rule. As discussed above, jurisdictions will have the option to complete the required assessments using data that has already been compiled and readily available on the Internet. Jurisdictions will, therefore, not have to incur the expense and administrative burdens associated with collecting and analyzing data. Further, the rule does not mandate that any actions be taken in response to the required assessments. Jurisdictions retain the discretion to consider the most appropriate methods to address their assessments, taking into account other needs identified as part of the Consolidated Planning process as well as financial and other resource constraints.

This rule therefore, which only requires consideration of the broadband and natural hazards resilience needs of low-income communities, has a minimal cost impact on all grantees subject to the Consolidated Planning process, whether large or small, and will not have a significant economic impact on substantial number of small entities.

Environmental Review

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern, or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule imposes either substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule would not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule would not impose any federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low- and moderate-income housing, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD amends 24 CFR part 91 as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

Subpart A—General

■ 2. In § 91.100, add two sentences to the end of paragraph (a)(1) to read as follows:

§ 91.100 Consultation; local governments.

(a) * * *

(1) * * * When preparing the consolidated plan, the jurisdiction shall also consult with public and private organizations. Commencing with consolidated plans submitted on or after January 1, 2018, such consultations shall include broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies.

* * * * *

■ 3. In § 91.105, add two sentences at the end of paragraph (a)(2)(ii) to read as follows:

§ 91.105 Citizen participation plan; local governments.

(a) * * *

(2) * * *

(ii) * * * The jurisdiction shall encourage the participation of public and private organizations. Commencing with consolidated plans submitted on or after January 1, 2018, such consultations shall include broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies in the process of developing the consolidated plan.

* * * * *

■ 4. In § 91.110, add two sentences at the end of paragraph (a) introductory text to read as follows:

§ 91.110 Consultation; States.

(a) * * * When preparing the consolidated plan, the State shall also consult with public and private organizations. Commencing with consolidated plans submitted on or after January 1, 2018, such consultations shall include broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies.

* * * * *

■ 5. In § 91.115, add a sentence at the end of paragraph (a)(2)(ii) to read as follows:

§ 91.115 Citizen participation plan; States.

(a) * * *

(2) * * *

(ii) * * * Commencing with consolidated plans submitted in or after January 1, 2018, the State shall also encourage the participation of public and private organizations, including broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies in the process of developing the consolidated plan.

* * * * *

Subpart C—Local Governments; Contents of Consolidated Plan

■ 6. In § 91.200, redesignate paragraph (b)(3)(iv) as paragraph (b)(3)(vi), and add new paragraphs (b)(3)(iv) and (v) to read as follows:

§ 91.200 General.

* * * * *

(b) * * *

(3) * * *

(iv) Commencing with consolidated plans submitted on or after January 1, 2018, public and private organizations, including broadband internet service providers and organizations engaged in narrowing the digital divide;

(v) Commencing with consolidated plans submitted on or after January 1, 2018, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies; and

* * * * *

■ 7. Revise § 91.210(a) to read as follows:

§ 91.210 Housing market analysis.

(a) *General characteristics.* (1) Based on information available to the jurisdiction, the plan must describe the significant characteristics of the jurisdiction's housing market, including the supply, demand, and condition and cost of housing and the housing stock available to serve persons with disabilities, and to serve other low-income persons with special needs, including persons with HIV/AIDS and their families.

(2) Data on the housing market should include, to the extent information is available, an estimate of the number of vacant or abandoned buildings and whether units in these buildings are suitable for rehabilitation.

(3) The jurisdiction must also identify and describe any areas within the jurisdiction with concentrations of racial/ethnic minorities and/or low-income families, stating how it defines the terms ''area of low-income concentration'' and ''area of minority concentration'' for this purpose. The locations and degree of these concentrations must be identified, either in a narrative or on one or more maps.

(4) Commencing with consolidated plans submitted on or after January 1, 2018, the jurisdiction must also describe the broadband needs of housing occupied by low- and moderate-income households based on an analysis of data, identified by the jurisdiction, for its low- and moderate-income neighborhoods. These needs include the need for broadband wiring and for connection to the broadband service in the household units and the need for increased competition by having more than one broadband Internet service provider serve the jurisdiction.

(5) Commencing with consolidated plans submitted on or after January 1, 2018, the jurisdiction must also describe the vulnerability of housing occupied by low- and moderate-income households to increased natural hazard risks associated with climate change based on an analysis of data, findings, and methods identified by the jurisdiction in its consolidated plan.

* * * * *

Subpart D—State Governments; Contents of Consolidated Plan

■ 8. In § 91.300, remove the word ''and'' following the semicolon at the end of paragraph (b)(3)(iii), redesignate paragraph (b)(3)(iv) as paragraph (b)(3)(vi), and add new paragraphs (b)(3)(iv) and (v) to read as follows:

§ 91.300 General.

* * * * *

(b) * * *

(3) * * *

(iv) Commencing with consolidated plans submitted on or after January 1, 2018, public and private organizations, including broadband internet service providers and organizations engaged in narrowing the digital divide;

(v) Commencing with consolidated plans submitted on or after January 1, 2018, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies; and

* * * * *

■ 9. Revise § 91.310(a) to read as follows:

§ 91.310 Housing market analysis.

(a) *General characteristics.* (1) Based on data available to the State, the plan must describe the significant characteristics of the State's housing markets (including such aspects as the supply, demand, and condition and cost of housing).

(2) Commencing with consolidated plans submitted on or after January 1, 2018, the State must describe the broadband needs of housing in the State based on an analysis of data identified by the State. These needs include the need for broadband wiring and for connection to the broadband service in the household units, the need for increased competition by having more than one broadband Internet service provider serve the jurisdiction.

(3) Commencing with consolidated plans submitted on or after January 1, 2018, the State must also describe the vulnerability of housing occupied by low- and moderate-income households to increased natural hazard risks due to climate change based on an analysis of data, findings, and methods identified by the State in its consolidated plan.

* * * * *

Dated: *December 14, 2016.*

Harriet Tregoning,

Principal Deputy Assistant Secretary for Community Planning and Development.

Nani A. Coloretti,

Deputy Secretary.

[FR Doc. 2016–30421 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9803]

RIN 1545–BL87

Treatment of Certain Transfers of Property to Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to certain transfers of property by United States persons to foreign corporations. The final regulations affect United States persons that transfer certain property, including foreign goodwill and going concern value, to foreign corporations in nonrecognition transactions described in section 367 of the Internal Revenue Code (Code). The regulations also combine certain sections of the existing regulations under section 367(a) into a single section. This document also withdraws certain temporary regulations.

DATES: *Effective date:* These regulations are effective on December 16, 2016.

Applicability date: For dates of applicability, see §§ 1.367(a)–1(g)(5), 1.367(a)–2(k), 1.367(a)–4(b), and 1.367(a)–6(j); 1.367(d)–1(j); and 1.6038B–1(g)(7).

FOR FURTHER INFORMATION CONTACT: Ryan A. Bowen, (202) 317–6937 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in the regulations have been submitted for review and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–0026.

The collections of information are in § 1.6038B–1(c)(4) and (d)(1). The collections of information are mandatory. The likely respondents are domestic corporations. Burdens

associated with these requirements will be reflected in the burden for Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation. Estimates for completing the Form 926 can be located in the form instructions.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books and records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final regulations issued under sections 367 and 6038B of the Code. Temporary regulations were published on May 16, 1986 (TD 8087, 51 FR 17936) (the 1986 temporary regulations). Proposed regulations under these sections were published on September 16, 2015 (80 FR 55568) (the proposed regulations). Written comments to the proposed regulations were received, and a public hearing was held on February 8, 2016. All comments are available at *www.regulations.gov* or upon request.

The proposed regulations generally provided five substantive changes from the 1986 temporary regulations: (1) Eliminating the favorable treatment for foreign goodwill and going concern value by narrowing the scope of the active trade or business exception under section 367(a)(3) (ATB exception) and eliminating the exception under § 1.367(d)–1T(b) that provides that foreign goodwill and going concern value is not subject to section 367(d); (2) allowing taxpayers to apply section 367(d) to certain property that otherwise would be subject to section 367(a); (3) removing the twenty-year limitation on useful life for purposes of section 367(d) under § 1.367(d)–1T(c)(3); (4) removing the exception under § 1.367(a)–5T(d)(2) that permits certain property denominated in foreign currency to qualify for the ATB exception; and (5) changing the valuation rules under § 1.367(a)–1T to better coordinate the regulations under sections 367 and 482 (including temporary regulations under section 482 issued with the proposed regulations (see § 1.482–1T(f)(2)(i), TD 9738, 80 FR 55538).

Specifically with regard to the ATB exception, the proposed regulations revised the categories of property that are eligible for the ATB exception so that foreign goodwill and going concern value cannot qualify for the exception. Under the 1986 temporary regulations, all property was eligible for the ATB exception, subject only to five narrowly tailored exceptions. In addition to limiting the scope of the ATB exception, the proposed regulations also implemented changes to the ATB exception that were intended to consolidate various provisions and update the 1986 temporary regulations in response to subsequent changes to the Code.

The proposed regulations did not resolve the extent to which property, including foreign goodwill and going concern value, that is not explicitly enumerated in section 936(h)(3)(B)(i) through (v) (enumerated section 936 intangibles) is described in section 936(h)(3)(B) and therefore subject to section 367(d) or instead is subject to section 367(a) and not eligible for the ATB exception. All property that is described in section 936(h)(3)(B) is referred to at times in this preamble as ''section 936 intangibles.'' Nonetheless, the proposed regulations permitted taxpayers to apply section 367(d) to such property. Under this rule, a taxpayer that has historically taken the position that goodwill and going concern value is not described in section 936(h)(3)(B) could apply section 367(d) to such property.

These regulations generally finalize the proposed regulations, as well as portions of the 1986 temporary regulations, as amended by this Treasury decision. Although minor wording changes have been made to certain aspects of those portions of the 1986 temporary regulations, the final regulations are not intended to be interpreted as making substantive changes to those regulations. Further explanation of the proposed regulations can be found in the Explanation of Provisions section of the preamble to the proposed regulations. That Explanation of Provisions section is hereby incorporated as appropriate into this preamble.

Summary of Comments and Explanation of Revisions

Nineteen sets of comments were received in response to the proposed regulations, and three speakers presented at the public hearing. In drafting the final regulations, the Treasury Department and the IRS carefully considered all of the comments received.

This section of the preamble is comprised of five parts that discuss, in turn, the comments received with respect to (i) the elimination of the favorable treatment of transfers of foreign goodwill and going concern value, (ii) the useful life of property for purposes of applying section 367(d), (iii) the applicability date of the final regulations, (iv) the qualification of property denominated in foreign currency for the ATB exception, and (v) other issues.

I. Foreign Goodwill and Going Concern Value

A. Overview

The Treasury Department and the IRS received a variety of comments in response to the proposed elimination of the favorable treatment of transfers of foreign goodwill and going concern value provided by the 1986 temporary regulations. Two comments supported the treatment of foreign goodwill and going concern value under the proposed regulations. One comment asserted that allowing intangible property to be transferred outbound in a tax-free manner is inconsistent with the policies of section 367. Other comments acknowledged the concerns about tax avoidance described in the preamble to the proposed regulations, but requested specific exceptions for transfers of foreign goodwill and going concern value in situations that the comments asserted were not abusive. Other comments disagreed more fundamentally with the approach taken and stated that the Treasury Department and the IRS should withdraw the proposed regulations entirely. Many of these comments asserted that eliminating the favorable treatment of transfers of foreign goodwill and going concern value would be an invalid exercise of regulatory authority under section 367.

Overall, the comments indicated widely divergent understandings of the nature of foreign goodwill and going concern value. Accordingly, the comments also widely differed in their proffered justifications for an exception for foreign goodwill and going concern value and in the recommended contours of an appropriate exception. The variance in the comments regarding these fundamental issues highlights the difficulty of permitting some form of favorable treatment for foreign goodwill and going concern value while preventing tax avoidance.

As described in greater detail in Part I.B of this Summary of Comments and Explanation of Revisions, and consistent with the proposed regulations, the final regulations eliminate the favorable treatment of foreign goodwill and going concern value contained in the 1986 temporary regulations. The Treasury Department and the IRS have

determined that this change is necessary to carry out the tax policy embodied in section 367 in a fair, impartial, and reasonable manner, taking into account the intent of Congress, the realities of relevant transactions, the need for the IRS to administer the rules and monitor compliance, and the overall integrity of the federal tax system. In particular, the final regulations are consistent with the policy and intent of the statute, which does not reference foreign goodwill or going concern value, and with Congress' expectation that the Secretary would exercise the regulatory authority under section 367 to require gain recognition when property is transferred offshore under circumstances that present a potential for tax avoidance.

B. Interpretation of Section 367

1. Summary of Comments Challenging Authority

The Treasury Department and the IRS received numerous comments addressing the proposed regulations' treatment of foreign goodwill and going concern value. One comment asserted that the ATB exception must apply to transfers of foreign goodwill and going concern value, because (i) foreign goodwill and going concern value is not a section 936(h)(3)(B) intangible, and so is subject to section 367(a) rather than section 367(d), and (ii) the legislative history indicates that Congress expected that the transfer of such value should be tax-free. The comment further asserted that, because goodwill and going concern value is inextricably linked to the conduct of an active trade or business, the ATB exception necessarily encompasses such transfers. Other comments asserted that finalizing the proposed regulations would represent an unreasonable exercise of regulatory authority because the proposed regulations eliminated the favorable treatment of all transfers of purported foreign goodwill and going concern value, rather than just those transfers that the Treasury Department and the IRS determine are abusive.

Several comments asserted that the proposed regulations are inconsistent with Congressional intent and cited statements from the legislative history to section 367, such as the following:

> The committee does not anticipate that the transfer of goodwill or going concern value developed by a foreign branch to a newly organized foreign corporation will result in abuse of the U.S. tax system. . . . The committee contemplates that the transfer of goodwill or going concern value developed by a foreign branch will be treated under [the exception for transfers of property for use in the active conduct of a foreign trade or business] rather than a separate rule applicable to intangibles.

H.R. Rep. No. 98–432, pt. 2, at 1317–19 (1984).

Comments also asserted that it is inappropriate to use regulatory authority under section 367 to address transfer pricing concerns under section 482.

2. Response

The Treasury Department and the IRS do not agree with the foregoing comments. Section 367 generally provides for income recognition on transfers of property to a foreign corporation in certain transactions that otherwise would qualify for nonrecognition. While section 367(a)(3)(A) includes a broad exception to this general rule for property used in the active conduct of a trade or business outside of the United States, grants of rulemaking authority in section 367(a)(3)(A) and (B) authorize the Secretary to exercise administrative discretion in determining the property to which nonrecognition treatment applies under the ATB exception. Moreover, section 367(d) reflects a clear policy that income generally should be recognized with respect to transfers of section 936 intangibles. The 1984 legislative history to section 367 explains that Congress intended for the Secretary to use his ''regulatory authority to provide for recognition in cases of transfers involving the *potential* of tax avoidance.'' S. Rep. No. 98–169, at 364 (1984) (emphasis added). The Treasury Department and the IRS have determined that the proposed regulations and these final regulations are consistent with that intention and the authority granted to the Secretary under section 367, based on the fact that the statute does not refer to foreign goodwill and going concern value and the determination that, as described in the preamble to the proposed regulations, the favorable treatment of foreign goodwill and going concern value contravenes the policy that income generally should be recognized with respect to transfers of section 936 intangibles. The remainder of this section discusses subsequent changes to the regulatory, statutory, and market context in which the 1984 legislative history was drafted, in order to reconcile the statements in the 1984 legislative history expressing the expectation that an exception for foreign goodwill and going concern value would not result in abuse with the IRS's contrary experience administering the statute during the intervening years.

a. The 1980s and Early 1990s

The Treasury Department and the IRS considered the 1984 legislative history to section 367 in issuing the 1986 temporary regulations. The 1986 temporary regulations gave effect to the statements in the legislative history indicating that Congress anticipated that the transfer of goodwill and going concern value developed by a foreign branch to a newly organized foreign corporation generally would not result in abuse of the U.S. tax system, and, on that basis, that such transfers would benefit from nonrecognition treatment. As a result, the 1986 temporary regulations provide nonrecognition treatment for foreign goodwill and concern value. The 1986 temporary regulations did not provide a conceptual definition of foreign goodwill and going concern value but, in effect, provided a rule for valuing it by describing foreign goodwill and going concern value as the residual value of a business operation conducted outside of the United States after all other tangible and intangible assets have been identified and valued. § 1.367(a)–1T(d)(5)(iii).

The Treasury Department and the IRS also took into account the 1984 legislative history in issuing the proposed regulations and these final regulations. In doing so, the Treasury Department and the IRS also considered that, in amending section 367 in 1984, Congress did not choose to statutorily mandate any particular treatment of foreign goodwill and going concern value and instead delegated broad authority to the Secretary to promulgate regulations under section 367 to carry out its purposes in this complex area. The Treasury Department and the IRS further considered that the legal and factual context in which the 1984 legislative history was drafted has changed significantly over the last 32 years.

Before 1993, goodwill and going concern value was not amortizable. As a result, in 1984, much of the case law and policy debate regarding goodwill and going concern value involved sales of business operations at arm's length between unrelated parties, where the taxpayer attempted to minimize the value of goodwill in order to maximize the value of amortizable intangibles. See, for example, *Newark Morning Ledger Co.* v. *United States,* 507 U.S. 546 (1993). In 1989, the General Accounting Office analyzed data with respect to unresolved tax cases involving purchased intangibles and found that, presumably in order to minimize the amount of unamortizable goodwill, taxpayers had identified 175

different types of customer-based intangibles that were distinct from goodwill. See General Accounting Office, Report to the Joint Committee on Taxation: Issues and Policy Proposals Regarding Tax Treatment of Intangible Assets, at 3 (Aug. 1991).

b. Statutory and Regulatory Changes

In 1993, Congress addressed these valuation disputes between taxpayers and the IRS by enacting section 197, which, similar to the approach taken by the proposed regulations, did not directly address the underlying disagreement about the relative size of goodwill but substantially reduced the stakes of the disagreement. That is, by generally providing for the amortization of goodwill over 15 years, the enactment of section 197 generally eliminated the incentive that existed in 1984, when Congress enacted section 367(d) in its present form, for taxpayers to argue that goodwill has relatively minor value.

Other law changes since 1984 have increased the relevance of section 367(d) and the incentive for taxpayers to overstate the value attributable to goodwill and going concern value. Before 1997, amounts received under section 367(d) were treated as ordinary income from U.S. sources. In 1997, Congress amended section 367(d)(2)(C) to provide that amounts received under section 367(d) are treated as ordinary income that is sourced in the same manner as a royalty, and thus potentially as from sources outside the United States. Taxpayer Relief Act of 1997, Public Law 105–34, 111 Stat. 788. The 1997 amendments increased the relevance of section 367(d) and the exception for foreign goodwill and going concern value because, before 1997, the consequences under the foreign tax credit limitation of the treatment of section 367(d) deemed royalties as U.S. source income represented a substantial disincentive for taxpayers to structure transactions in a way that would be subject to section 367(d).

Additionally, the so-called ''check-the-box'' regulations of § 301.7701–3, published December 18, 1996 (TD 8697, 61 FR 66584), and Congress's enactment in 2006 of the subpart F ''look-thru'' rule in section 954(c)(6) (Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109–222, 120 Stat. 345), increased the potential benefit to taxpayers from transferring high-value intangibles offshore by reducing obstacles to redeploying cash earned in overseas operations among foreign affiliates without incurring U.S. tax. Both of these changes also facilitate, in certain circumstances, the ability of foreign subsidiaries to license transferred intangibles to affiliates without incurring subpart F income.

Finally, on January 5, 2009, the Treasury Department and the IRS issued temporary regulations under section 482 (TD 9441, 74 FR 340) related to cost sharing arrangements (subsequently finalized at TD 9568, 76 FR 80082 (Dec. 22, 2011)). The 2009 cost sharing regulations, in particular the supplemental guidance in § 1.482–7T(g) on transfer pricing methods applicable in determining the arm's length price for a platform contribution transaction or PCT (so-called ''buy-in payments''), were intended, in part, to address inappropriate income shifting from intangible transfers under the prior cost sharing regulations. Although the prior cost sharing regulations did not provide any favorable treatment for foreign goodwill and going concern value, in the experience of the IRS, taxpayers took positions under those regulations that allowed a domestic cost sharing participant to transfer intangibles to a foreign cost sharing participant for development under a cost sharing arrangement without fully compensating the domestic cost sharing participant for the value of the transferred intangibles. It is also the experience of the IRS that the 2009 cost sharing regulations limited taxpayers' ability to use PCTs in cost sharing arrangements to shift high value intangibles offshore without appropriate compensation, thereby increasing the relative appeal of transferring intangibles in a transaction subject to section 367. Thus, taxpayers began using transactions subject to section 367 to transfer intangibles intended for development under a cost sharing arrangement rather than as part of a PCT.

c. Changing Markets for Intangibles

Moreover, since Congress enacted section 367(d) in its current form in 1984, the relative importance of intangibles in the economy and in the profitability of business has increased greatly. According to a joint report issued by the Economic and Statistics Administration and the U.S. Patent and Trademark Office, ''IP use permeates all aspects of the economy with increasing intensity and extends to all parts of the U.S.'' Justin Antonipillai, Economics and Statistics Administration, & Michelle K. Lee, U.S. Patent and Trademark Office, Intellectual Property and the U.S. Economy, at p.30 (2016). This growing importance is reflected in the significant increase in the portion of business values attributable to intangible assets in the years since 1984, with one study indicating that intangibles accounted for only 32 percent of the market value of the S&P 500 in 1985, but accounted for 84 percent by 2015. Annual Study of Intangible Asset Market Value from Ocean Tomo, LLC (Mar. 4, 2015, 12:00 a.m.), *http://www.oceantomo.com/2015/03/04/2015-intangible-asset-market-value-study/.* Growth in the share of business values attributable to section 936 intangibles during this period, together with the statutory and regulatory changes discussed in the preceding paragraphs, have increased the incentives for taxpayers to transfer such valuable intangibles to related offshore affiliates in transactions subject to section 367(d) and to misattribute intangible value from enumerated section 936 intangibles to foreign goodwill and going concern value in the context of such transactions.

d. The Potential for Abuse

Since 1984, taxpayers have reversed their positions regarding the significance of goodwill and going concern value in response to the enactment of sections 197 and 367(d), and now commonly assert that such value constitutes a large percentage—even the vast majority—of an enterprise's value. The IRS's experience administering section 367(d) has, once again, highlighted the abuse potential that arises from the need to distinguish value attributable to nominally distinct intangibles that are used together in a single trade or business. Specifically, the uncertainty inherent in distinguishing between value attributable to goodwill and going concern value and value attributable to other intangible property makes any exception to income recognition for the outbound transfer of goodwill and going concern value unduly difficult to administer and prone to tax avoidance. Of course, any rule that provides for the tax-free transfer of one type of property, while the transfer of other types of property remains taxable, provides an incentive to improperly allocate value away from the taxable property and onto the tax-free property. This problem is acute, however, in cases involving the offshore reorganization of entire business divisions that include high-value, interrelated intangibles, because goodwill and going concern value are particularly difficult to distinguish (perhaps are even indistinguishable) from the enumerated section 936 intangibles. See, for example, *International Multifoods Corp.* v. *Commissioner,* 108 T.C. 25, 42 (1997) (noting that it ''is well established that trademarks embody goodwill''). See also Joint Committee on Taxation, Present

Law and Background Related to Possible Income Shifting and Transfer Pricing, (JCX–37–10) July 20, 2010, at 110 (noting that unique intangible property is difficult to value because it is rarely, if ever, transferred to third parties).

e. Legislative Intent and the Broad Grant of Authority To Limit Potential Abuses

These statutory, regulatory, and market developments since Congress amended section 367(d) in 1984, as well as the experience of the IRS in administering section 367 over that period, inform the manner in which the Treasury Department and the IRS seek to give effect to the intent of Congress in this complex area of law. As a starting point, the Treasury Department and the IRS observe that the statutory grants of authority in section 367(a) and (d), coupled with the absence of any specific statutory protection for transfers of goodwill and going concern value, form the basis for the broad authority of the Treasury Department and the IRS to design the appropriate parameters for the taxation of outbound transfers. The 1984 legislative history expressed an expectation that outbound transfers of foreign goodwill and going concern value would not lead to abuse of the U.S. tax system and, on the basis of that expectation, anticipated that the Secretary would exercise the regulatory authority under section 367 in a manner that would allow taxpayers to transfer foreign goodwill and going concern value outbound without current U.S. tax. The legislative history also explains that Congress expected the Secretary to use the ''regulatory authority to provide for recognition in cases of transfers involving the potential of tax avoidance.'' Accordingly, the administrative discretion to determine the contours of nonrecognition treatment must be exercised in light of the income recognition objectives of the statute and informed by the IRS's experience in administering the exception.

The Treasury Department and the IRS have determined that the premise of the expectation noted in the legislative history that an exception to recognition treatment would apply to foreign goodwill and going concern value—namely, that outbound transfers of foreign goodwill and going concern value would not lead to abuse—is inconsistent with the experience of the IRS in administering section 367(d), and consequently no longer supports such an exception. Rather, based on the IRS's experience over the past three decades, the Treasury Department and the IRS have determined that the favorable treatment of foreign goodwill and going concern value has interfered with the application of the general rule in section 367(d) that requires income recognition upon the outbound transfer of section 936 intangibles due to the inherent difficulty of distinguishing value attributable to goodwill and going concern value from value attributable to enumerated section 936 intangibles, coupled with taxpayer efforts to maximize the value allocated to goodwill and going concern value.

The Treasury Department and the IRS also observe that the 1984 legislative history explains that the 1984 amendments to section 367(d) were made in response to challenges the IRS faced in administering the prior regime. That regime required a taxpayer to clear its purpose for transferring property offshore with the IRS. See H.R. Rep. 98–432, pt. 2, at 1315. The 1984 reworking of section 367 was intended to promote administrability by making the analysis of outbound transfers more objective. Other passages from the legislative history show that the general purpose of the amendments to section 367 was to close ''serious loopholes,'' and that the 1984 revisions were intended to strengthen the application of that section. *Id.*

Accordingly, the Treasury Department and the IRS do not view the legislative history as mandating an exception for transfers of goodwill and going concern value developed by a foreign branch, or as indicating that Congress anticipated, or would have condoned, the extent of the claims regarding foreign goodwill and going concern value that the IRS has in fact encountered. To the contrary, the Treasury Department and the IRS have concluded that the statutory purpose of the income recognition provisions in section 367(d) is incompatible with the favorable treatment of foreign goodwill and going concern value reflected in the 1986 temporary regulations. In particular, taking into account the statutory, regulatory, and market developments since 1984 and the experience of the IRS in administering section 367(d) under the 1986 temporary regulations, the Treasury Department and the IRS have determined that, at this juncture, the approach most consistent with the intent of Congress in 1984, including the directive to use regulatory authority ''to provide for recognition in cases of transfers involving the potential of tax avoidance,'' is to remove the favorable treatment for foreign goodwill and going concern value in the 1986 temporary regulations.

The Treasury Department and the IRS also disagree with the notion expressed in comments that the proposed regulations inappropriately attempt to solve section 482 transfer pricing problems under the authority of section 367. Congress made clear in adding the commensurate with income language to both sections 367(d) and 482 in 1986 that the provisions are closely related, and it is within the authority of the Treasury Department and the IRS to consider valuation concerns in administering section 367. Section 1231(e)(1) and (2) of the Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085, 2562–3.

For these reasons, the Treasury Department and the IRS disagree with comments asserting that the Treasury Department and the IRS lack the authority to eliminate the favorable treatment that applied to foreign goodwill and going concern value under the 1986 temporary regulations.

C. Other Comments Suggesting That Some Favorable Treatment for Transfers of Foreign Goodwill and Going Concern Value Be Maintained

Several comments generally favored retaining both the nonrecognition treatment for foreign goodwill and going concern value and its current measurement as the residual value of a foreign business operation. Other comments, however, acknowledged the problems associated with the residual valuation approach but supported an exception determined on some other basis. Some of these comments included suggestions for other ways to define goodwill and going concern value and for determining the amount that should qualify for nonrecognition. The Treasury Department and the IRS have determined that none of the comments provided a sufficiently administrable approach that would reliably ensure that section 367 applies with respect to the full value of all section 936 intangibles.

1. Local Pressure To Incorporate; Industry-Based Exception

The proposed regulations specifically requested comments on a potential exception that would apply to situations where there is limited potential for abuse. As an example, the comment solicitation posited the incorporation, in response to regulatory pressure or compulsion, of a financial services business that previously had operated as a branch in another country. The Treasury Department and the IRS received several comments in response to this solicitation.

Several comments suggested that the final regulations provide an exception that would continue to permit favorable treatment of transfers of foreign

goodwill and going concern value that occur as a result of the incorporation of a branch in a country that exerts regulatory pressure (either implicit or explicit) upon the U.S. transferor to conduct its operations in that country in corporate form. According to these comments, the incorporation of a branch in these circumstances is not motivated by tax considerations but rather occurs in order to comply with local law or regulations.

The regulations under section 367 provide that certain property is deemed to be transferred for use in the active conduct of a trade or business outside of the United States when the transfer is either legally required by the local foreign government as a necessary condition of doing business or is compelled by a genuine threat of immediate expropriation by the local foreign government. Section 367 and the regulations thereunder do not, however, provide exceptions to the requirement to recognize income or gain when assets that are not eligible for the ATB exception, such as section 936 intangibles and assets described in section 367(a)(3)(B), are transferred in this circumstance. Accordingly, the policy of section 367 and the regulations thereunder is not to expand on the types of assets that are eligible for the ATB exception in this circumstance. Moreover, the mere fact that a taxpayer is compelled or pressured to incorporate its branch does not mean that the taxpayer has any less incentive to reduce the tax consequences of such incorporation by adopting the aggressive valuation positions that the proposed regulations were intended to prevent. Therefore, the final regulations do not provide a special exception to continue the favorable treatment of foreign goodwill and going concern value in this circumstance. Notably, some taxpayers that are pressured to incorporate branch operations in these circumstances can avoid being subject to section 367 by incorporating the branch using an eligible entity described in § 301.7701–2 that could elect to be treated as a disregarded entity for U.S. federal income tax purposes.

Several comments recommended an exception for transfers of foreign goodwill and going concern value by taxpayers in certain industries, such as banking and finance, life insurance, and industries that primarily provide services to third parties, asserting that such businesses do not possess the types of highly valuable intangibles about which they believe the Treasury Department and the IRS are concerned. The comments did not provide any basis, however, for the Treasury Department and the IRS to conclude that taxpayers in particular industries consistently lack valuable intangibles of the kind listed in section 936(h)(3)(B), even though the prevalence of specific types of intangibles may differ across industries. Additionally, the ability and incentive to allocate value away from other intangibles, such as trademarks, and toward goodwill or going concern value is not limited to particular industries. As a general matter, the Treasury Department and the IRS attempt, to the extent possible, to avoid issuing guidance based on industry classifications that are not clearly and closely tied to specific tax policy concerns. Accordingly, the final regulations do not provide any industry-specific exceptions.

Based on these comments, the Treasury Department and the IRS considered whether it would be possible to provide an exception for tax-free transfers of foreign goodwill and going concern value developed by a foreign branch that did not possess or otherwise benefit from the use of any highly valuable enumerated section 936 intangibles. If the absence of such highly valuable intangibles could be reliably determined, the concerns regarding the potential to attribute value away from such intangibles and toward goodwill and going concern value would be mitigated. However, such an exception would require the development and administration of standards to determine whether any enumerated section 936 intangible was highly valuable, an exercise that would be as difficult (and in many circumstance would be no different) than the exercise of distinguishing value attributable to foreign goodwill and going concern value from value attributable to other intangibles transferred together with it. Such an exception also would require a careful examination of the particular facts of a transferor's assets and business as a threshold matter to confirm that valuable enumerated section 936 intangibles are not made available for the benefit of the transferee foreign corporation, either through a separate but related transfer to the foreign corporation or through a service provided to the foreign corporation using such intangibles. Accordingly, the Treasury Department and the IRS did not adopt this potential exception in these final regulations.

2. Foreign Branch Exception

Several comments suggested maintaining the favorable treatment of foreign goodwill and going concern value in situations in which section 367 applies to the incorporation of a long-standing foreign branch or a branch that conducts an active foreign business operation. The Treasury Department and the IRS acknowledge that conditioning favorable treatment for foreign goodwill and going concern value on the presence of a robust foreign branch would increase the likelihood that the business at issue has substantive foreign operations. However, in situations where the exception would continue to apply, the requirement of a robust foreign branch would not address the potential for tax avoidance that motivated the proposed regulations when value must be allocated between foreign goodwill and going concern value, on the one hand, and enumerated section 936 intangibles, on the other hand. Thus, the final regulations do not adopt the comments suggesting an exception for goodwill and going concern value developed by a foreign branch that is subsequently incorporated because, when applicable, such an exception would not address the administrative difficulties in identifying and separately valuing the property that is and is not eligible for the exception, and therefore would be insufficient to prevent the potential for tax avoidance.

3. New Rules for Valuing Foreign Goodwill and Going Concern Value

Other comments suggested that the regulations provide new rules for determining foreign goodwill and going concern value, such that an exception for such transfers could be provided that would be less susceptible to the abuses described in the preamble to the proposed regulations. That is, the comments suggested determining goodwill and going concern value using an approach that differs from that in existing § 1.367(a)–1T(d)(5)(iii), which treats it as the residual after other intangibles are valued.

Several of these comments suggested determining foreign goodwill and going concern value by classifying intangibles as routine and non-routine and permitting value attributable to routine intangibles to be transferred tax-free under an exception. One comment asserted that goodwill is relatively easy to value as compared to certain enumerated section 936 intangibles but did not explain why or how goodwill is more easily valued or how to reliably allocate value between goodwill and enumerated section 936 intangibles. Another comment asserted that goodwill can be valued based on the premise that it is the kind of asset that enables an existing business to produce ''routine'' or ''normal'' operating profits

or cash flow during the period that a new business would be assembling its assets and workforce and attracting a customer base, but the comment did not explain how to determine ''routine'' or ''normal'' operating profits.

Another comment recommended determining foreign goodwill and going concern value using a formulaic approach based on sales and general and administrative expenses, asserting that routine expenses for operational costs and compensation are closely associated with the business activities that give rise to goodwill and going concern value. The comment did not provide any support for this premise. As a general matter, cost-based methods (in comparison with market-based and income-based methods) are not a reliable means of valuing intangible property because the value of intangible property does not necessarily bear any predictable relationship to the costs of developing the property. The comment suggesting a cost-based approach did not demonstrate that determining goodwill and going concern value in the section 367(d) context is a situation where costs are a reliable measure of value (regardless of whether goodwill and going concern value are section 936(h)(3)(B) intangibles). Accordingly, the Treasury Department and the IRS have determined that a rule that determined foreign goodwill and going concern value based on certain expenses would be inappropriate.

Another comment proposed, for branches incorporated in a jurisdiction with which the United States has an income tax treaty in effect, using the earnings before interest, taxes, depreciation, and amortization of the branch as reported to foreign tax authorities as reliable data on which to base a valuation. An exception based on information reported to a foreign country's tax authority, which may be based on that jurisdiction's generally accepted accounting standards, does not address the concerns expressed by the Treasury Department and the IRS in the preamble to the proposed regulations. Most significantly, the comment does not explain how this information would be useful in determining the value of foreign goodwill and going concern value or distinguishing value attributable to enumerated section 936 intangibles from that of other property, nor have the Treasury Department and the IRS been able to identify how it would be useful. Accordingly, this recommendation has not been adopted.

In summary, none of the proposed approaches for more directly valuing foreign goodwill and going concern value offer a principled and administrable basis for allocating value between foreign goodwill and going concern value that would be subject to an exception and other intangibles that would not. The Treasury Department and the IRS therefore concluded that the proposed approaches would not provide a meaningful improvement over the residual value approach in the 1986 temporary regulations as a conceptual or administrative matter.

4. Formulaic Caps on Foreign Goodwill and Going Concern Value

Several comments suggested that the favorable treatment for transfers of foreign goodwill and going concern value could be maintained while addressing the concerns that prompted the issuance of the proposed regulations by capping the amount that can qualify for the exception, either on a non-rebuttable basis or in the absence of a ruling. For example, one comment suggested that the excepted amount should not exceed 25 percent of the branch's net enterprise value, unless a ruling is obtained from the IRS. The comment asserted that 25 percent represents a modest portion of a branch's value that is likely to be attributable to branch goodwill and going concern value. Another comment suggested that the excepted amount should not exceed 50 percent of the total value of the assets transferred to the foreign corporation. Although such formulaic caps would limit the potential tax avoidance from improperly attributing value from enumerated section 936 intangibles to foreign goodwill and going concern value that is eligible for an exception, the amount excepted under such an approach would still potentially reflect value properly attributable to enumerated section 936 intangibles. That is, with respect to amounts claimed below the cap, a formulaic cap would not relieve the IRS of the need to distinguish foreign goodwill and going concern value from enumerated section 936 intangibles, a key challenge that motivated the approach of the proposed regulations. Moreover, the Treasury Department and the IRS have determined that the discretionary ruling practice proposed by one comment would require an onerous commitment of IRS resources (which the comment acknowledged are constrained), and, without detailed procedures for both identifying and valuing foreign goodwill and going concern value, would simply accelerate the disputes that occur under the 1986 temporary regulations. As a result, the final regulations do not adopt the recommendations to use a formulaic cap to limit the amount of foreign goodwill and going concern value.

5. Professional Services Exception

One comment stated that U.S. citizens may conduct professional services outside the United States as sole practitioners, or in partnership with other practitioners, and observed that the incorporation of such a business would entail a section 351 contribution subject to section 367 (assuming the transferee entity was classified as a corporation for U.S. federal income tax purposes). According to the comment, because any goodwill in such a scenario would relate to foreign customers and a foreign business or professional license, there could be no abuse warranting taxation under section 367.

The Treasury Department and the IRS do not agree that the outbound transfer of value developed in such cases will necessarily not result in abuse of the U.S. tax system. The potential for abuse in a transfer subject to section 367 arises not just from the possibility that value associated with U.S. customers would be denominated as foreign goodwill, but also from the fundamental difficulty in reliably distinguishing value attributable to enumerated section 936 intangibles from value attributable to other intangibles, an issue that is no different in the professional services context. Therefore, the final regulations do not adopt this comment.

6. Joint Venture Exception

One comment proposed maintaining the favorable treatment of foreign goodwill and going concern value for transfers to joint venture companies, particularly cases in which the U.S. transferor is going into business with one or more unrelated foreign parties (third parties) and in which the U.S. transferor's interest in the joint venture is equal to or less than 50 percent. According to the comment, the U.S. transferor in this situation has a financial incentive to segregate its intangibles contributed to the joint venture from its other property. The presence of a third party, however, would not necessarily reduce the U.S. transferor's incentive to attribute value to foreign goodwill and going concern value, rather than to enumerated section 936 intangibles, in order to minimize the tax consequences of the transfer, since such a distinction may be irrelevant to the third party. Accordingly, the final regulations do not adopt this proposal.

D. Classifying Foreign Goodwill and Going Concern Value as Subject to Section 367(a) or (d)

Several comments requested that the Treasury Department and the IRS address whether goodwill and going concern value should be characterized as a section 936(h)(3)(B) intangible, and thus subject to section 367(d), or instead as property subject to section 367(a). Comments also requested that the regulations provide certainty to taxpayers that have taken the position that goodwill and going concern value is not described in section 936(h)(3)(B) by providing that such taxpayers will be permitted to treat goodwill and going concern value as property subject to section 367(a) rather than section 367(d).

As discussed in the preamble to the proposed regulations, the Treasury Department and the IRS acknowledge that taxpayers have taken different positions regarding the scope of section 936(h)(3)(B) and that the issue is more significant following the elimination of the favorable treatment for foreign goodwill and going concern value. Any enumerated section 936 intangible, and any item similar to such specifically enumerated intangibles, is subject to the regime provided by section 367(d). The Treasury Department and the IRS have determined that it would be inconsistent with the policy underlying section 367(d) to permit intangible property that is described in section 936(h)(3)(B) to be subject to section 367(a). Accordingly, the Treasury Department and the IRS have determined that it is appropriate to retain the approach provided in the proposed regulations, which allows taxpayers to apply section 367(d) to certain property that otherwise would be taxed under section 367(a) but which continues to require taxpayers to apply section 367(d) to all property described in section 936(h)(3)(B). Because the identification of items that are neither explicitly listed in section 936(h)(3)(B)(i) through (v) nor explicitly listed as potentially qualifying for the ATB exception generally will require a case-by-case functional and factual analysis, the final regulations do not address the characterization of such items as similar items (within the meaning of section 936(h)(3)(B)(vi)) or as something else. In general, potential rules under section 367 for identifying and valuing transferred property are beyond the scope of these final regulations.

II. Useful Life

The proposed regulations eliminated the 20-year limitation on useful life for intangible property subject to section 367(d) that was included in § 1.367(d)–1T(c)(3), because of concerns that the limitation results in less than all of the income attributable to transferred intangible property being taken into account by the U.S. transferor. In the preamble to the proposed regulations, the Treasury Department and the IRS solicited comments on how to simplify the administration of section 367(d) inclusions for property with a very long useful life in the absence of the 20-year limitation. In response to this comment solicitation, several comments requested that the final regulations restore the 20-year limitation on useful life because it promotes administrability for both taxpayers and the IRS.

After considering the comments received, the Treasury Department and the IRS agree that a 20-year limitation on inclusions may promote administrability for both taxpayers and the IRS in cases where the useful life of the transferred property is indefinite or is reasonably anticipated to exceed twenty years. Accordingly, in such cases, the final regulations provide that taxpayers may, in the year of transfer, choose to take into account section 367(d) inclusions only during the 20-year period beginning with the first year in which the U.S. transferor takes into account income pursuant to section 367(d). However, the Treasury Department and the IRS have determined that this optional limitation should not affect the present value of all amounts included by the taxpayer under section 367(d). Accordingly, the final regulations specifically require a taxpayer that chooses to limit section 367(d) inclusions to a 20-year period to include, during that period, amounts that reasonably reflect amounts that, in the absence of the limitation, would be required to be included over the useful life of the transferred property following the end of the 20-year period. This requirement is consistent with the requirement in section 367(d) to include amounts that are commensurate with the income attributable to the transferred intangible during its full useful life, without limitation. The requirement of the final regulations that inclusions during the limited 20-year period begin in the first year in which in which the U.S. transferor takes into account income pursuant to section 367(d) reflects the possibility of delays between the year the intangible property is transferred and the first year in which exploitation of the transferred property results in taxable income being earned by the transferee and included under section 367(d) by the transferor.

One comment also suggested that the IRS be precluded from making commensurate-with-income adjustments for taxable years beginning more than 20 years after the outbound transfer. In response to this comment, the final regulations provide that, if a taxpayer chooses to limit inclusions under section 367(d) to a 20-year period, no adjustments will be made for taxable years beginning after the conclusion of the 20-year period. Thus, after the statute of limitations expires for taxable years during the 20-year period, a taxpayer will have no further section 367(d) inclusions as a result of the Commissioner's examination of taxable years that begin after the end of the 20-year period. However, consistent with the commensurate-with-income principle, for purposes of determining whether income inclusions during the 20-year period are commensurate with the income attributable to the transferred property, and whether adjustments should be made for taxable years during that period while the statute of limitations for such taxable years is open, the Commissioner may take into account information with respect to taxable years after that period, such as the income attributable to the transferred property during those later years.

The final regulations revise the definition of useful life to provide that useful life includes the entire period during which exploitation of the transferred intangible property is reasonably anticipated to affect the determination of taxable income, in order to appropriately account for the fact that exploitation of intangible property can result in both revenue increases and cost decreases. A comment asserted that including use in subsequently developed intangibles within the useful life of the transferred intangible property would be too difficult to administer and was not consistent with the arm's length standard. The Treasury Department and the IRS disagree with this comment. The value of many types of intangible property is derived not only from use of the intangible property in its present form, but also from its use in further development of the next generation of that intangible and other property. For example, if a software developer were to sell all of its copyright rights in its software to an unrelated party, and the copyright rights are expected to derive value both from the exclusive right to use the current generation computer code to make and sell current generation

software products and from the exclusive right to use the current generation code in the development of other versions of the software, which will then be used to make and sell future generation software products, the software developer would expect to be compensated for the latter right. That is, if the software has value in developing a future generation of products, the software developer would not ignore the value of the use of the software in future research and development and hand over those rights free of charge, and an uncontrolled purchaser would be willing to compensate the developer to obtain such rights.

III. Applicability Date

Several comments requested that the final regulations apply to transfers occurring after their date of publication, and not relate back to the date the proposed regulations were issued. These comments asserted that the proposed regulations change long-standing law in a way that would prejudice taxpayers that had arranged their business operations based on the 1986 temporary regulations. Others speculated that the final regulations might deviate from the proposed regulations to such an extent that substantial confusion would result for taxpayers attempting to determine their tax results in the interim period before the final regulations were published. Finally, one comment asserted that an applicability date relating back to the proposed regulations would violate the Administrative Procedure Act (APA), specifically 5 U.S.C. 553, which provides that the effective date of certain final regulations must be at least 30 days after their date of publication.

After considering these comments, the Treasury Department and the IRS have determined that the proposed applicability date, under which the final regulations would apply to transfers occurring on or after September 14, 2015, should be retained. The proposed regulations were issued to curtail the potential for abuse that exists under the 1986 temporary regulations from treating value that should be attributed to enumerated section 936 intangibles instead as exempt foreign goodwill or going concern value. The proposed effective date was intended to prevent taxpayers from using the time while the proposed regulations were pending to accelerate transfers subject to section 367 in order to take abusive positions under the 1986 temporary regulations before the finalization of the proposed regulations.

The Treasury Department and the IRS have statutory authority to issue regulations applicable at least as of the date the proposed regulations were filed with the **Federal Register**. The pre-1996 version of section 7805(b)—which governs regulations related to statutory provisions enacted before July 30, 1996, such as section 367—provides express retroactive rulemaking authority by stating that the Secretary may prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect. Section 7805(b) (1995). Because section 7805(b) is the more specific statute, it controls over the general notice requirements of 5 U.S.C. 553. See, for example, *Redhouse* v. *Commissioner,* 728 F.2d 1249, 1253 (9th Cir. 1984); *Wing* v. *Commissioner,* 81 T.C. 17, 28–30 & n.17 (1983).

Finally, the Treasury Department and the IRS disagree with the comment that differences between the proposed and final regulations may create confusion. The final regulations are a logical outgrowth of the proposed regulations in light of the comments received and their consideration by the Treasury Department and the IRS. In particular, the final regulations do not differ from the proposed regulations with respect to the elimination of the favorable treatment for transfers of foreign goodwill and going concern value. Furthermore, a transfer of property that is subject to recognition treatment under section 367 under the final regulations would also have been subject to such treatment under section 367 under the proposed regulations.

For these reasons, the final regulations generally apply to transfers occurring on or after September 14, 2015, the date the proposed regulations were filed with the **Federal Register**, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–2 that are filed on or after September 14, 2015.

IV. Qualification of Property Denominated in Foreign Currency for the ATB Exception

Although section 367(a)(3)(B)(iii) provides that the ATB exception does not apply, and therefore that section 367(a)(1) applies, to foreign currency or other property denominated in foreign currency, current § 1.367(a)–5T(d)(2) generally provides that section 367(a)(1) nonetheless does not apply to certain transfers of property denominated in the currency of the country in which the transferee foreign corporation is organized. The proposed regulations eliminated this regulatory exception from the general rule in section 367(a)(3)(B)(iii) that turns off the ATB exception for such property. One comment recommended clarifying the regulations under section 367(a) by adopting the language and concepts reflected in the changes to the foreign currency rules in subpart J that were made after the publication of the 1986 temporary regulations. In response to this comment, § 1.367(a)–2(c)(3) of the final regulations, which corresponds to existing § 1.367(a)–5T(d)(2), reflects amendments that increase consistency with the rules in sections 987 and 988. In particular, the terms ''foreign currency'' and ''property denominated in foreign currency'' are no longer used. Rather, proposed § 1.367(a)–2(c)(3) is revised to refer to nonfunctional currency and other property that gives rise to a section 988 transaction of the taxpayer described in section 988(c)(1)(B), or that would give rise to such a section 988 transaction if it were acquired, accrued, or entered into directly by the taxpayer. The Treasury Department and the IRS consider that these modifications do not substantially change the scope of property subject to the rule at § 1.367(a)–5T(d)(2).

V. Other Issues

Other comments suggested that regulations address many outstanding issues in the context of section 367 that were not addressed in the proposed regulations. These suggestions include guidance to address the following topics: (i) The valuation of intangibles subject to section 367(d) and the forms that deemed payments should take, including guidance providing parity with the section 482 form-of-payment rules; (ii) whether a receivable is created upon an audit-related adjustment; (iii) the tax basis consequences under section 367(d), including how section 367(d) applies to intangibles subject to the section 197 anti-churning rules; (iv) coordination of the general rules and disposition rules in section 367(d); (v) issues raised in connection with Notice 2012–39 (2012–31 IRB 95); (vi) the definition of ''property'' for purposes of section 367; and (vii) the subsequent transfer rules under the ATB exception.

The Treasury Department and the IRS generally agree that additional guidance under section 367(a) and (d) is desirable and would benefit both taxpayers and the government. However, these issues are beyond the scope of this project. For example, while the Treasury Department and the IRS are aware that there is uncertainty regarding the application of the subsequent transfer rules to transactions involving hybrid partnerships, the Treasury Department and the IRS have determined that transactions involving partnerships merit a more holistic consideration and

that this regulation package is not the appropriate vehicle to address the issue. Consequently, the regulations finalize the subsequent transfer rules in § 1.367(a)–2T(c) (located in § 1.367(a)–2(g) of these final regulations), but the Treasury Department and the IRS expect those rules will be amended after a more detailed consideration of transactions involving partnerships.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It is hereby certified that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This certification is based on the fact that the regulations under section 367(a) and (d) simplify existing regulations, and the regulations under section 6038B make relatively minor changes to existing information reporting requirements. Moreover, these regulations primarily will affect large domestic corporations filing consolidated returns. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business. No comments were received.

Drafting Information

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

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

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

Section 1.367(d)–1 also issued under 26 U.S.C. 367(d). * * *

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■ **Par. 2.** Section 1.367(a)–0 is added to read as follows:

§ 1.367(a)–0 Table of contents.

This section lists the paragraphs contained in §§ 1.367(a)–1 through 1.367(a)–8.

§ 1.367(a)–1 Transfers to foreign corporations subject to section 367(a): In general.

(a) Scope.
(b) General rules.
(1) Foreign corporation not considered a corporation for purposes of certain transfers.
(2) Cases in which foreign corporate status is not disregarded.
(3) Determination of value.
(4) In general.
(5) Treatment of certain property as subject to section 367(d).
(c) [Reserved].
(d) Definitions.
(1) United States person.
(2) Foreign corporation.
(3) Transfer.
(4) Property.
(5) Intangible property.
(6) Operating intangibles.
(e) Close of taxable year in certain section 368(a)(1)(F) reorganizations.
(f) Exchanges under sections 354(a) and 361(a) in certain section 368(a)(1)(F) reorganizations.
(1) Rule.
(2) Rule applies regardless of whether a continuance under applicable law.
(g) Effective/applicability dates.

§ 1.367(a)–2 Exceptions for transfers of property for use in the active conduct of a trade or business.

(a) Scope and general rule.
(1) Scope.
(2) General rule.
(b) Eligible property.
(c) Exception for certain property.
(1) Inventory.
(2) Installment obligations, etc.
(3) Nonfunctional currency, etc.
(4) Certain leased tangible property.
(d) Active conduct of a trade or business outside the United States.
(1) In general.
(2) Trade or business.
(3) Active conduct.
(4) Outside of the United States.
(5) Use in the trade or business.
(6) Active leasing and licensing.
(e) Special rules for certain property to be leased.
(1) Leasing business of the foreign corporation.
(2) De minimis leasing by the foreign corporation.
(3) Aircraft and vessels leased in foreign commerce.
(f) Special rules for oil and gas working interests.
(1) In general.
(2) Active use of working interest.
(3) Start-up operations.
(4) Other applicable rules.
(g) Property retransferred by the foreign corporation.
(1) General rule.
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(h) Compulsory transfers of property.
(i) [Reserved].
(j) Failure to comply with reporting requirements of section 6038B.
(1) Failure to comply.
(2) Relief for certain failures to comply that are not willful.
(k) Effective/applicability dates.
(1) In general.
(2) Foreign currency exception.

§ 1.367(a)–3 Treatment of transfers of stock or securities to foreign corporations.

(a) In general.
(1) Overview.
(2) Exceptions for certain exchanges of stock or securities.
(3) Cross-references.
(b) Transfers of stock or securities of foreign corporations.
(1) General rule.
(2) Certain transfers subject to sections 367(a) and (b).
(c) Transfers of stock or securities of domestic corporations.
(1) General rule.
(2) Ownership presumption.
(3) Active trade or business test.
(4) Special rules.
(5) Definitions.
(6) Reporting requirements of U.S. target company.
(7) Ownership statements.
(8) Certain transfers in connection with performance of services.
(9) Private letter ruling option.
(10) Examples.
(11) Effective date.
(d) Indirect stock transfers in certain nonrecognition transfers.
(1) In general.
(2) Special rules for indirect transfers.
(3) Examples.
(e) [Reserved].
(f) Failure to file statements.
(1) Failure to file.
(2) Relief for certain failures to file that are not willful.
(g) Effective/applicability dates.
(1) Rules of applicability.
(2) Election.
(h) Former 10-year gain recognition agreements.
(i) [Reserved].
(j) Transition rules regarding certain transfers of domestic or foreign stock or securities after December 16, 1987, and prior to July 20, 1998.
(1) Scope.
(2) Transfers of domestic or foreign stock or securities: Additional substantive rules.
(k) [Reserved].

§ 1.367(a)–4 Special rule applicable to U.S. depreciated property.

(a) Depreciated property used in the United States.
(1) In general.
(2) U.S. depreciated property.
(3) Property used within and without the United States.
(b) Effective/applicability dates.

§ 1.367(a)–5 [Reserved].

§ 1.367(a)–6 Transfer of foreign branch with previously deducted losses.

(a) through (b)(1) [Reserved].
(2) No active conduct exception.
(c)(1) [Reserved].
(2) Gain limitation.

(3) [Reserved].
(4) Transfers of certain intangible property.
(d) through (i) [Reserved].
(j) Effective/applicability dates.

§ 1.367(a)–7 Outbound transfers of property described in section 361(a) or (b).

(a) Scope and purpose.
(b) General rule.
(1) Nonrecognition exchanges enumerated in section 367(a)(1).
(2) Nonrecognition exchanges not enumerated in section 367(a)(1).
(c) Elective exception.
(1) Control.
(2) Gain recognition.
(3) Basis adjustments required for control group members.
(4) Agreement to amend or file a U.S. income tax return.
(5) Election and reporting requirements.
(d) Section 361 exchange followed by successive distributions to which section 355 applies.
(e) Other rules.
(1) Section 367(a) property with respect to which gain is recognized.
(2) Relief for certain failures to comply that are not willful.
(3) Anti-abuse rule.
(4) Certain income inclusions under § 1.367(b)–4.
(5) Certain gain under § 1.367(a)–6.
(f) Definitions.
(g) Examples.
(h) Applicable cross-references.
(i) [Reserved].
(j) Effective/applicability dates.
(1) In general.
(2) Section 367(d) property.

§ 1.367(a)–8 Gain recognition agreement requirements.

(a) Scope.
(b) Definitions and special rules.
(1) Definitions.
(2) Special rules.
(c) Gain recognition agreement.
(1) Terms of agreement.
(2) Content of gain recognition agreement.
(3) Description of transferred stock or securities and other information.
(4) Basis adjustments for gain recognized.
(5) Terms and conditions of a new gain recognition agreement.
(6) Cross-reference.
(d) Filing requirements.
(1) General rule.
(2) Special requirements.
(3) Common parent as agent for U.S. transferor.
(e) Signatory.
(1) General rule.
(2) Signature requirement.
(f) Extension of period of limitations on assessments of tax.
(1) General rule.
(2) New gain recognition agreement.
(g) Annual certification.
(h) Use of security.
(i) [Reserved].
(j) Triggering events.
(1) Disposition of transferred stock or securities.
(2) Disposition of substantially all of the assets of the transferred corporation.
(3) Disposition of certain partnership interests.
(4) Disposition of stock of the transferee foreign corporation.
(5) Deconsolidation.
(6) Consolidation.
(7) Death of an individual; trust or estate ceases to exist.
(8) Failure to comply.
(9) Gain recognition agreement filed in connection with indirect stock transfers and certain triangular asset reorganizations.
(10) Gain recognition agreement filed pursuant to paragraph (k)(14) of this section.
(k) Triggering event exceptions.
(1) Transfers of stock of the transferee foreign corporation to a corporation or partnership.
(2) Complete liquidation of U.S. transferor under sections 332 and 337.
(3) Transfers of transferred stock or securities to a corporation or partnership.
(4) Transfers of substantially all of the assets of the transferred corporation.
(5) Recapitalizations and section 1036 exchanges.
(6) Certain asset reorganizations.
(7) Certain triangular reorganizations.
(8) Complete liquidation of transferred corporation.
(9) Death of U.S. transferor.
(10) Deconsolidation.
(11) Consolidation.
(12) Intercompany transactions.
(13) Deemed asset sales pursuant to section 338(g) elections.
(14) Other dispositions or events.
(l) [Reserved].
(m) Receipt of boot in nonrecognition transactions.
(1) Dispositions of transferred stock or securities.
(2) Dispositions of assets of transferred corporation.
(n) Special rules for distributions with respect to stock.
(1) Certain dividend equivalent redemptions treated as dispositions.
(2) Gain recognized under section 301(c)(3).
(o) Dispositions or other events that terminate or reduce the amount of gain subject to the gain recognition agreement.
(1) Taxable disposition of stock of the transferee foreign corporation.
(2) Gain recognized in connection with certain nonrecognition transactions.
(3) Gain recognized under section 301(c)(3).
(4) Dispositions of substantially all of the assets of a domestic transferred corporation.
(5) Certain distributions or transfers of transferred stock or securities to U.S. persons.
(6) Dispositions or other event following certain intercompany transactions.
(7) Expropriations under foreign law.
(p) Relief for certain failures to file or failures to comply that are not willful.
(1) In general.
(2) Procedures for establishing that a failure to file or failure to comply was not willful.
(3) Examples.
(q) Examples.
(1) Presumed facts and references.
(2) Examples.
(r) Effective/applicability date.
(1) General rule.
(2) Applicability to transfers occurring before March 13, 2009.
(3) Applicability to requests for relief submitted before November 19, 2014.

■ **Par. 3.** Section 1.367(a)–1 is revised to read as follows:

§ 1.367(a)–1 Transfers to foreign corporations subject to section 367(a): In general.

(a) *Scope.* Section 367(a)(1) provides the general rule concerning certain transfers of property by a United States person (referred to at times in this section as the ''U.S. person'' or ''U.S. transferor'') to a foreign corporation. Paragraph (b) of this section provides general rules explaining the effect of section 367(a)(1). Paragraph (c) of this section describes transfers of property that are described in section 367(a)(1). Paragraph (d) of this section provides definitions that apply for purposes of sections 367(a) and (d) and the regulations thereunder. Paragraphs (e) and (f) of this section provide rules that apply to certain reorganizations described in section 368(a)(1)(F). Paragraph (g) of this section provides dates of applicability. For rules concerning the reporting requirements under section 6038B for certain transfers of property to a foreign corporation, see § 1.6038B–1.

(b) *General rules*—(1) *Foreign corporation not considered a corporation for purposes of certain transfers.* If a U.S. person transfers property to a foreign corporation in connection with an exchange described in section 351, 354, 356, or 361, then, pursuant to section 367(a)(1), the foreign corporation will not be considered to be a corporation for purposes of determining the extent to which gain is recognized on the transfer. Section 367(a)(1) denies nonrecognition treatment only to transfers of items of property on which gain is realized. Thus, the amount of gain recognized because of section 367(a)(1) is unaffected by the transfer of items of property on which loss is realized (but not recognized).

(2) *Cases in which foreign corporate status is not disregarded.* For circumstances in which section 367(a)(1) does not apply to a U.S. transferor's transfer of property to a foreign corporation, and thus the foreign corporation is considered to be a corporation, see §§ 1.367(a)–2, 1.367(a)–3, and 1.367(a)–7.

(3) *Determination of value.* In cases in which a U.S. transferor's transfer of property to a foreign corporation constitutes a controlled transaction as defined in § 1.482–1(i)(8), the value of

the property transferred is determined in accordance with section 482 and the regulations thereunder.

(4) *Character, source, and adjustments*—(i) *In general.* If a U.S. person is required to recognize gain under section 367 upon a transfer of property to a foreign corporation, then—

(A) The character and source of such gain are determined as if the property had been disposed of in a taxable exchange with the transferee foreign corporation (unless otherwise provided by regulation); and

(B) Appropriate adjustments to earnings and profits, basis, and other affected items will be made according to otherwise applicable rules, taking into account the gain recognized under section 367(a)(1). For purposes of applying section 362, the foreign corporation's basis in the property received is increased by the amount of gain recognized by the U.S. transferor under section 367(a) and the regulations issued pursuant to that section. To the extent the regulations provide that the U.S. transferor recognizes gain with respect to a particular item of property, the foreign corporation increases its basis in that item of property by the amount of such gain recognized. For example, §§ 1.367(a)–2, 1.367(a)–3, and 1.367(a)–4 provide that gain is recognized with respect to particular items of property. To the extent the regulations do not provide that gain recognized by the U.S. transferor is with respect to a particular item of property, such gain is treated as recognized with respect to items of property subject to section 367(a) in proportion to the U.S. transferor's gain realized in such property, after taking into account gain recognized with respect to particular items of property transferred under any other provision of section 367(a). For example, § 1.367(a)–6 provides that branch losses must be recaptured by the recognition of gain realized on the transfer but does not associate the gain with particular items of property. See also § 1.367(a)–1(c)(3) for rules concerning transfers by partnerships or of partnership interests.

(C) The transfer will not be recharacterized for U.S. Federal tax purposes solely because the U.S. person recognizes gain in connection with the transfer under section 367(a)(1). For example, if a U.S. person transfers appreciated stock or securities to a foreign corporation in an exchange described in section 351, the transfer is not recharacterized as other than an exchange described in section 351 solely because the U.S. person recognizes gain in the transfer under section 367(a)(1).

(ii) *Example.* The rules of this paragraph (b)(4) are illustrated by the following example.

Example. Domestic corporation DC transfers inventory with a fair market value of $1 million and adjusted basis of $800,000 to foreign corporation FC in exchange for stock of FC that is described in section 351(a). Title passes within the United States. Pursuant to section 367(a), DC is required to recognize gain of $200,000 upon the transfer. Under the rule of this paragraph (b)(4), the gain is treated as ordinary income (sections 1201 and 1221) from sources within the United States (section 861) arising from a taxable exchange with FC. Appropriate adjustments to earnings and profits, basis, etc., will be made as if the transfer were subject to section 351. Thus, for example, DC's basis in the FC stock received, and FC's basis in the transferred inventory, will each be increased by the $200,000 gain recognized by DC, pursuant to sections 358(a)(1) and 362(a), respectively.

(5) *Treatment of certain property as subject to section 367(d).* A U.S. transferor may apply section 367(d) and § 1.367(d)–1, rather than section 367(a) and the regulations thereunder, to a transfer of property to a foreign corporation that otherwise would be subject to section 367(a), provided that the property is not eligible property, as defined in § 1.367(a)–2(b) but determined without regard to § 1.367(a)–2(c). A U.S. transferor and any other U.S. transferor that is related (within the meaning of section 267(b) or 707(b)(1)) to the U.S. transferor must consistently apply this paragraph (b)(5) to all property described in this paragraph (b)(5) that is transferred to one or more foreign corporations pursuant to a plan. A U.S. transferor applies the provisions of this paragraph (b)(5) in the form and manner set forth in § 1.6038B–1(d)(1)(iv) and (v).

(c)(1) through (c)(3)(i) reserved. For further guidance, see § 1.367(a)–1T(c)(1) through (c)(3)(i).

(ii) *Transfer of partnership interest treated as transfer of proportionate share of assets*—(A) *In general.* If a U.S. person transfers an interest as a partner in a partnership (whether foreign or domestic) in an exchange described in section 367(a)(1), then that person is treated as having transferred a proportionate share of the property of the partnership in an exchange described in section 367(a)(1). Accordingly, the applicability of the exception to section 367(a)(1) provided in § 1.367(a)–2 is determined with reference to the property of the partnership rather than the partnership interest itself. A U.S. person's proportionate share of partnership property is determined under the rules and principles of sections 701 through 761 and the regulations thereunder.

(c)(3)(i)(A) *Example* through (7) reserved. For further guidance, see § 1.367(a)–1T(c)(3)(i)(A) *Example* through (7).

(d) *Definitions.* The following definitions apply for purposes of sections 367(a) and (d) and the regulations thereunder.

(1) *United States person.* The term ''United States person'' includes those persons described in section 7701(a)(30). The term includes a citizen or resident of the United States, a domestic partnership, a domestic corporation, and any estate or trust other than a foreign estate or trust. (For definitions of these terms, see section 7701 and the regulations thereunder.) For purposes of this section, an individual with respect to whom an election has been made under section 6013(g) or (h) is considered to be a resident of the United States while such election is in effect. A nonresident alien or a foreign corporation will not be considered a United States person because of its actual or deemed conduct of a trade or business within the United States during a taxable year.

(2) *Foreign corporation.* The term ''foreign corporation'' has the meaning set forth in section 7701(a)(3) and (5) and § 301.7701–5.

(3) *Transfer.* For purposes of section 367 and regulations thereunder, the term ''transfer'' means any transaction that constitutes a transfer for purposes of section 332, 351, 354, 355, 356, or 361, as applicable. A person's entering into a cost sharing arrangement under § 1.482–7 or acquiring rights to intangible property under such an arrangement shall not be considered a transfer of property described in section 367(a)(1). See § 1.6038B–1T(b)(4) for the date on which the transfer is considered to be made.

(4) *Property.* For purposes of section 367 and the regulations thereunder, the term ''property'' means any item that constitutes property for purposes of section 351, 354, 355, 356, or 361, as applicable.

(5) *Intangible property.* The term ''intangible property'' means either property described in section 936(h)(3)(B) or property to which a U.S. person applies section 367(d) pursuant to paragraph (b)(5) of this section, but does not include property described in section 1221(a)(3) or a working interest in oil and gas property.

(6) *Operating intangibles.* An operating intangible is any property described in section 936(h)(3)(B) of a type not ordinarily licensed or otherwise transferred in transactions

between unrelated parties for consideration contingent upon the licensee's or transferee's use of the property. Examples of operating intangibles may include long-term purchase or supply contracts, surveys, studies, and customer lists.

(f) *Exchanges under sections 354(a) and 361(a) in certain section 368(a)(1)(F) reorganizations*—(1) *Rule.* In every reorganization under section 368(a)(1)(F), where the transferor corporation is a domestic corporation, and the acquiring corporation is a foreign corporation, there is considered to exist—

(i) A transfer of assets by the transferor corporation to the acquiring corporation under section 361(a) in exchange for stock (or stock and securities) of the acquiring corporation and the assumption by the acquiring corporation of the transferor corporation's liabilities;

(ii) A distribution of the stock (or stock and securities) of the acquiring corporation by the transferor corporation to the shareholders (or shareholders and security holders) of the transferor corporation; and

(iii) An exchange by the transferor corporation's shareholders (or shareholders and security holders) of their stock (or stock and securities) of the transferor corporation for stock (or stock and securities) of the acquiring corporation under section 354(a).

(2) *Rule applies regardless of whether a continuance under applicable law.* For purposes of paragraph (f)(1) of this section, it shall be immaterial that the applicable foreign or domestic law treats the acquiring corporation as a continuance of the transferor corporation.

(g) *Effective/applicability dates.* (1) through (3) [Reserved]. For further guidance, *see* § 1.367(a)–1T(g)(1) through (3).

(4) The rules in paragraphs (b)(4)(i)(B) and (b)(4)(i)(C) of this section apply to transfers occurring on or after April 18, 2013. For guidance with respect to paragraph (b)(4)(i)(B) of this section before April 18, 2013, see 26 CFR part 1 revised as of April 1, 2012. The rules in paragraph (e) of this section apply to transactions occurring on or after March 31, 1987. The rules in paragraph (f) of this section apply to transactions occurring on or after January 1, 1985.

(5) Paragraphs (a), (b)(1) through (b)(4)(i)(B), (b)(4)(ii) through (b)(5), (c)(3)(ii)(A), (d) introductory text through (d)(2), (d)(4) through (d)(6) of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§ 1.367(a)–1 and 1.367(a)–1T as contained in 26 CFR part 1 revised as of April 1, 2016.

§ 1.367(a)–1T [Amended]

■ **Par. 4.** Section 1.367(a)–1T is amended by removing and reserving paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(4)(i)(A), (b)(4)(ii), (c)(3)(ii)(A), (d) introductory text, (d)(1), (d)(2), (d)(4), and (d)(5), and adding and reserving new paragraphs (b)(5) and (d)(6).

■ **Par. 5.** Section 1.367(a)–2 is revised to read as follows:

§ 1.367(a)–2 Exceptions for transfers of property for use in the active conduct of a trade or business.

(a) *Scope and general rule*—(1) *Scope.* Paragraph (a)(2) of this section provides the general exception to section 367(a)(1) for certain property transferred for use in the active conduct of a trade or business. Paragraph (b) of this section describes property that is eligible for the exception provided in paragraph (a)(2) of this section. Paragraph (c) of this section describes property that is not eligible for the exception provided in paragraph (a)(2) of this section. Paragraph (d) of this section provides general rules, and paragraphs (e) through (h) of this section provide special rules, for determining whether property is used in the active conduct of a trade or business outside of the United States. Paragraph (i) of this section is reserved. Paragraph (j) of this section provides relief for certain failures to comply with the reporting requirements under paragraph (a)(2)(iii) of this section that are not willful. Paragraph (k) of this section provides dates of applicability. The rules of this section do not apply to a transfer of stock or securities in an exchange subject to § 1.367(a)–3.

(2) *General rule.* Except as otherwise provided in §§ 1.367(a)–4, 1.367(a)–6, and 1.367(a)–7, section 367(a)(1) does not apply to property transferred by a United States person (U.S. transferor) to a foreign corporation if—

(i) The property constitutes eligible property;

(ii) The property is transferred for use by the foreign corporation in the active conduct of a trade or business outside of the United States, as determined under paragraph (d), (e), (f), (g), or (h) of this section, as applicable; and

(iii) The U.S. transferor complies with the reporting requirements of section 6038B and the regulations thereunder.

(b) *Eligible property.* Except as provided in paragraph (c) of this section, eligible property means—

(1) Tangible property;

(2) A working interest in oil and gas property; and

(3) A financial asset. For purposes of this section, a financial asset is—

(i) A cash equivalent;

(ii) A security within the meaning of section 475(c)(2), without regard to the last sentence of section 475(c)(2) (referencing section 1256) and without regard to section 475(c)(4), but excluding an interest in a partnership;

(iii) A commodities position described in section 475(e)(2)(B), 475(e)(2)(C), or 475(e)(2)(D); and

(iv) A notional principal contract described in § 1.446–3(c)(1).

(c) *Exception for certain property.* Notwithstanding paragraph (b) of this section, property described in paragraph (c)(1), (2), (3), or (4) of this section does not constitute eligible property.

(1) *Inventory.* Stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business (including raw materials and supplies, partially completed goods, and finished products).

(2) *Installment obligations, etc.* Installment obligations, accounts receivable, or similar property, but only to the extent that the principal amount of any such obligation has not previously been included by the taxpayer in its taxable income.

(3) *Nonfunctional currency, etc.*—(i) *In general.* Property that gives rise to a section 988 transaction of the taxpayer described in section 988(c)(1)(A) through (C), without regard to section 988(c)(1)(D) and (E), or that would give rise to such a section 988 transaction if it were acquired, accrued, entered into, or disposed of directly by the taxpayer.

(ii) *Limitation of gain required to be recognized.* If section 367(a)(1) applies to a transfer of property described in paragraph (c)(3)(i) of this section, then the gain required to be recognized is limited to the gain realized as part of the same transaction upon the transfer of property described in paragraph (c)(3)(i) of this section, less any loss realized as part of the same transaction upon the transfer of property described in paragraph (c)(3)(i) of this section. This limitation applies in lieu of the rule in § 1.367(a)–1(b)(1). No loss is recognized with respect to property described in this paragraph (c)(3).

(4) *Certain leased tangible property.* Tangible property with respect to which the transferor is a lessor at the time of the transfer, unless either the foreign corporation is the lessee at the time of the transfer or the foreign corporation will lease the property to third persons.

(d) *Active conduct of a trade or business outside the United States*—(1) *In general.* Except as provided in paragraphs (e), (f), (g), and (h) of this section, to determine whether property is transferred for use by the foreign corporation in the active conduct of a trade or business outside of the United States, four factual determinations must be made:

(i) What is the trade or business of the foreign corporation (see paragraph (d)(2) of this section);

(ii) Do the activities of the foreign corporation constitute the active conduct of that trade or business (see paragraph (d)(3) of this section);

(iii) Is the trade or business conducted outside of the United States (see paragraph (d)(4) of this section); and

(iv) Is the transferred property used or held for use in the trade or business (see paragraph (d)(5) of this section)?

(2) *Trade or business.* Whether the activities of the foreign corporation constitute a trade or business is determined based on all the facts and circumstances. In general, a trade or business is a specific unified group of activities that constitute (or could constitute) an independent economic enterprise carried on for profit. For example, the activities of a foreign selling subsidiary could constitute a trade or business if they could be independently carried on for profit, even though the subsidiary acts exclusively on behalf of, and has operations fully integrated with, its parent corporation. To constitute a trade or business, a group of activities must ordinarily include every operation which forms a part of, or a step in, a process by which an enterprise may earn income or profit. In this regard, one or more of such activities may be carried on by independent contractors under the direct control of the foreign corporation. (However, see paragraph (d)(3) of this section.) The group of activities must ordinarily include the collection of income and the payment of expenses. If the activities of the foreign corporation do not constitute a trade or business, then the exception provided by this section does not apply, regardless of the level of activities carried on by the corporation. The following activities are not considered to constitute by themselves a trade or business for purposes of this section:

(i) Any activity giving rise to expenses that would be deductible only under section 212 if the activities were carried on by an individual; or

(ii) The holding for one's own account of investments in stock, securities, land, or other property, including casual sales thereof.

(3) *Active conduct.* Whether a trade or business is actively conducted by the foreign corporation is determined based on all the facts and circumstances. In general, a corporation actively conducts a trade or business only if the officers and employees of the corporation carry out substantial managerial and operational activities. A corporation may be engaged in the active conduct of a trade or business even though incidental activities of the trade or business are carried out on behalf of the corporation by independent contractors. In determining whether the officers and employees of the corporation carry out substantial managerial and operational activities, however, the activities of independent contractors are disregarded. On the other hand, the officers and employees of the corporation are considered to include the officers and employees of related entities who are made available to and supervised on a day-to-day basis by, and whose salaries are paid by (or reimbursed to the lending related entity by), the foreign corporation. See paragraph (d)(6) of this section for the standard that applies to determine whether a trade or business that produces rents or royalties is actively conducted. The rule of this paragraph (d)(3) is illustrated by the following example.

Example. X, a domestic corporation, and Y, a foreign corporation not related to X, transfer property to Z, a newly formed foreign corporation organized for the purpose of combining the research activities of X and Y. Z contracts all of its operational and research activities to Y for an arm's-length fee. Z's activities do not constitute the active conduct of a trade or business.

(4) *Outside of the United States.* Whether the foreign corporation conducts a trade or business outside of the United States is determined based on all the facts and circumstances. Generally, the primary managerial and operational activities of the trade or business must be conducted outside the United States and immediately after the transfer the transferred assets must be located outside the United States. Thus, the exception provided by this section would not apply to the transfer of the assets of a domestic business to a foreign corporation if the domestic business continued to operate in the United States after the transfer. In such a case, the primary operational activities of the business would continue to be conducted in the United States. Moreover, the transferred assets would be located in the United States. However, it is not necessary that every item of property transferred be used outside of the United States. As long as the primary managerial and operational activities of the trade or business are conducted outside of the United States and substantially all of the transferred assets are located outside the United States, incidental items of transferred property located in the United States may be considered to have been transferred for use in the active conduct of a trade or business outside of the United States.

(5) *Use in the trade or business.* Whether property is used or held for use by the foreign corporation in a trade or business is determined based on all the facts and circumstances. In general, property is used or held for use in the foreign corporation's trade or business if it is—

(i) Held for the principal purpose of promoting the present conduct of the trade or business;

(ii) Acquired and held in the ordinary course of the trade or business; or

(iii) Otherwise held in a direct relationship to the trade or business. Property is considered held in a direct relationship to a trade or business if it is held to meet the present needs of that trade or business and not its anticipated future needs. Thus, property will not be considered to be held in a direct relationship to a trade or business if it is held for the purpose of providing for future diversification into a new trade or business, future expansion of trade or business activities, future plant replacement, or future business contingencies.

(6) *Active leasing and licensing.* For purposes of paragraph (d)(3) of this section, whether a trade or business that produces rents or royalties is actively conducted is determined under the principles of section 954(c)(2)(A) and the regulations thereunder, but without regard to whether the rents or royalties are received from an unrelated party. See §§ 1.954–2(c) and (d).

(e) *Special rules for certain property to be leased*—(1) *Leasing business of the foreign corporation.* Except as otherwise provided in this paragraph (e), tangible property that will be leased to another person by the foreign corporation will be considered to be transferred for use by the foreign corporation in an active trade or business outside the United States only if—

(i) The foreign corporation's leasing of the property constitutes the active

conduct of a leasing business, as determined under paragraph (d)(6) of this section;

(ii) The lessee of the property is not expected to, and does not, use the property in the United States; and

(iii) The foreign corporation has a need for substantial investment in assets of the type transferred.

(2) *De minimis leasing by the foreign corporation.* Tangible property that will be leased to another person by the foreign corporation but that does not satisfy the conditions of paragraph (e)(1) of this section will, nevertheless, be considered to be transferred for use in the active conduct of a trade or business if either—

(i) The property transferred will be used by the foreign corporation in the active conduct of a trade or business but will be leased during occasional brief periods when the property would otherwise be idle, such as an airplane leased during periods of excess capacity; or

(ii) The property transferred is real property located outside the United States and—

(A) The property will be used primarily in the active conduct of a trade or business of the foreign corporation; and

(B) Not more than ten percent of the square footage of the property will be leased to others.

(3) *Aircraft and vessels leased in foreign commerce.* For purposes of satisfying paragraph (e)(1) of this section, an aircraft or vessel, including component parts such as an engine leased separately from the aircraft or vessel, that will be leased to another person by the foreign corporation will be considered to be transferred for use in the active conduct of a trade or business if—

(i) The employees of the foreign corporation perform substantial managerial and operational activities of leasing aircraft or vessels outside the United States; and

(ii) The leased property is predominantly used outside the United States, as determined under § 1.954–2(c)(2)(v).

(f) *Special rules for oil and gas working interests*—(1) *In general.* A working interest in oil and gas property will be considered to be transferred for use in the active conduct of a trade or business if—

(i) The transfer satisfies the conditions of paragraph (f)(2) or (f)(3) of this section;

(ii) At the time of the transfer, the foreign corporation has no intention to farm out or otherwise transfer any part of the transferred working interest; and

(iii) During the first three years after the transfer there are no farmouts or other transfers of any part of the transferred working interest as a result of which the foreign corporation retains less than a 50-percent share of the transferred working interest.

(2) *Active use of working interest.* A working interest in oil and gas property that satisfies the conditions in paragraphs (f)(1)(ii) and (iii) of this section will be considered to be transferred for use in the active conduct of a trade or business if—

(i) The U.S. transferor is regularly and substantially engaged in exploration for and extraction of minerals, either directly or through working interests in joint ventures, other than by reason of the property that is transferred;

(ii) The terms of the working interest transferred were actively negotiated among the joint venturers;

(iii) The working interest transferred constitutes at least a five percent working interest;

(iv) Before and at the time of the transfer, through its own employees or officers, the U.S. transferor was regularly and actively engaged in—

(A) Operating the working interest, or

(B) Analyzing technical data relating to the activities of the venture;

(v) Before and at the time of the transfer, through its own employees or officers, the U.S. transferor was regularly and actively involved in decision making with respect to the operations of the venture, including decisions relating to exploration, development, production, and marketing; and

(vi) After the transfer, the foreign corporation will for the foreseeable future satisfy the requirements of subparagraphs (iv) and (v) of this paragraph (f)(2).

(3) *Start-up operations.* A working interest in oil and gas property that satisfies the conditions in paragraphs (f)(1)(ii) and (iii) of this section but that does not satisfy all the requirements of paragraph (f)(2) of this section will, nevertheless, be considered to be transferred for use in the active conduct of a trade or business if—

(i) The working interest was acquired by the U.S. transferor immediately before the transfer and for the specific purpose of transferring it to the foreign corporation;

(ii) The requirements of paragraphs (f)(2)(ii) and (iii) of this section are satisfied; and

(iii) The foreign corporation will for the foreseeable future satisfy the requirements of paragraph (f)(2)(iv) and (v) of this section.

(4) *Other applicable rules.* A working interest in oil and gas property that is not described in paragraph (f)(1) of this section may nonetheless qualify for the exception to section 367(a)(1) contained in this section depending upon the facts and circumstances.

(g) *Property retransferred by the foreign corporation*—(1) *General rule.* Property will not be considered to be transferred for use in the active conduct of a trade or business outside of the United States if—

(i) At the time of the transfer, it is reasonable to believe that, in the reasonably foreseeable future, the foreign corporation will sell or otherwise dispose of any material portion of the property other than in the ordinary course of business; or

(ii) Except as provided in paragraph (g)(2) of this section, the foreign corporation receives the property in an exchange described in section 367(a)(1), and, as part of the same transaction, transfers the property to another person. For purposes of the preceding sentence, a subsequent transfer within six months of the initial transfer will be considered to be part of the same transaction, and a subsequent transfer more than six months after the initial transfer may be considered to be part of the same transaction under step-transaction principles.

(2) *Exception.* Notwithstanding paragraph (g)(1) of this section, the active conduct exception provided by this section shall apply to the initial transfer if—

(i) The initial transfer is followed by one or more subsequent transfers described in section 351 or 721; and

(ii) Each subsequent transferee is either a partnership in which the preceding transferor is a general partner or a corporation in which the preceding transferor owns common stock; and

(iii) The ultimate transferee uses the property in the active conduct of a trade or business outside the United States.

(h) *Compulsory transfers of property.* Property is presumed to be transferred for use in the active conduct of a trade or business outside of the United States, if—

(1) The property was previously in use in the country in which the foreign corporation is organized; and

(2) The transfer is either:

(i) Legally required by the foreign government as a necessary condition of doing business; or

(ii) Compelled by a genuine threat of immediate expropriation by the foreign government.

(i) [Reserved].

(j) *Failure to comply with reporting requirements of section 6038B*—(1)

Failure to comply. For purposes of the exception to the application of section 367(a)(1) provided in paragraph (a)(2) of this section, a failure to comply with the reporting requirements of section 6038B and the regulations thereunder (failure to comply) has the meaning set forth in § 1.6038B–1(f)(2).

(2) *Relief for certain failures to comply that are not willful*—(i) *In general.* A failure to comply described in paragraph (j)(1) of this section will be deemed not to have occurred for purposes of satisfying the requirements of this section if the taxpayer demonstrates that the failure was not willful using the procedure set forth in this paragraph (j)(2). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether a failure to comply was a willful failure will be determined by the Director of Field Operations, Cross Border Activities Practice Area, Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) based on all the facts and circumstances. The taxpayer must submit a request for relief and an explanation as provided in paragraph (j)(2)(ii)(A) of this section. Although a taxpayer whose failure to comply is determined not to be willful will not be subject to gain recognition under this section, the taxpayer will be subject to a penalty under section 6038B if the taxpayer fails to demonstrate that the failure was due to reasonable cause and not willful neglect. See § 1.6038B–1(b)(1) and (f). The determination of whether the failure to comply was willful under this section has no effect on any request for relief made under § 1.6038B–1(f).

(ii) *Procedures for establishing that a failure to comply was not willful*—(A) *Time and manner of submission.* A taxpayer's statement that the failure to comply was not willful will be considered only if, promptly after the taxpayer becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure to comply. The amended return must be filed with the Internal Revenue Service at the location where the taxpayer filed its original return. The taxpayer may submit a request for relief from the penalty under section 6038B as part of the same submission. See § 1.6038B–1(f).

(B) *Notice requirement.* In addition to the requirements of paragraph (j)(2)(ii)(A) of this section, the taxpayer must comply with the notice requirements of this paragraph (j)(2)(ii)(B). If any taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(3) For illustrations of the application of the willfulness standard of this paragraph (j), see the examples in § 1.367(a)–8(p)(3).

(4) Paragraph (j) applies to requests for relief submitted on or after November 19, 2014.

(k) *Effective/applicability dates*—(1) *In general.* Except as provided in paragraphs (j)(4) and (k)(2) of this section, the rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§ 1.367(a)–2, –2T, –4, –4T, –5, and –5T as contained in 26 CFR part 1 revised as of April 1, 2016.

(2) *Foreign currency exception.* Notwithstanding paragraph (c)(3)(i) of this section, § 1.367(a)–5T(d)(2) as contained in 26 CFR part 1 revised as of April 1, 2016, applies to transfers of property denominated in a foreign currency occurring before December 16, 2016, other than transfers occurring before that date resulting from entity classification elections made under § 301.7701–3 that are filed on or after that date.

§ 1.367(a)–2T [Removed]

■ **Par. 6.** Section 1.367(a)–2T is removed.

§ 1.367(a)–3 [Amended]

■ **Par. 7.** For each section listed in the following the table, remove the language in the ''Remove'' column and add in its place the language in the ''Add'' column.

Section	Remove	Add
§ 1.367(a)–3(a)(3), first sentence	§ 1.367(a)–1T(c)	§ 1.367(a)–1(c).
§ 1.367(a)–3(c)(3)(i)(A)	§ 1.367(a)–2T(b)(2) and (3)	§ 1.367(a)–2(d)(2), (3), and (4).
§ 1.367(a)–3(c)(3)(ii)(B), last sentence	§ 1.367(a)–2T(b)(2) and (3)	§ 1.367(a)–2(d)(2) and (3).
§ 1.367(a)–3(c)(4)(i), last sentence	§ 1.367(a)–1T(c)(3)	§ 1.367(a)–1(c)(3).
§ 1.367(a)–3(c)(5)(iv), first sentence	§ 1.367(a)–1T(d)(1)	§ 1.367(a)–1(d)(1).
§ 1.367(a)–3(d)(3) *Example 7A(ii),* penultimate sentence	§ 1.367(a)–2T(a)(2)	§ 1.367(a)–2(a)(2)(iii).
§ 1.367(a)–3(d)(3) *Example 13(i),* penultimate sentence	§ 1.367(a)–2T(c)(2)	§ 1.367(a)–2(g)(2).

■ **Par. 8.** Section 1.367(a)–4 is revised to read as follows:

§ 1.367(a)–4 Special rule applicable to U.S. depreciated property.

(a) *Depreciated property used in the United States*—(1) *In general.* A U.S. person that transfers U.S. depreciated property (as defined in paragraph (a)(2) of this section) to a foreign corporation in an exchange described in section 367(a)(1), must include in its gross income for the taxable year in which the transfer occurs ordinary income equal to the gain realized that would have been includible in the transferor's gross income as ordinary income under section 617(d)(1), 1245(a), 1250(a), 1252(a), 1254(a), or 1255(a), whichever is applicable, if at the time of the transfer the U.S. person had sold the property at its fair market value. Recapture of depreciation under this paragraph (a) is required regardless of whether the exception to section 367(a)(1) provided by § 1.367(a)–2(a)(2) applies to the transfer of the U.S. depreciated property. However, the transfer of the U.S. depreciated property may qualify for the exception with respect to realized gain that is not included in ordinary income pursuant to this paragraph (a).

(2) *U.S. depreciated property.* U.S. depreciated property subject to the rules

of this paragraph (a) is any property that—

(i) Is either mining property (as defined in section 617(f)(2)), section 1245 property (as defined in section 1245(a)(3)), section 1250 property (as defined in section 1250(c)), farm land (as defined in section 1252(a)(2)), section 1254 property (as defined in section 1254(a)(3)), or section 126 property (as defined in section 1255(a)(2)); and

(ii) Has been used in the United States or has been described in section 168(g)(4) before its transfer.

(3) *Property used within and without the United States.* (i) If U.S. depreciated property has been used partly within and partly without the United States, then the amount required to be included in ordinary income pursuant to this paragraph (a) is reduced to an amount determined in accordance with the following formula:

$$\text{Full recapture amount} \times \frac{\text{U.S use}}{\text{Total use}}$$

(ii) For purposes of the fraction in paragraph (a)(3)(i) of this section, the ''full recapture amount'' is the amount that would otherwise be included in the transferor's income under paragraph (a)(1) of this section. ''U.S. use'' is the number of months that the property either was used within the United States or has been described in section 168(g)(4), and was subject to depreciation by the transferor or a related person. ''Total use'' is the total number of months that the property was used (or available for use), and subject to depreciation, by the transferor or a related person. For purposes of this paragraph (a)(3), property is not considered to have been in use outside of the United States during any period in which such property was, for purposes of section 168, treated as property not used predominantly outside the United States pursuant to section 168(g)(4). For purposes of this paragraph (a)(3), the term ''related person'' has the meaning set forth in § 1.367(d)–1(h).

(b) *Effective/applicability dates.* The rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§ 1.367(a)–4 and 1.367(a)–4T as contained in 26 CFR part 1 revised as of April 1, 2016.

§ 1.367(a)–4T [Removed]

■ **Par. 9.** § 1.367(a)–4T is removed.

§ 1.367(a)–5 [Removed and Reserved]

■ **Par. 10.** Section 1.367(a)–5 is removed and reserved.

§ 1.367(a)–5T [Removed]

■ **Par. 11.** § 1.367(a)–5T is removed.

■ **Par. 12.** Section 1.367(a)–6 is revised to read as follows:

§ 1.367(a)–6 Transfer of foreign branch with previously deducted losses.

(a) through (b)(1) [Reserved]. For further guidance, see § 1.367(a)–6T(a) through (b)(1).

(b)(2) *No active conduct exception.* The rules of this paragraph (b) apply regardless of whether any of the assets of the foreign branch satisfy the active trade or business exception of § 1.367(a)–2(a)(2).

(c)(1) [Reserved]. For further guidance, see § 1.367(a)–6T(c)(1).

(2) *Gain limitation.* The gain required to be recognized under paragraph (b)(1) of this section will not exceed the aggregate amount of gain realized on the transfer of all branch assets (without regard to the transfer of any assets on which loss is realized but not recognized).

(3) [Reserved].

(4) *Transfers of certain intangible property.* Gain realized on the transfer of intangible property (computed with reference to the fair market value of the intangible property as of the date of the transfer) that is an asset of a foreign branch is taken into account in computing the limitation on loss recapture under paragraph (c)(2) of this section. For rules relating to the crediting of gain recognized under this section against income deemed to arise by operation of section 367(d), see § 1.367(d)–1(g)(3).

(d) through (i) [Reserved]. For further guidance, see § 1.367(a)–6T(d) through (i).

(j) *Effective/applicability dates.* The rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see § 1.367(a)–6T as contained in 26 CFR part 1 revised as of April 1, 2016.

§ 1.367(a)–6T [Amended]

■ **Par. 13.** Section 1.367(a)–6T is amended by

■ 1. Removing and reserving paragraphs (b)(2), (c)(2), and (c)(4).

■ 2. Adding and reserving paragraph (j).

■ **Par. 14.** Section 1.367(a)–7 is amended by:

■ 1. Revising paragraph (f)(11).

■ 2. Redesignating paragraph (j) as (j)(1) and revising the first sentence, and adding paragraph (j)(2).

The revision and addition read as follows:

§ 1.367(a)–7 Outbound transfers of property described in section 361(a) or (b).

* * * * *

(f) * * *

(11) Section 367(d) property is intangible property as defined in § 1.367(a)–1(d)(5).

* * * * *

(j) *Effective/applicability dates*—(1) *In general.* Except for paragraph (e)(2) of this section, and as provided in paragraph (j)(2) of this section, this section applies to transfers occurring on or after April 18, 2013. * * *

(2) *Section 367(d) property.* The definition provided in paragraph (f)(11) of this section applies to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see § 1.367(a)–7 as contained in 26 CFR part 1 revised as of April 1, 2016.

§ 1.367(a)–7 [Amended]

■ **Par. 15.** For each section listed in the following table, remove the language in the ''Remove'' column and add in its place the language in the ''Add'' column.

Section	Remove	Add
§ 1.367(a)–7(a), sixth sentence	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(c), second sentence	§ 1.367(a)–2T	§ 1.367(a)–2.
§ 1.367(a)–7(c), second sentence	§ 1.367(a)–4T, 1.367(a)–5T	§ 1.367(a)–4.
§ 1.367(a)–7(c), second sentence	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(c)(2)(i)(B)	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(c)(2)(ii)(A)(*2*)	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(e)(1), third sentence	§ 1.367(a)–2T	§ 1.367(a)–2.
§ 1.367(a)–7(e)(1), third sentence	§ 1.367(a)–4T, 1.367(a)–5T	§ 1.367(a)–4.
§ 1.367(a)–7(e)(1), third sentence	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(e)(1), last sentence	§ 1.367(a)–1T(b)(4) and § 1.367(a)–1(b)(4)(i)(B).	§ 1.367(a)–1(b)(4).
§ 1.367(a)–7(e)(2)(i), third sentence	Director of Field Operations International, Large Business & International.	Director of Field Operations, Cross Border Activities Practice Area of Large Business & International.
§ 1.367(a)–7(e)(4)(ii), first and second sentences.	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(e)(5), heading	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(e)(5)(i), first sentence	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(e)(5)(ii), first sentence	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(f)(4)(ii)	§ 1.367(a)–6T	§ 1.367(a)–6.
§ 1.367(a)–7(g), last sentence	§ 1.367(a)–2T	§ 1.367(a)–2.
§ 1.367(a)–7(g), *Example 1 (ii)(A),* last sentence.	§ 1.367(a)–2T	§ 1.367(a)–2.
§ 1.367(a)–7(g), *Example 2 (ii)(A),* last sentence.	§ 1.367(a)–2T	§ 1.367(a)–2.
§ 1.367(a)–7(h), first sentence	§ 1.367(a)–1(b)(4)(i)(B) and § 1.367(a)–1T(b)(4).	§ 1.367(a)–1(b)(4).

§ 1.367(a)–8 [Amended]

■ **Par. 16.** For each section listed in the following table, remove the language in the ''Remove'' column and add in its place the language in the ''Add'' column.

Section	Remove	Add
§ 1.367(a)–8(b)(1)(xvii), first sentence	§ 1.367(a)–1T(d)(1)	§ 1.367(a)–1(d)(1).
§ 1.367(a)–8(b)(1)(xvii), second sentence	§ 1.367(a)–1T(c)(3)(i)	§ 1.367(a)–1(c)(3)(i).
§ 1.367(a)–8(c)(3)(viii)	§ 1.367(a)–1T(c)(3)(i)	§ 1.367(a)–1(c)(3)(i).
§ 1.367(a)–8(c)(3)(viii)	§ 1.367(a)–1T(c)(3)(ii)	§ 1.367(a)–1(c)(3)(ii).
§ 1.367(a)–8(c)(4)(iv), second sentence	§ 1.367(a)–1T(b)(4)	§ 1.367(a)–1(b)(4).
§ 1.367(a)–8(j)(3)	§ 1.367(a)–1T(c)(3)(ii)	§ 1.367(a)–1(c)(3)(ii).
§ 1.367(a)–8(j)(8), second sentence	Director of Field Operations International, Large Business & International.	Director of Field Operations, Cross Border Activities Practice Area of Large Business & International.

■ **Par. 17.** Section 1.367(d)–1 is added to read as follows:

§ 1.367(d)–1 Transfers of intangible property to foreign corporations.

(a) [Reserved]. For further guidance, see § 1.367(d)–1T(a).

(b) *Property subject to section 367(d).* Section 367(d) and the rules of this section apply to the transfer of intangible property, as defined in § 1.367(a)–1(d)(5), by a U.S. person to a foreign corporation in an exchange described in section 351 or 361. See section 367(a) and the regulations thereunder for the rules that apply to the transfer of any property other than intangible property.

(c)(1) through (2) [Reserved]. For further guidance, see § 1.367(d)–1T(c)(1) and (2).

(3) *Useful life*—(i) *In general.* For purposes of determining the period of inclusions for deemed payments under § 1.367(d)–1T(c)(1), the useful life of intangible property is the entire period during which exploitation of the intangible property is reasonably anticipated to affect the determination of taxable income, as of the time of transfer. Exploitation of intangible property includes any direct or indirect use or transfer of the intangible property, including use without further development, use in the further development of the intangible property itself (and any exploitation of the further developed intangible property), and use in the development of other intangible property (and any exploitation of the other developed intangible property).

(ii) *Procedure to limit inclusions to 20 years.* In cases where the useful life of the transferred property is indefinite or is reasonably anticipated to exceed twenty years, taxpayers may, in lieu of including amounts during the entire useful life of the intangible property, choose in the year of transfer to increase annual inclusions during the 20-year period beginning with the first year in which the U.S. transferor takes into account income pursuant to section 367(d), to reflect amounts that, but for this paragraph (c)(3)(ii), would have been required to be included following the end of the 20-year period. See § 1.6038B–1(d)(1)(iv) for guidance on reporting this choice of method. If the taxpayer applies this method during the 20-year period, no adjustments will be made for taxable years beginning after the conclusion of the 20-year period. However, for purposes of determining whether amounts included during the 20-year period are commensurate with the income attributable to the transferred intangible property, the

Commissioner may take into account information with respect to taxable years after that period, such as the income attributable to the transferred property during those later years. The application of this paragraph (c)(3)(ii) must be reflected in a statement (titled ''Application of 20-Year Inclusion Period to Section 367(d) Transfers'') attached to a timely filed original federal income tax return (including extensions) for the year of the transfer. An increase to the deemed payment rate made pursuant to this paragraph (c)(3)(ii) will be irrevocable, and a failure to timely file the statement under this paragraph (c)(3)(ii) may not be remedied.

(iii) Example. Property subject to section 367(d) is transferred from USP, a domestic corporation, to FA, a foreign corporation wholly owned by USP. The useful life of the transferred property, inclusive of derivative works, at the time of transfer is indefinite but is reasonably anticipated to exceed 20 years. In the first five years following the transfer, sales related to the property are expected to be $100x, $130x, $160x, $180x and $187.2x, respectively. Thereafter, for the remainder of the property's useful life, sales are expected to grow by four percent annually. In the first five years following the transfer, operating profits attributable to the property are expected to be $5x, $8x, $11x, $12.5x, and $13x, respectively. Thereafter, for the remainder of the property's useful life, operating profits are expected to grow by four percent annually. It is determined that the appropriate discount rate for sales and operating profits is 10 percent. The present value of operating profits through the property's indefinite useful life is $185x. The present value of sales through the property's indefinite useful life is $2698x. Accordingly, the sales based royalty rate during the property's useful life is 6.8 percent ($185x/$2698x). The taxpayer may choose to take income inclusions into account over a 20-year period. The present value of sales through the 20-year period is $1787x. Accordingly, the sales based royalty rate under the 20-year option is increased to 10.3 percent ($185x/$1787x).

(c)(4) through (g)(2) (introductory text) [Reserved]. For further guidance, see § 1.367(d)–1T(c)(4) through (g)(2) (introductory text).

(g)(2)(i) The intangible property transferred constitutes an operating intangible, as defined in § 1.367(a)–1(d)(6).

(g)(2)(ii) through (iii)(D) [Reserved]. For further guidance, see § 1.367(d)–1T(g)(2)(ii) through (iii)(D).

(E) The transferred intangible property will be used in the active conduct of a trade or business outside of the United States within the meaning of § 1.367(a)–2 and will not be used in connection with the manufacture or sale of products in or for use or consumption in the United States.

(g)(2)(iii) undesignated concluding paragraph [Reserved]. For further guidance, see § 1.367(d)–1T(g)(2)(iii) undesignated concluding paragraph.

(3) *Intangible property transferred from branch with previously deducted losses.* (i) If income is required to be recognized under section 904(f)(3) and the regulations thereunder or under § 1.367(a)–6 upon the transfer of intangible property of a foreign branch that had previously deducted losses, then the income recognized under those sections with respect to that property is credited against amounts that would otherwise be required to be recognized with respect to that same property under paragraphs (c) through (f) of this section in either the current or future taxable years. The amount recognized under section 904(f)(3) or § 1.367(a)–6 with respect to the transferred intangible property is determined in accordance with the following formula:

$$\text{Loss recapture income} \times \frac{\text{gain from intangible property}}{\text{gain from all branch assets}}$$

(ii) For purposes of the formula in paragraph (g)(3)(i) of this section, the ''loss recapture income'' is the total amount required to be recognized by the U.S. transferor pursuant to section 904(f)(3) or § 1.367(a)–6. The ''gain from intangible property'' is the total amount of gain realized by the U.S. transferor pursuant to section 904(f)(3) and § 1.367(a)–6 upon the transfer of items of property that are subject to section 367(d). ''Gain from intangible property'' does not include gain realized with respect to intangible property by reason of an election under paragraph (g)(2) of this section. The ''gain from all branch assets'' is the total amount of gain realized by the transferor upon the transfer of items of property of the branch for which gain is realized.

(g)(4) through (i) [Reserved]. For further guidance, see § 1.367(d)–1T(g)(4) through (i).

(j) *Effective/applicability dates.* This section applies to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under § 301.7701–3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see § 1.367(d)–1T as contained in 26 CFR part 1 revised as of April 1, 2016.

§ 1.367(d)–1T [Amended]

■ **Par. 18.** Section 1.367(d)–1T is amended by removing and reserving paragraphs (b), (c)(3), and (g)(2)(i), (g)(2)(iii)(E), and (g)(3).

■ **Par. 19.** Section 1.367(e)–2 is amended by

■ 1. Revising paragraph (b)(3)(iii).

■ 2. Revising paragraph (e)(4)(ii)(B).

The revisions read as follows.

§ 1.367(e)–2 Distributions described in section 367(e)(2).

* * * * *

(b) * * *

(3) * * *

(iii) *Other rules.* For other rules that may apply, see sections 381, 897, 1248, and § 1.482–1(f)(2)(i)(C).

* * * * *

(e) * * *

(4) * * *

(ii) * * *

(B) The period of limitations on assessment of tax for the taxable year in which gain is required to be reported will be extended until the close of the third full taxable year ending after the date on which the domestic liquidating corporation, foreign distributee corporation, or foreign liquidating corporation, as applicable, furnishes to the Director of Field Operations, Cross Border Activities Practice Area of Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) the information that should have been provided under this section.

* * * * *

§ 1.884–5 [Amended]

■ **Par. 20.** Section 1.884–5 is amended in paragraph (e)(3)(ii)(A) by removing the citation ''§ 1.367(a)–2T(b)(5),'' and adding the citation ''§ 1.367(a)–2(d)(5)'' in its place.

§ 1.1248–8 [Amended]

■ **Par. 21.** Section 1.1248–8 is amended in paragraph (b)(2)(iv)(B)(*1*)(*ii*) by removing the citation ''§§ 1.367(a)–6T,'' and adding the citation ''§ 1.367(a)–6'' in its place.

§ 1.1248(f)–2 [Amended]

■ **Par. 22.** Section 1.1248(f)–2 is amended in the last sentence of paragraph (e) by removing the citation ''§ 1.367(a)–2T,'' and adding the citation ''§ 1.367(a)–2'' in its place.

■ **Par. 23.** Section 1.6038B–1 is amended by:

■ 1. Removing the citation ''§ 1.367(a)–1T(c),'' in the fourth sentence of paragraph (b)(1)(i) and adding the citation ''§ 1.367(a)–1(c)'' in its place.

■ 2. Revising paragraphs (c)(1) through (5) and (d).

■ 3. Revising the first sentence of paragraph (g)(1).

■ 4. Adding paragraph (g)(7).

The additions and revision read as follows:

§ 1.6038B–1 Reporting of certain transfers to foreign corporations.

* * * * *

(c) * * *

(1) through (4) introductory text [Reserved]. For further guidance, see § 1.6038B–1T(c)(1) through (4) introductory text.

(i) *Active business property.* Describe any transferred property that qualifies under § 1.367(a)–2(a)(2). Provide here a general description of the business conducted (or to be conducted) by the transferee, including the location of the business, the number of its employees, the nature of the business, and copies of the most recently prepared balance sheet and profit and loss statement. Property listed within this category may be identified by general type. For example, upon the transfer of the assets of a manufacturing operation, a reasonable description of the property to be used in the business might include the categories of office equipment and supplies, computers and related equipment, motor vehicles, and several major categories of manufacturing equipment. However, any property that is includible in both paragraphs (c)(4)(i) and (iii) of this section (property subject to depreciation recapture under § 1.367(a)–4(a)) must be identified in the manner required in paragraph (c)(4)(iii) of this section. If property is considered to be transferred for use in the active conduct of a trade or business under a special rule in paragraph (e), (f), or (g) of § 1.367(a)–2, specify the applicable rule and provide information supporting the application of the rule.

(ii) *Stock or securities.* Describe any transferred stock or securities, including the class or type, amount, and characteristics of the transferred stock or securities, as well as the name, address, place of incorporation, and general description of the corporation issuing the stock or securities.

(iii) *Depreciated property.* Describe any property that is subject to depreciation recapture under § 1.367(a)–4(a). Property within this category must be separately identified to the same extent as was required for purposes of the previously claimed depreciation deduction. Specify with respect to each such asset the relevant recapture provision, the number of months that such property was in use within the United States, the total number of months the property was in use, the fair market value of the property, a schedule of the depreciation deduction taken with respect to the property, and a calculation of the amount of depreciation required to be recaptured.

(iv) *Property not transferred for use in the active conduct of a trade or business.* Describe any property that is eligible property, as defined in § 1.367(a)–2(b) taking into account the application of § 1.367(a)–2(c), that was transferred to the foreign corporation but not for use in the active conduct of a trade or business outside the United States (and was therefore not listed under paragraph (c)(4)(i) of this section).

(v) *Property transferred under compulsion.* If property qualifies for the exception of § 1.367(a)–2(a)(2) under the rules of paragraph (h) of that section, provide information supporting the claimed application of such exception.

(vi) *Certain ineligible property.* Describe any property that is described in § 1.367(a)–2(c) and that therefore cannot qualify under § 1.367(a)–2(a)(2) regardless of its use in the active conduct of a trade or business outside of the United States. The description must be divided into the relevant categories, as follows:

(A) *Inventory, etc.* Property described in § 1.367(a)–2(c)(1);

(B) *Installment obligations, etc.* Property described in § 1.367(a)–2(c)(2);

(C) *Foreign currency, etc.* Property described in § 1.367(a)–2(c)(3); and

(D) *Leased property.* Property described in § 1.367(a)–2(c)(4).

(vii) *Other property that is ineligible property.* Describe any property, other than property described in § 1.367(a)–2(c), that cannot qualify under § 1.367(a)–2(a)(2) regardless of its use in the active conduct of a trade or business outside of the United States and that is not subject to the rules of section 367(d) under § 1.367(a)–1(b)(5) (treatment of certain property as subject to section 367(d)). Each item of property must be separately identified.

(viii) [Reserved]. For further guidance, see § 1.6038B–1T(c)(4)(viii).

(5) *Transfer of foreign branch with previously deducted losses.* If the property transferred is property of a foreign branch with previously deducted losses subject to §§ 1.367(a)–6 and –6T, provide the following information:

(i) through (iv) [Reserved]. For further information, see § 1.6038B–1T(c)(5)(i) through (iv).

* * * * *

(d)(1) through (1)(iii) [Reserved]. For further guidance, see § 1.6038B–1T(d)(1) through (1)(iii).

(iv) *Intangible property transferred.* Provide a description of the intangible property transferred, including its adjusted basis. Generally, each item of intangible property must be separately identified, including intangible property described in § 1.367(d)–1(g)(2)(i). Identify all property that is subject to the rules of section 367(d) under § 1.367(a)–1(b)(5) (treatment of certain property as subject to section 367(d)). Describe any property for which the income required to be taken into account under section 367(d) and the regulations thereunder will be recognized over a 20-year period pursuant to § 1.367(d)–1(c)(3)(ii). Estimate the anticipated income or cost reductions attributable to the intangible property's use beyond the 20-year period.

(v)–(vi) [Reserved]. For further guidance, see § 1.6038B–1T(d)(1)(v) through (1)(vi).

(vii) *Coordination with loss rules.* List any intangible property subject to section 367(d) the transfer of which also gives rise to the recognition of gain under section 904(f)(3) or §§ 1.367(a)–6 or –6T. Provide a calculation of the gain required to be recognized with respect to such property, in accordance with the provisions of § 1.367(d)–1(g)(3).

(d)(1)(viii) through (d)(2) [Reserved]. For further guidance, see § 1.6038B–1T(d)(1)(viii) through (d)(2).

* * * * *

(g) *Effective/applicability dates.* (1) This section applies to transfers occurring on or after July 20, 1998, except as provided in paragraphs (g)(2) through (g)(7) of this section, and except for transfers of cash made in tax years beginning on or before February 5, 1999 (which are not required to be reported under section 6038B), and transfers described in paragraph (e) of this section (which applies to transfers that are subject to §§ 1.367(e)–1(f) and 1.367(e)–2(e)). * * *

* * * * *

(7) Paragraphs (c)(4)(i) through (vii), (c)(5), and (d)(1)(iv) and (vii) of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification

elections made under § 301.7701–3 that are filed on or after September 14, 2015. For guidance with respect to paragraphs (c)(4), (c)(5), and (d)(1) of this section before this section is applicable, see §§ 1.6038B–1 and 1.6038B–1T as contained in 26 CFR part 1 revised as of April 1, 2016.

§ 1.6038B–1T [Amended]

■ **Par. 24.** Section 1.6038B–1T is amended by removing and reserving paragraphs (c)(4)(i) through (c)(5) introductory text, and (d)(1)(iv) and (vii).

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: November 23, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–29791 Filed 12–15–16; 8:45 am]

BILLING CODE 4830–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in January 2017. The interest assumptions are used for paying benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC. As discussed below, PBGC will publish a separate final rule document dealing with interest assumptions under its regulation on Allocation of Assets in Single-Employer Plans for the first quarter of 2017.

DATES: Effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy (*Murphy.Deborah@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4400 ext. 3451. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4400 ext. 3451.)

SUPPLEMENTARY INFORMATION: PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribes actuarial assumptions—including interest assumptions—for paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions in the regulation are also published on PBGC's Web site (*http://www.pbgc.gov*).

PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for January 2017.[1]

PBGC normally updates the assumptions under the benefit payments regulation for January at the same time as PBGC updates assumptions for the first quarter of the year under its regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) in a single rulemaking document. Because of delays in obtaining data used in setting assumptions under Part 4044 for the first quarter of 2017, PBGC is publishing two separate rulemaking documents to update the benefit payments regulation for January 2017 and the allocation regulation for the first quarter of 2017.

The January 2017 interest assumptions under the benefit payments regulation will be 1.25 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for December 2016, these interest assumptions represent an increase in the immediate rate of 0.50 percent and are otherwise unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the payment of benefits under plans with valuation dates during January 2017, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

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

In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 279, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

[1] Appendix B to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) prescribes interest assumptions for valuing benefits under terminating covered single-employer plans for purposes of allocation of assets under ERISA section 4044. Those assumptions are updated quarterly.

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	*
279	1–1–17	2–1–17	1.25	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 279, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*		*	*	*	*	*	*
279	1–1–17	2–1–17	1.25	4.00	4.00	4.00	7	8

Deborah Chase Murphy,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2016–30098 Filed 12–15–16; 8:45 am]

BILLING CODE 7709–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2016–0359; FRL–9956–63–Region 4]

Air Plan Approval; TN; Revisions to the Knox County Portion of the TN SIP

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC), on January 11, 2016. The revision was submitted by TDEC on behalf of the Knox County Department of Air Quality Management, which has jurisdiction over Knox County, Tennessee. The revision that EPA is approving amends the Knox County Air Quality Management Department's regulations, which are part of the Tennessee SIP, to address EPA's startup, shutdown, and malfunction (SSM) SIP call for Knox County. EPA is approving the January 11, 2016, SIP revision because the Agency has determined that it is in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or Act).

DATES: This rule will be effective January 17, 2017.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2016–0359. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Madolyn Sanchez, Air Regulatory Management Section, Air Planning and Implementation Branch, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Sanchez can be reached via telephone at (404) 562–9644 and via electronic mail at *sanchez.madolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On May 22, 2015, EPA finalized an action (hereafter referred to as the ''SSM SIP Action'') [1] that responded to a Sierra Club petition for rulemaking concerning state rule treatment of excess emissions by sources during periods of SSM and called for 36 states to submit corrective SIP revisions to EPA by November 22, 2016. As discussed in that action, EPA determined that Knox County Regulation 32.1(C) [2] is inconsistent with the fundamental requirements of CAA sections 113(e)(1), 114(c) and 304 and the credible evidence rule [3] and thus issued a SIP call requiring the State to submit a corrective SIP revision addressing this provision. *See* 80 FR 33965.

On January 11, 2016, the State of Tennessee submitted a SIP revision, pursuant to a request by the Knox County Department of Air Quality Management, to address the SSM SIP Action with respect to Knox County. The revision removes the language from Knox County Regulation 32.1(C) that EPA found to be unlawful in the SSM SIP Action and replaces it with ''(Reserved).'' In a proposed rulemaking published on September 22, 2016 (81 FR 65313), EPA proposed to approve that

[1] *See* ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' 80 FR 33839 (June 12, 2015).

[2] Knox County SIP Regulation 32.1(C) is a subsection of Section 32.0, ''Use of Evidence.''

[3] 40 CFR 51.212(c); *see also* ''Credible Evidence Revisions,'' 62 FR 8314 (Feb. 24, 1997).

SIP revision. The details of Tennessee's SIP revision and the rationale for EPA's action are explained in the proposed rulemaking. Comments on the proposed rulemaking were due on or before October 24, 2016. EPA did not receive any comments on the proposed action.

II. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Knox County Regulation Section 32.0 entitled ''Use of Evidence,'' effective November 12, 2015, which replaces the language previously included in Section 32.1(C) with ''(Reserved).'' Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[4] EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 4 Office (please contact the person identified in the ''For Further Information Contact'' section of this preamble for more information).

III. Final Action

EPA is approving the Tennessee SIP revision consisting of replacing the language in Section 32.1(C) currently in the EPA-approved SIP for Knox County with ''(Reserved).'' EPA is approving the January 11, 2016 SIP revision because the Agency has determined that it is in accordance with the requirements for SIP provisions under the CAA, is otherwise consistent with the CAA, and adequately addresses the SSM SIP call with respect to the Knox County portion of the Tennessee SIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 14, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: December 1, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

40 CFR part 52 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 RR—Tennessee

■ 2. Section 52.2220(c) is amended under Table 3 by revising the entry for ''32.0'' to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

[4] 62 FR 27968 (May 22, 1997).

TABLE 3—EPA APPROVED KNOX COUNTY, REGULATIONS

State section	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
32.0	Use of Evidence	11/12/2015	12/16/2016, [Insert citation of publication].	EPA is replacing the language in Section 32.1(C) with ''(Reserved)''.
*	*	*	*	*

* * * * *

[FR Doc. 2016–30056 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2016–0269; FRL–9956–60–Region 5]

Air Plan Approval; Ohio; Redesignation of the Ohio Portion of the Cincinnati, Ohio-Kentucky-Indiana Area to Attainment of the 2008 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finding that the Cincinnati, Ohio-Kentucky-Indiana area is attaining the 2008 ozone National Ambient Air Quality Standard (NAAQS or standard) and is redesignating the Ohio portion of the Cincinnati area to attainment for the 2008 ozone NAAQS because the area meets the statutory requirements for redesignation under the Clean Air Act (CAA or Act). The Cincinnati area includes Butler, Clermont, Clinton, Hamilton, and Warren Counties in Ohio; Lawrenceburg Township in Dearborn County, Indiana; and, Boone, Campbell, and Kenton Counties in Kentucky. EPA is also approving, as a revision to the Ohio State Implementation Plan (SIP), the state's plan for maintaining the 2008 ozone standard through 2030 in the Cincinnati area. Finally, EPA finds adequate and is approving the state's 2020 and 2030 volatile organic compound (VOC) and oxides of nitrogen (NO_X) Motor Vehicle Emission Budgets (MVEBs) for the Ohio and Indiana portion of the Cincinnati area. The Ohio Environmental Protection Agency (Ohio EPA) submitted the SIP revision and redesignation request on April 21, 2016.

DATES: This final rule is effective December 16, 2016.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2016–0269. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information 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 through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

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

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

I. What is being addressed in this document?

This rule takes action on the submission from Ohio EPA, dated April 21, 2016, requesting redesignation of the Ohio portion of the Cincinnati area to attainment for the 2008 ozone standard. The background for today's action is discussed in detail in EPA's proposal, dated September 28, 2016 (81 FR 66602). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 2008 ozone NAAQS is attained in an area when the 3-year average of the annual fourth highest daily maximum 8-hour average concentration is equal to or less than 0.075 ppm, when truncated after the thousandth decimal place, at all of the ozone monitoring sites in the area. (*See* 40 CFR 50.15 and appendix P to 40 CFR part 50.) Under the CAA, EPA may redesignate nonattainment areas to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and if it meets the other CAA redesignation requirements in section 107(d)(3)(E). The proposed rule, dated September 28, 2016, provides a detailed discussion of how Ohio has met these CAA requirements.

As discussed in the September 28, 2016, proposal, quality-assured and certified monitoring data for 2013–2015 and preliminary data for 2016 show that the Cincinnati area has attained and continues to attain the 2008 ozone standard. In the maintenance plan submitted for the area, Ohio has demonstrated that the ozone standard will be maintained in the area through 2030. Finally, Ohio and Indiana have adopted 2020 and 2030 VOC and NO_X MVEBs for the Ohio and Indiana portion of the Cincinnati area that are supported by Ohio's maintenance demonstration.

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

EPA provided a 30-day review and comment period for the September 28, 2016, proposed rule. The comment period ended on October 28, 2016. During the comment period, comments in support of the action were submitted on behalf of the Ohio Utility Group and its member companies. We received no adverse comments on the proposed rule.

III. What action is EPA taking?

EPA is determining that the Cincinnati nonattainment is attaining the 2008 ozone standard, based on quality-assured and certified monitoring data for 2013–2015 and that the Ohio portion of this area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus changing the legal designation of the Ohio portion of the Cincinnati area from nonattainment to attainment for the 2008 ozone standard. EPA is also approving, as a revision to the Ohio SIP, the state's maintenance plan for the area. The maintenance plan is designed to keep the Cincinnati area in

attainment of the 2008 ozone NAAQS through 2030. Finally, EPA finds adequate and is approving the newly-established 2020 and 2030 MVEBs for the Indiana and Ohio portion of the Cincinnati area.

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

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 14, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Ozone, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Administrative practice and procedure, Air pollution control, Designations and classifications, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 5, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

Parts 52 and 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

■ 2. Section 52.1885 is amended by revising paragraph (ff) introductory text and adding paragraph (pp) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(ff) Approval—The 1997 8-hour ozone standard maintenance plans for the following areas have been approved:

* * * * *

(pp) Approval—The 2008 8-hour ozone standard maintenance plans for the following areas have been approved:

(1) Approval—On April 21, 2016, the Ohio Environmental Protection Agency submitted a request to redesignate the Ohio portion of the Cincinnati, OH-KY-IN area to attainment of the 2008 ozone NAAQS. As part of the redesignation request, the State submitted a maintenance plan as required by section 175A of the Clean Air Act. Elements of the section 175 maintenance plan include a contingency plan and an obligation to submit a subsequent maintenance plan revision in 8 years as required by the Clean Air Act. The 2020 motor vehicle emissions budgets for the Ohio and Indiana portions of the Cincinnati, OH-KY-IN area are 30.00 tons per summer day (TPSD) for VOC and 26.77 TPSD for NO_X. The 2030 motor vehicle emissions budgets for the Ohio and Indiana portions of the area are 18.22 TPSD for VOC and 16.22 TPSD for NO_X.

PART 81—[AMENDED]

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

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

■ 2. Section 81.336 is amended by revising the entry for Cincinnati, OH-KY-IN in the table entitled ''Ohio—2008 8-Hour Ozone NAAQS (Primary and secondary)'' to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—2008 8-HOUR OZONE NAAQS

[Primary and secondary]

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
Cincinnati, OH-KY-IN: [2]	December 16, 2016	Attainment.		
Butler County				
Clermont County				
Clinton County				
Hamilton County				
Warren County				
* * *	*	*	*	*

[1] This date is July 20, 2012, unless otherwise noted.
[2] Excludes Indian country located in each area, unless otherwise noted.

* * * * *

[FR Doc. 2016–30054 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

LEGAL SERVICES CORPORATION

45 CFR Part 1602

Procedures for Disclosure of Information Under the Freedom of Information Act

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: The Legal Services Corporation (LSC) is revising its regulation on procedures for disclosure of information under the Freedom of Information Act to implement the statutorily required amendments in the FOIA Improvement Act of 2016. LSC is also making technical changes to improve the structure and clarity of its Freedom of Information Act (FOIA) regulations.

DATES: The final rule is effective as of December 16, 2016.

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SUPPLEMENTARY INFORMATION:

I. Background

LSC is subject to the FOIA by the terms of the Legal Services Corporation Act. 42 U.S.C. 2996d(g). LSC has implemented FOIA by adopting regulations that contain the rules and procedures LSC will follow in making its records available to the public. LSC last amended its FOIA regulations in 2008. 73 FR 67791, Dec. 31, 2008.

On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016 (''2016 Amendments'' or the ''Act''). The Act codifies a number of transparency and openness principles and enacts housekeeping measures designed to facilitate FOIA requests and production. The revised regulations described in this final rule reflect the required changes prescribed by the Act. LSC also clarified the language and updated the structure of its FOIA regulations.

In light of the deadline established by Congress, LSC management requested that the Operations and Regulations Committee (Committee) recommend that the Board authorize expedited rulemaking and publication of this final rule. On October 16, 2016, the Committee considered the request and voted to make the recommendation to the Board. On October 18, 2016, the Board voted to authorize expedited rulemaking and the publication of the final rule and request for comments. LSC published the final rule and request for comments on October 31, 2016, 81 FR 75330, and the comment period closed on November 30, 2016. LSC received no substantive adverse comments. LSC received comments from two parties recommending technical changes, which LSC has incorporated into this final rule where noted.

II. Section-by-Section Analysis

Section 1602.1 Purpose

There are no proposed changes to this section.

Section 1602.2 Definitions

LSC modified several existing definitions, deleted one definition, and added five new definitions to make its regulations clearer. LSC amended the Definitions section as follows:

Duplication. LSC modified this definition to require the release of records ''in a form appropriate for release.'' This change complies with

FOIA guidance that records be released in the format requested, where possible.

LSC. LSC replaced all references to ''the Corporation'' with ''LSC'' for simplicity. LSC introduced this definition to make clear that, unless otherwise specified, references to LSC in this rule include both the Corporation and LSC's Office of Inspector General.

Office. LSC added this definition in order to simplify references to the Office of Inspector General and/or the Office of Legal Affairs, where appropriate.

Office of Inspector General records. LSC deleted this definition because the general definition of *records* includes the Office of Inspector General records, making this definition redundant.

Person. LSC's prior regulations did not define *person.* To address this gap, LSC added a definition modeled after the definition of *person* contained in the FOIA, 5 U.S.C. 551(2). In response to the rule published in the **Federal Register** on October 31, 2016, 81 FR 75330, LSC received a comment recommending that it add ''or a Federal agency'' to the definition of *person* to clarify that a Federal agency is not a person. LSC is adopting that recommendation.

Records. LSC modified the definition of this term to comport with the definition of *records* in LSC's Records Management Policy, which was updated in September 2015. It also incorporates Office of Inspector General records, which were previously defined separately.

Rule. LSC's FOIA regulations cite to personnel rules, rules of procedure, and substantive rules, but do not define the term *rule.* To address this gap, LSC added a definition of *rule* modeled on the definition contained in the FOIA, 5 U.S.C. 551(4).

Submitter. On February 14, 2003, LSC published in the **Federal Register** a final rule adding provisions for a submitter's rights process to its FOIA regulations. 68 FR 7433, Feb. 14, 2003. These provisions were modeled after the process outlined in Executive Order No. 12,600 (June 23, 1987). The 2003 final rule limited *submitter* solely to any person or entity from whom LSC receives grant application records. LSC is expanding the definition of *submitter* to include ''any person or applicant for funds who provides confidential commercial information to LSC.'' This definition more closely conforms with the spirit of E.O. 12,600 and ensures that submitters who may have an interest in the protection of their confidential commercial information are properly notified.

Confidential Commercial Information. LSC added a definition of *confidential commercial information* modeled on the definition in E.O. 12,600 to comport with the new definition of *submitter* described above. LSC received a comment recommending that the phrase ''because disclosure could reasonably be expected to cause substantial competitive harm'' be deleted from the definition of *confidential commercial information* because substantial competitive harm is not the only reason that information could be withheld under Exemption 4. LSC is adopting that recommendation.

Section 1602.3 Policy

LSC made minor technical edits to clarify this section, including clarifying the foreseeability definition as recommended by one commenter.

Section 1602.4 Records Published in the ***Federal Register***

LSC made minor technical edits to clarify this section.

Section 1602.5 Public Reading Room

This section sets out the process by which LSC makes available for public inspection the records described in the FOIA, 5 U.S.C. 552(a)(2). In the prior version of its FOIA regulations, LSC set out the specific categories of records that must be publicly disclosed. LSC deleted those specific provisions and replaced them with a broader reference to 552(a)(2) generally in anticipation of implementing the ''Release to One, Release to All'' policy. One commenter recommended that LSC implement ''Release to One, Release to All'' as a policy and delete the reference to the policy from its regulations. LSC also received a comment recommending that it delete reference to § 1602.10 as authority for LSC to withhold records from the public reading room because the FOIA itself provides sufficient authority. LSC is adopting these recommendations.

LSC also made minor technical revisions to clarify this section.

Section 1602.6 Procedures for Using the Public Reading Room

LSC added a provision to this section that will provide requesters with onsite computer and printer access to electronic reading room records. This provision is consistent with Federal agency practice and provides greater access to LSC's records to the public at large.

Section 1602.7 Index of Records

LSC updated this section to reflect its current practice of maintaining its index of records electronically.

Section 1602.8 Requests for Records

The prior version of § 1602.8 included provisions relating to the format of requests for records, the timing of responses, and the format of responses to requests. There were no subheadings to distinguish these provisions within the section, making it difficult to follow. To improve readability, LSC restructured § 1602.8 by limiting the section solely to provisions related to the format of FOIA requests. LSC also added a provision that informs requesters of their right to specify the preferred form or format for the records sought and that requires requesters to provide their contact information to assist LSC in communicating with them about their request. One commenter recommended that LSC delete the phrase ''LSC shall respond to such a request as promptly as possible'', referring to requests for fee waivers or reductions, because LSC would not adjudicate a fee waiver until fees are at issue. The proposed language suggested that all fee waivers would be adjudicated promptly, when this may not always occur. LSC is adopting this recommendation.

Section 1602.9 Timing and Responses to Requests for Records

This is a new section. As described in the discussion of § 1602.8, LSC determined that it would be clearer if the provisions for timing and responses to requests were contained in a separate section. LSC also made technical changes to the language and structure to improve clarity. In addition, LSC added provisions describing the dispute resolution processes available to the public as required by the 2016 Amendments. These provisions describe when a requester may seek assistance, including dispute resolution services, from an LSC FOIA Public Liaison or the U.S. National Archives and Record Administration's Office of Government Information Services. In response to the final rule published on October 31, 2016, 81 FR 75330, LSC received a comment recommending that it articulate the procedures for consultations and referrals when it processes a request that contains within the records information of interest to another Office or Federal agency. LSC also received a comment recommending that it remove § 1602.9(b)(3)'s reference to ''two or more components of LSC'' because LSC has only two components, LSC and the Office of Inspector General. LSC is adopting both recommendations.

Section 1602.10 Exemptions for Withholding Records

LSC amended this section to incorporate the 2016 Amendments' codification of the Department of Justice's foreseeable harm standard, which requires LSC to withhold information only if disclosure would harm an interest protected by an exemption or prohibited by law. It further obligates LSC to consider whether partial disclosure of information is possible when full disclosure is not and to take reasonable steps to segregate and release nonexempt information. One commenter recommended that LSC clarify the foreseeable harm standard. LSC is adopting this recommendation.

In addition, LSC modified its rule regarding the applicability of the deliberative process privilege, as required by the 2016 Amendments. The privilege now applies only to records created within 25 years of the date on which the records were requested.

Finally, LSC added exemptions 1, 8, and 9 from 5 U.S.C. 552(8)(B)(b) to its regulations. While these exemptions, which deal with national security, financial institutions, and geological information, generally do not apply to the work of LSC, their absence caused confusion because LSC's exemption numbers did not track the commonly used exemption numbers found in both the FOIA and case law. This change will eliminate any confusion.

Section 1602.11 Officials Authorized To Grant or Deny Requests for Records

LSC deleted paragraph (a) of this section, which describes the role of the General Counsel in adequately and consistently applying the provisions of this part within LSC. The 2016 Amendments establish the role of the Chief FOIA Officer in ensuring compliance with FOIA, thereby superseding LSC's prior regulations.

Section 1602.12 Denials

LSC added a provision to this section requiring it to include a provision in its denial decisions notifying the requester of his or her right to seek dispute resolution services from LSC's FOIA Public Liaison or the Office of Government Information Services.

Section 1602.13 Appeals of Denials

LSC made minor technical edits to clarify this section. LSC also added a provision that requires LSC to notify a requester of the dispute resolution services offered by the Office of Government Information Services as a non-exclusive alternative to litigation. LSC received a comment recommending that it include contact information for the Office of Government Information Services' voluntary dispute resolution services. LSC is adopting this recommendation.

Section 1602.14 Fees

LSC added a provision to this section that prohibits LSC from assessing fees if its response time is delayed, subject to limited exceptions described in the 2016 Amendments. One commenter recommended that LSC add a provision excusing a failure to comply with the time limits set forth in the regulation when a court determines that exceptional circumstances exist. The commenter also recommended that LSC detail its fee structure and provide requesters an opportunity to reformulate their request at a lower cost. LSC is adopting both recommendations.

Section 1602.15 Submitter's Rights Process

As previously described in the discussion of § 1602.2's definition of the term *submitter,* LSC expanded the submitter's rights process to include ''any person or applicant for funds who provides confidential commercial information to LSC.'' This definition more closely conforms with the spirit of E.O. 12600 and ensures that submitters who may have an interest in the protection of their confidential information are properly notified.

Finally, LSC clarified an ambiguous provision that requires a submitter to provide to LSC within seven days his or her statement objecting to disclosure of his information. One commenter recommended that LSC delete the seven-day response period and instead specify in its notice to the requester a reasonable time period within which the submitter must respond. LSC also received a comment recommending that LSC's regulations comport with agency practice that makes the notice of proposed release the final administrative action by LSC. LSC is adopting these recommendations.

List of Subjects in 45 CFR Part 1602

Freedom of information.

■ For the reasons stated in the preamble, the Legal Services Corporation revises 45 CFR part 1602 to read as follows:

PART 1602—PROCEDURES FOR DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

Sec.

1602.1 Purpose.
1602.2 Definitions.
1602.3 Policy.
1602.4 Records published in the Federal Register.
1602.5 Public reading room.
1602.6 Procedures for use of public reading room.
1602.7 Index of records.
1602.8 Requests for records.
1602.9 Timing and responses to requests for records.
1602.10 Exemptions for withholding records.
1602.11 Officials authorized to grant or deny requests for records.
1602.12 Denials.
1602.13 Appeals of denials.
1602.14 Fees.
1602.15 Submitter's rights process.

Authority: 42 U.S.C. 2996g(e).

§ 1602.1 Purpose.

This part contains the rules and procedures the Legal Services Corporation (LSC) follows in making records available to the public under the Freedom of Information Act.

§ 1602.2 Definitions.

(a) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, LSC will look to the use to which a requester will put the documents requested. When LSC has reasonable cause to doubt the requester's stated use of the records sought, or where the use is not clear from the request itself, it will seek additional clarification before assigning the request to a category.

(b) *Confidential commercial information* means records provided to LSC by a submitter that arguably contain material exempt from release under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(c) *Duplication* means the process of making a copy of a requested record pursuant to this part in a form appropriate for release in response to a FOIA request.

(d) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, or an institution of professional or vocational education which operates a program or programs of scholarly research.

(e) *FOIA* means the Freedom of Information Act, 5 U.S.C. 552.

(f) *LSC* means the Legal Services Corporation. Unless explicitly stated otherwise, LSC includes the Office of Inspector General.

(g) *Non-commercial scientific institution* means an institution that is

not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(h) *Office* refers to the Office of Legal Affairs and/or the Office of Inspector General (OIG).

(i) *Person* includes an individual, partnership, corporation, association, or public or private organization other than LSC or a Federal agency.

(j) *Records* are any type of information made or received by LSC or the OIG for purposes of transacting LSC or OIG business and preserved by LSC or the OIG (either directly or maintained by a third party under contract to LSC or the OIG for records management purposes) regardless of form (*e.g.,* paper or electronic, formal or informal, copies or original) as evidence of LSC's or OIG's organization, functions, policies, decisions, procedures, operations, or other activities of LSC or the OIG or because the record has informational value.

(k) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase or subscription or by free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation. LSC may also consider the past publication record of the requester in making such a determination.

(l) *Review* means the process of examining documents located in response to a request to determine whether any portion of any such document is exempt from disclosure. It also includes processing any such documents for disclosure. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(m) *Rule* means the whole or a part of an LSC statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of LSC.

(n) *Search* means the process of looking for and retrieving records that are responsive to a request for records. It includes page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Searches may be conducted manually or by automated means and will be conducted in the most efficient and least expensive manner.

(o) *Submitter* means any person or applicant for funds who provides confidential commercial information to LSC.

§ 1602.3 Policy.

LSC will make records concerning its operations, activities, and business available to the public to the maximum extent reasonably possible. LSC will withhold records from the public only in accordance with the FOIA and this part. LSC will disclose records otherwise exempt from disclosure under the FOIA when LSC does not reasonably foresee that disclosure would harm an interest protected by an exemption and disclosure is not prohibited by law or protected under Exemption 3.

§ 1602.4 Records published in the Federal Register.

LSC routinely publishes in the **Federal Register** information on its basic structure and operations necessary to inform the public how to deal effectively with LSC. LSC will make reasonable efforts to currently update such information, which will include basic information on LSC's location, functions, rules of procedure, substantive rules, statements of general policy, and information regarding how the public may obtain information, make submittals or requests, or obtain decisions.

§ 1602.5 Public reading room.

(a) LSC will maintain a public reading room at its offices at 3333 K St. NW., Washington, DC 20007. This room will be supervised and will be open to the public during LSC's regular business hours. Procedures for use of the public reading room are described in § 1602.6. LSC also maintains an electronic public reading room that may be accessed at *http://www.lsc.gov/about-lsc/foia/foia-electronic-public-reading-room.*

(b) Subject to the limitation stated in paragraph (c) of this section, LSC will make available for public inspection in its electronic public reading room the records described in 5 U.S.C. 552(a)(2).

(c) Records required by FOIA to be available in the public reading room may be exempt from mandatory disclosure pursuant to 5 U.S.C. 552(b). LSC will not make such records available in the public reading room. LSC may edit other records maintained in the reading room by redacting details about individuals to prevent clearly unwarranted invasions of personal privacy. In such cases, LSC will attach a full explanation of the redactions to the record. LSC will indicate the extent of the redactions unless doing so would harm an interest protected by the exemption under which the redactions are made. If technically feasible, LSC will indicate the extent of the redactions at the place in the record where the redactions were made.

§ 1602.6 Procedures for use of public reading room.

(a) A person who wishes to inspect or copy records in the public reading room should arrange a time in advance, by telephone or letter request made to the Office of Legal Affairs, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007 or by email to *FOIA@lsc.gov.*

(1) In appropriate circumstances, LSC will advise persons making telephonic requests to use the public reading room that a written request would aid in the identification and expeditious processing of the records sought.

(2) Written requests should identify the records sought in the manner provided in § 1602.8(b) and should request a specific date for inspecting the records.

(b) LSC will advise the requester as promptly as possible if, for any reason, it is not feasible to make the records sought available on the date requested.

(c) A computer terminal and printer are available upon request in the public reading room for accessing Electronic Reading Room records.

§ 1602.7 Index of records.

LSC will maintain and make available for public inspection in an electronic format a current index identifying any matter within the scope of § 1602.4 and § 1602.5(b).

§ 1602.8 Requests for records.

(a) LSC will make its records promptly available, upon request, to any person in accordance with this section, unless:

(1) the FOIA requires the records to be published in the **Federal Register** (§ 1602.4) or to be made available in the public reading room (§ 1602.5); or

(2) LSC determines that such records should be withheld and are exempt from mandatory disclosure under the FOIA and § 1602.10.

(b)(1) *Requests for LSC records.* All requests for LSC records must be clearly marked Freedom of Information Act Request and shall be addressed to the FOIA Analyst, Office of Legal Affairs, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007. Email requests shall be sent to *FOIA@lsc.gov.* Requests for LSC Records may also be made online using the FOIA Request Electronic Submission Form located at *http://www.lsc.gov/about-lsc/foia.*

(2) *Requests for Office of Inspector General records.* All requests for records maintained by the OIG must be clearly marked Freedom of Information Act Request and shall be addressed to the FOIA Officer, Office of Inspector General, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007. Email requests shall be sent to *FOIA@oig.lsc.gov.*

(3) Any request not marked and addressed as specified in this section will be so marked by LSC personnel as soon as it is properly identified, and will be forwarded immediately to the appropriate Office. A request improperly addressed will be deemed to have been received as in accordance with § 1602.9 only when it has been received by the appropriate Office. Upon receipt of an improperly addressed request, the Chief FOIA Officer, Office of Inspector General Legal Counsel or their designees shall notify the requester of the date on which the time period began.

(c) A request must reasonably describe the records requested so that employees of LSC who are familiar with the subject area of the request are able, with a reasonable amount of effort, to determine which particular records are within the scope of the request. Before submitting their requests, requesters may contact LSC's or OIG's FOIA Analyst or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. If LSC determines that a request does not reasonably describe the records sought, LSC will inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify their request may discuss their request with LSC's or OIG's FOIA Analyst or FOIA Public Liaison. If a request does not reasonably describe the records sought, LSC's response to the request may be delayed.

(d) To facilitate the location of records by LSC, a requester should try to provide the following kinds of information, if known:

(1) The specific event or action to which the record refers;

(2) The unit or program of LSC that may be responsible for or may have produced the record;

(3) The date of the record or the date or period to which it refers or relates;

(4) The type of record, such as an application, a grant, a contract, or a report;

(5) Personnel of LSC who may have prepared or have knowledge of the record;

(6) Citations to newspapers or publications which have referred to the record.

(e) Requests may specify the preferred form or format (including electronic formats) for the records sought. LSC will provide records in the form or format indicated by the requester to the extent such records are readily reproducible in the requested form or format. LSC reserves the right to limit the number of copies of any document that will be provided to any one requester or to require that special arrangements for duplication be made in the case of bound volumes or other records representing unusual problems of handling or reproduction.

(f) Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist LSC in communicating with them and providing released records.

(g) LSC is not required to create a record or to perform research to satisfy a request.

(h) Any request for a waiver or reduction of fees should be included in the FOIA request, and any such request should indicate the grounds for a waiver or reduction of fees, as set out in § 1602.14(g).

§ 1602.9 Timing and responses to requests for records.

(a)(1) Upon receiving a request for LSC or Inspector General records under § 1602.8, the Chief FOIA Officer, Office of Inspector General Legal Counsel or their designees shall make an initial determination of whether to comply with or deny such request. The Chief FOIA Officer, Office of Inspector General Legal Counsel or their designees will send the determination to the requester within 20 business days after receipt of the request and will notify the requester of their right to seek assistance from an LSC FOIA Public Liaison.

(2) The 20-day period under paragraph (a)(1) of this section shall commence on the date on which the request is first received by the appropriate Office, but in no event later than 10 working days after the request has been received by either the Office of Legal Affairs or the Office of Inspector General. The 20-day period shall not be tolled by the Office processing the request except that the processing Office may make one request to the requester for information pursuant to paragraph (b) of this section and toll the 20-day period while

(i) It is awaiting such information that it has reasonably requested from the requester under this section; or

(ii) It communicates with the requester to clarify issues regarding fee assessment.

In either case, the processing Office's receipt of the requester's response to such a request for information or clarification ends the tolling period.

(b) *Consultation.* When records originated with the Office processing the request, but contain within them information of interest to another Office or Federal agency, the Office processing the request should typically consult with that other entity prior to making a release determination.

(c) *Referral.* (1) If the processing Office determines that the other Office or Federal agency is best able to determine whether to disclose the record, the processing Office will typically refer the responsibility for responding to the request for that record to the other Office or Federal agency. Ordinarily, the Office that originated the record is presumed to be the best Office to make the disclosure determination. However, if the Offices or Federal agency jointly agree that the processing Office is in the best position to respond regarding the record, then the record may be released by the processing Office after consultation with the other Office or Federal agency.

(2) Whenever a referral occurs, the processing Office must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the Office or Federal agency to which the record was referred, including that Office's or Federal agency's FOIA contact information.

(d)(1) In unusual circumstances, as specified in paragraph (d)(3) of this section, LSC may extend the time limit

for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which LSC expects to send its determination.

(2) LSC may also provide an opportunity to the requester to narrow the request. In addition, to aid the requester, LSC shall make available a FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and LSC, and shall notify the requester of his right to seek dispute resolution services from the U.S. National Archives and Records Administration's Office of Government Information Services.

(3) *Unusual circumstances.* As used in this part, *unusual circumstances* are limited to the following, but only to the extent reasonably necessary for the proper processing of the particular request:

(i) The need to search for and collect the requested records from establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another Office, Federal agency, or organization having a substantial interest in the determination of the request.

(c)(1) When the processing Office cannot send a determination to the requester within the applicable time limit, the Chief FOIA Officer, Office of the Inspector General Legal Counsel, or their designees shall inform the requester of the reason for the delay, the date on which the processing Office expects to send its determination, and the requester's right to treat the delay as a denial and to appeal to LSC's President or Inspector General, in accordance with § 1602.13, or to seek dispute resolution services from a FOIA Public Liaison or the Office of Government Information Services.

(2) If the processing Office has not sent its determination by the end of the 20-day period or the last extension thereof, the requester may deem the request denied, and exercise a right of appeal in accordance with § 1602.13, or seek dispute resolution services from LSC's or OIG's FOIA Public Liaison or the National Archives and Records Administration's Office of Government Information Services. The Chief FOIA Officer, Office of Inspector General Legal Counsel, or their designees may ask the requester to forego appeal until a determination is made.

(d) After the processing Office determines that a request will be granted, LSC or the OIG will act with due diligence in providing a substantive response.

(e)(1) *Expedited treatment.* Requests and appeals will be taken out of order and given expedited treatment whenever the requester demonstrates a compelling need. A compelling need means:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged LSC activity and the request is made by a person primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest raising questions about LSC's integrity which may affect public confidence in LSC.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. For a prompt determination, a request for expedited processing must be properly addressed and marked and received by LSC pursuant to § 1602.8.

(3) A requester who seeks expedited processing must submit a statement demonstrating a compelling need and explaining in detail the basis for requesting expedited processing. The requester must certify that the statement is true and correct to the best of the requester's knowledge and belief.

(4) Within 10 calendar days of receiving a request for expedited processing, the Chief FOIA Officer, Office of Inspector General Legal Counsel or their designees shall decide whether to grant the request and shall notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, the requester may appeal in writing to LSC's President or Inspector General in the format described in § 1602.13(a). Any appeal of a denial for expedited treatment shall be acted on expeditiously by LSC.

§ 1602.10 Exemptions for withholding records.

(a) LSC shall—

(1) Withhold information under this section only if—

(i) LSC reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraph (b); or

(ii) Disclosure is prohibited by law; and

(2)(i) Consider whether partial disclosure of information is possible whenever LSC determines that a full disclosure of a requested record is not possible; and

(ii) Take reasonable steps necessary to segregate and release nonexempt information;

(b) LSC may withhold a requested record from public disclosure only if one or more of the following exemptions authorized by the FOIA apply:

(1)(i) Matter that is specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and

(ii) Is in fact properly classified pursuant to such Executive Order;

(2) Matter that is related solely to the internal personnel rules and practices of LSC;

(3) Matter that is specifically exempted from disclosure by statute (other than the exemptions under FOIA at 5 U.S.C. 552(b)), provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding, or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with LSC, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, including enforcing the Legal Services Corporation Act or any other law, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person or a recipient of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and

in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Matter that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(c) In the event that one or more of the exemptions in paragraph (b) of this section applies, any reasonably segregable portion of a record shall be provided to the requester after redaction of the exempt portions. The amount of information redacted and the exemption under which the redaction is being made shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the redaction is made. If technically feasible, the amount of information redacted and the exemption under which the redaction is being made shall be indicated at the place in the record where the redaction occurs.

(d) No requester shall have a right to insist that any or all of the techniques in paragraph (c) of this section should be employed in order to satisfy a request.

(e) Records that may be exempt from disclosure pursuant to paragraph (b) of this section may be made available at the discretion of the LSC official authorized to grant or deny the request for records, after appropriate consultation as provided in § 1602.11. LSC will disclose records otherwise exempt from disclosure under the FOIA when LSC does not reasonably foresee that disclosure would harm an interest protected by an exemption and disclosure is not prohibited by law or protected under Exemption 3.

§ 1602.11 Officials authorized to grant or deny requests for records.

(a) The Chief FOIA Officer, Office of Inspector General Legal Counsel or their designees are authorized to grant or deny requests under this part. In the absence of an Office of Inspector General Legal Counsel, the Inspector General shall name a designee who will be authorized to grant or deny requests under this part and who will perform all other functions of the Office of Inspector General Legal Counsel under this part.

(b)(1) The Chief FOIA Officer or designee shall consult with the Office of Inspector General Legal Counsel or designee prior to granting or denying any request for records or portions of records which originated with the OIG, or which contain information which originated with the OIG, but which are maintained by other components of LSC.

(2) The Office of Inspector General Legal Counsel or designee shall consult with the Chief FOIA Officer or designee prior to granting or denying any request for records or portions of records which originated with any component of LSC other than the OIG, or which contain information which originated with a component of LSC other than the OIG, but which are maintained by the OIG.

§ 1602.12 Denials.

(a) A denial of a written request for a record that complies with the requirements of § 1602.8 shall be in writing and shall include the following:

(1) A reference to the applicable exemption or exemptions in § 1602.10(b) upon which the denial is based;

(2) An explanation of how the exemption applies to the requested records;

(3) A statement explaining why it is deemed unreasonable to provide segregable portions of the record after deleting the exempt portions;

(4) An estimate of the volume of requested matter denied unless providing such estimate would harm the interest protected by the exemption under which the denial is made;

(5) The name and title of the person or persons responsible for denying the request;

(6) An explanation of the right to appeal the denial and of the procedures for submitting an appeal, as described in § 1602.13, including the address of the official to whom appeals should be submitted; and

(7) An explanation of the right of the requester to seek dispute resolution services from a FOIA Public Liaison or the Office of Government Information Services.

(b) Whenever LSC makes a record available subject to the deletion of a portion of the record, such action shall be deemed a denial of a record for purposes of paragraph (a) of this section.

(c) All denials shall be treated as final opinions under § 1602.5(b).

§ 1602.13 Appeals of denials.

(a) Any person whose written request has been denied is entitled to appeal the denial within 90 days of the date of the response by writing to the President of LSC or, in the case of a denial of a request for OIG records, the Inspector General, at the mailing or email addresses given in § 1602.8(b)(1) and (2). The envelope and letter or email appeal should be clearly marked: ''Freedom of Information Appeal.'' An appeal need not be in any particular form, but should adequately identify the denial, if possible, by describing the requested record, identifying the official who issued the denial, and providing the date on which the denial was issued.

(b) No personal appearance, oral argument, or hearing will ordinarily be permitted on appeal of a denial. Upon request and a showing of special circumstances, however, this limitation may be waived and an informal conference may be arranged with the President, Inspector General or their designees for this purpose.

(c)(1) The decision of the President or the Inspector General on an appeal shall be in writing and, in the event the denial is in whole or in part upheld, shall contain an explanation responsive to the arguments advanced by the requester, the matters described in § 1602.12(a)(1) through (4), and the provisions for judicial review of such decision under 5 U.S.C. 552(a)(4). The decision must also notify the requester of the dispute resolution services offered by the National Archives and Records Administration's Office of Government Information Systems as a non-exclusive alternative to litigation. A requester may contact the Office of Government Information Services in any of the following ways:

(i) Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road—OGIS, College Park, MD 20740.

(ii) *ogis.archives.gov.*

(iii) *Email: ogis@nara.gov.*

(iv) *Telephone:* 202–741–5770.

(v) *Facsimile:* 202–741–5769.

(vi) *Toll-free:* 1–877–684–6448.

(2) Dispute resolution through the Office of Government Information Services is a voluntary process. If LSC agrees to participate in the dispute resolution services provided by the Office of Government Information Services, it will actively engage in the process in an attempt to resolve the dispute.

(d) LSC will send its decision to the requester within 20 business days after receipt of the appeal, unless an additional period is justified due to

unusual circumstances, as described in § 1602.9, in which case LSC may extend the time limit for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which LSC expects to send its determination. The decision of the President or the Inspector General shall constitute the final action of LSC. All such decisions shall be treated as final opinions under § 1602.5(b)(1).

(e) On an appeal, the President or designee shall consult with the OIG prior to reversing in whole or in part the denial of any request for records or portions of records which originated with the OIG, or which contain information which originated with the OIG, but which are maintained by LSC. The Inspector General or designee shall consult with the President prior to reversing in whole or in part the denial of any request for records or portions of records which originated with LSC, or which contain information which originated with LSC, but which are maintained by the OIG.

§ 1602.14 Fees.

(a) LSC will not charge fees for information routinely provided in the normal course of doing business.

(b)(1) When records are requested for commercial use, LSC shall limit fees to reasonable standard charges for document search, review, and duplication.

(2) LSC shall not assess any search fees (or if the requester is a representative of the news media, duplication fees) if LSC has failed to comply with the time limits set forth in § 1602.9 and no unusual circumstances, as defined in that section apply.

(3)(i) If LSC has determined that unusual circumstances as defined in § 1602.9 apply and LSC has provided timely written notice to the requester in accordance with § 1602.9, a failure described in paragraph (2) is excused for an additional 10 days. If LSC fails to comply with the extended time limit, LSC may not assess any search fees (or, if the requester is a representative of the news media, duplication fees) except as provided in paragraphs (a)(3)(ii)–(iii) of this section.

(ii) If LSC has determined that unusual circumstances as defined in § 1602.9 apply and more than 5,000 pages are necessary to respond to the request, LSC may charge search fees or duplication fees if LSC has provided a timely written notice to the requester in accordance with § 1602.9 and LSC has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with § 1602.9.

(iii) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(c) When records are sought by a representative of the news media or by an educational or non-commercial scientific institution, LSC shall limit fees to reasonable standard charges for document duplication after the first 100 pages; and

(d) For all other requests, LSC shall limit fees to reasonable standard charges for search time after the first 2 hours and duplication after the first 100 pages.

(e) The schedule of charges and fees for services regarding the production or disclosure of the Corporation's records is as follows:

(1) Manual search for and review of records will be charged as follows:

(i) *Administrative fee:* $22.35/hour;

(ii) *Professional fee:* $66.26/hour;

(iii) Charges for search and review time less than a full hour will be billed by quarter-hour segments;

(2) *Duplication by paper copy:* 35 cents per page;

(3) *Duplication by other methods:* actual charges as incurred;

(4) *Packing and mailing records:* no charge for regular mail;

(5) *Express mail:* actual charges as incurred.

(f) LSC may charge for time spent searching even if it does not locate any responsive records or it withholds the records located as exempt from disclosure.

(g) *Fee waivers.* A requester may seek a waiver or reduction of the fees established under paragraph (e) of this section. A fee waiver or reduction request will be granted where LSC has determined that the requester has demonstrated that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations of LSC and is not primarily in the commercial interest of the requester.

(1) In order to determine whether disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of LSC, LSC shall consider the following four factors:

(i) *The subject of the request:* Whether the subject of the requested records concerns ''the operations or activities of LSC.'' The subject of the requested records must concern identifiable operations or activities of LSC, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed:* Whether the disclosure is ''likely to contribute'' to an understanding of LSC operations or activities. The requested records must be meaningfully informative about LSC operations or activities in order to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that is already in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure:* Whether disclosure of the requested records will contribute to ''public understanding.'' The disclosure must contribute to a reasonably broad audience of persons interested in the subject, as opposed to the personal interest of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. LSC shall presume that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding:* Whether the disclosure is likely to contribute ''significantly'' to public understanding of LSC operations or activities. The disclosure must enhance the public's understanding of the subject in question to a significant extent.

(2) In order to determine whether disclosure of the information is not primarily in the commercial interest of the requester, LSC will consider the following two factors:

(i) *The existence and magnitude of a commercial interest:* Whether the requester has a commercial interest that would be furthered by the requested disclosure. LSC shall consider any commercial interest of the requester (with reference to the definition of *commercial use* in this part) or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure.

(ii) *The primary interest in disclosure:* Whether the magnitude of the identified commercial interest is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily'' in the commercial interest of the requester. A fee waiver or reduction is justified where the public interest is of greater magnitude than is

any identified commercial interest in disclosure. LSC ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed primarily to serve a public interest.

(3) Where LSC has determined that a fee waiver or reduction request is justified for only some of the records to be released, LSC shall grant the fee waiver or reduction for those records.

(4) Requests for fee waivers and reductions shall be made in writing and must address the factors listed in this paragraph as they apply to the request.

(h) Requesters must agree to pay all fees charged for services associated with their requests. LSC will assume that requesters agree to pay all charges for services associated with their requests up to $25 unless otherwise indicated by the requester. For requests estimated to exceed $25, LSC will consult with the requester prior to processing the request, and such requests will not be deemed to have been received by LSC until the requester agrees in writing to pay all fees charged for services. LSC will also make available its FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(i) No requester will be required to make an advance payment of any fee unless:

(1) The requester has previously failed to pay a required fee within 30 days of the date of billing, in which case an advance deposit of the full amount of the anticipated fee together with the fee then due plus interest accrued may be required (and the request will not be deemed to have been received by LSC until such payment is made); or

(2) LSC determines that an estimated fee will exceed $250, in which case the requester shall be notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. Such notification shall be transmitted as soon as possible, but in any event within five working days of receipt by LSC, giving the best estimate then available. The notification shall offer the requester the opportunity to confer with appropriate representatives of LSC for the purpose of reformulating the request so as to meet the needs of the requester at a reduced cost. The request will not be deemed to have been received by LSC for purposes of the initial 20-day response period until the requester makes a deposit on the fee in an amount determined by LSC.

(j) Interest may be charged to those requesters who fail to pay the fees charged. Interest will be assessed on the amount billed, starting on the 31st day following the day on which the billing was sent. The rate charged will be as prescribed in 31 U.S.C. 3717.

(k) If LSC reasonably believes that a requester or group of requesters is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, LSC shall aggregate such requests and charge accordingly. Likewise, LSC will aggregate multiple requests for documents received from the same requester within 45 days.

§ 1602.15 Submitter's rights process.

(a) When LSC receives a FOIA request seeking the release of confidential commercial information, LSC shall provide prompt written notice of the request to the submitter in order to afford the submitter an opportunity to object to the disclosure of the requested confidential commercial information. The notice shall reasonably describe the confidential commercial information requested, inform the submitter of the process required by paragraph (b) of this section, and provide a reasonable time period for the submitter to respond.

(b) If a submitter who has received notice of a request for the submitter's confidential commercial information wishes to object to the disclosure of the confidential commercial information, the submitter must provide LSC within the time period set forth in the notice, a detailed written statement identifying the information which it objects. The submitter must send its objections to the Office of Legal Affairs or, if it pertains to Office of Inspector General records, to the Office of Inspector General, and must specify the grounds for withholding the information under FOIA or this part. In particular, the submitter must demonstrate why the information is commercial or financial information that is privileged or confidential. If the submitter fails to respond to the notice from LSC within the time period specified in the notice, LSC will deem the submitter to have no objection to the disclosure of the information.

(c) Upon receipt of written objection to disclosure by a submitter, LSC shall consider the submitter's objections and specific grounds for withholding in deciding whether to release the disputed information. Whenever LSC decides to disclose information over the objection of the submitter, LSC shall give the submitter written notice which shall include:

(1) A description of the information to be released and a notice that LSC intends to release the information;

(2) A statement of the reason(s) why the submitter's request for withholding is being rejected; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(d) The requirements of this section shall not apply if:

(1) LSC determines upon initial review of the requested confidential commercial information that the requested information should not be disclosed;

(2) The information has been previously published or officially made available to the public; or

(3) Disclosure of the information is required by statute (other than FOIA) or LSC's regulations.

(e) Whenever a requester files a lawsuit seeking to compel disclosure of a submitter's information, LSC shall promptly notify the submitter.

(f) Whenever LSC provides a submitter with notice and opportunity to oppose disclosure under this section, LSC shall notify the requester that the submitter's rights process under this section has been triggered. Likewise, whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, LSC shall notify the requester.

Dated: December 12, 2016.

Stefanie K. Davis,

Assistant General Counsel.

[FR Doc. 2016–30144 Filed 12–15–16; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1845 and 1852

RIN 2700–AE33

NASA Federal Acquisition Regulation Supplement: Contractor Financial Reporting of Property (2016–N024)

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA is issuing a final rule amending the NASA Federal Acquisition Regulation Supplement (NFS) to add a monthly reporting requirement for contractors having custody of $10 million or more in NASA-owned Property, Plant and Equipment (PP&E).

DATES: *Effective:* January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Andrew O'Rourke, telephone 202–358–4560.

SUPPLEMENTARY INFORMATION:

I. Background

NASA published a proposed rule in the **Federal Register** at 81 FR 48726 on July 26, 2016, to amend the NFS to add a monthly reporting requirement at 1852.245–73 for contracts in which the contractor has custody of NASA-owned PP&E valued at $10 million or more to ensure contractor-held PP&E are more accurately represented in NASA financial statements. Two respondents provided comments in response to the proposed rule.

II. Discussion and Analysis

NASA reviewed the public comments in the development of the final rule. A discussion of the comments and any changes made to the rule as a result of these comments is provided, as follows:

A. Changes. No changes are being made to the final rule as a result of the public comments received with the exception of minor editorial changes.

B. Analysis of Public Comments.

1. Recommend use of different approach to asset management.

Comment: One respondent agreed with the overall objective of the rule, but disagreed with NASA's proposed approach and changes in the rule. The respondent commented that the NFS clause is fundamentally flawed, is non-GAAP accounting, and it does not in of itself create adequate infrastructure to provide reliable accounting data and financial reporting. The respondent commented that the clause inappropriately combines and transforms property management accountability data under a contract based upon FAR 45 Government Property, into Financial Accounting Standards Board (FASB) accounting data. The respondent commented that NASA-owned and contractor-furnished internal use property, acquired under a contract that is accountable to a contract is generally not subject to NASA's capitalization threshold of $500,000; however, what is acquired and furnished includes property transactions for research and development, period cost, program cost . . ., probably very little individual capital items, per FASAB No. 6—Accounting for property, plant, and equipment. The respondent commented that using property accountability data subject to FAR 45, for financial accounting data is wrong, as it does not provide faithful representation of NASA's PP&E as well as external reporting of property accountability in all other Government agencies is not on a monthly basis. The respondent commented that reporting this information will not result in improved decision making. The respondent also stated that reporting unreliable financial data on a yearly basis or monthly basis is a waste of NASA resources, the cost to increase the reporting cycle from annual to monthly is not inconsequential, and NASA should expect their contractors to ask for a contract modification with due consideration. The respondent recommended that NASA not proceed with the proposed rule, rather NASA should migrate to the new ISO 55000 Asset Management standard.

Response: NASA does not concur with the respondent's stance on the proposed rule. The objective of the rule is to clarify and emphasize the supplemental instructions in paragraph (a) of NFS clause 1852.245–73 that all contractors having custody of NASA Property, Plant, and Equipment (PP&E) with a value of $10 million or more are required to report this information on a monthly basis to NASA. The property reporting requirement is to help assess the efficiency and effectiveness of asset management consistent with the Statement of Federal Financial Accounting Standard (SFFAS) No. 6, Accounting for Property, Plant, and Equipment, and NASA Procedural Requirement (NPR) 9250.1, Property, Plant, and Equipment and Operating Materials and Supplies, which implements SFFAS No. 6. The respondent failed to provide data to support their comments concerning the NFS clause or the recommendation to migrate to a new standard. Thus, no changes were made in response to this comment.

2. Difference between monthly and annual reporting.

Comment: One respondent submitted the following questions on the proposed rule:

- If a contractor has $10M worth of property, is reporting is required?
- If the value drops below $10M, does the contractor stop reporting on a monthly basis?
- Is the $10M per contract or the sum of NASA property accountable to the contractor?
- Is the NASA Form 1018 required for the monthly reporting or is another format/system used?
- If NASA is going to require monthly financial reporting, are they referring to how the contractor reports monthly financials on the CHATS report or how the contractor reports on the NASA Form 1018?
- Will NASA require the contractor to submit a NASA Form 1018 monthly or a CHATS monthly?
- Currently in the month of September an annual and a monthly financial report is due. Will NASA eliminate one of these if they are going to require 1018s on a monthly basis?

Response: If at any time during performance of the contract, NASA-owned property in the custody of the contractor has a value of $10 million or more for the contract, the contractor shall submit a report no later than the 21st of each month. At any time during performance of the contract if the value of property for the contract drops below $10M, the contractor does not have to submit the monthly report. A contractor having NASA-owned property in their custody of $10 million or more will be required to report both the monthly and yearly reporting in accordance with the requirements of paragraph (c)(1) and paragraph (c)(2) of the clause utilizing the NASA Form 1018, the NASA Form 1018 Electronic Submission System (NESS), NASA Form 533 Contractor Financial Management Report, and any supplemental instructions issued by the contracting officer. Accordingly, no changes were made in response to this respondent's questions.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

The objective of this rule is to add a monthly reporting requirement for contractors having custody of NASA-owned PP&E valued at $10 million or greater to ensure that contractor-held PP&E are more accurately represented in NASA financial statements consistent with the Statement of Federal Financial

Accounting Standard (SFFAS) No. 6, Accounting for Property, Plant, and Equipment and NASA Procedural Requirement (NPR) 9250.1, Property, Plant, and Equipment and Operating Materials and Supplies.

Two respondents provided comments in response to the proposed rule, but none of the comments were submitted in response to the Initial Regulatory Flexibility Act request in the proposed rule. Thus, no changes were made to the final rule.

NASA does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* because the affected NASA contractors with custody of NASA-owned Property, Plant, and Equipment (PP&E) valued at $10 million or greater are primarily large businesses.

The requirements under this rule apply to any contract award (including contracts for supplies, services, construction, and major systems) that requires contractors to use Government property. According to NASA Property Records in Fiscal Year (FY) 2015 there were 643 contracts that required reporting NASA contractors with custody of Government property to report that property. Of the 643 contracts, approximately 20% or 129 contracts were with small business contractors. Of the 643 contracts, 32 contracts had NASA-owned and contractor-held PP&E with a value of $10 million or more and required monthly reporting. Of those 32 contracts, only three were awarded to small business contractors.

Each NASA contractor is required to submit annually the NASA Form 1018, NASA Property in the Custody of Contractors. This rule will add a new reporting requirement requiring contractors to submit a report if at any time during performance of the contract NASA-owned property in the custody of the contractor has a value of $10 million or more. However, the impact of this reporting requirement is minimal on small entities based on FY 2015 NASA property records that show only three small business contractors with custody of NASA PP&E valued at $10 million or more. There are no additional professional skills necessary in this area on the part of small businesses.

There are no significant alternatives that could further minimize the already minimal impact on businesses, small or large. New PP&E reporting requirements are the same for both large and small businesses once the NASA-owned PP&E threshold of $10 million is reached.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C chapter 35); however, these changes to the NFS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 2700–0017, titled NASA Property in the Custody of Contractors and OMB Control No. 9000–0075, titled Government Furnished Property Requirements.

List of Subjects in 48 CFR Parts 1845 and 1852

Government procurement.

Manuel Quinones,

NASA FAR Supplement Manager.

Accordingly, 48 CFR parts 1845 and 1852 are amended as follows:

PART 1845—GOVERNMENT PROPERTY

■ 1. The authority citation for part 1845 continues to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

■ 2. Amend section 1845.107–70 by revising paragraph (d) to read as follows:

1845.107–70 NASA solicitation provisions and contract clauses.

* * * * *

(d) The contracting officer shall insert the clause at *1852.245–73,* Financial Reporting of NASA Property in the Custody of Contractors, in cost reimbursement solicitations and contracts and in all contracts in which the contractor has custody of NASA-owned property with a value of $10 million or more, unless all property to be provided is subject to the clause at *1852.245–71,* Installation-Accountable Government Property. Insert the clause 1852.245–73 in other types of solicitations and contracts when it is known at award that property will be provided to the contractor or that the contractor will acquire property title to which will vest in the Government prior to delivery.

* * * * *

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 1852 continues to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

■ 4. Amend section 1852.245–73 by—

■ a. Revising the date of the clause; and

■ b. Revising paragraphs (b)(2) and (c).

The revised text reads as follows:

1852.245–73 Financial reporting of NASA property in the custody of contractors.

* * * * *

Financial Reporting of NASA Property in the Custody of Contractors (Jan 2017)

* * * * *

(b) * * *

(2) The Contractor shall mail the original signed NF 1018 directly to the cognizant NASA Center Industrial Property Officer and a copy to the cognizant NASA Center Deputy Chief Financial Officer, Finance, unless the Contractor uses the NF 1018 Electronic Submission System (NESS) for report preparation and submission.

* * * * *

(c)(1) The annual reporting period shall be from October 1 of each year through September 30 of the following year. The report shall be submitted in time to be received by October 31st. The information contained in these reports is entered into the NASA accounting system to reflect current asset values for agency financial statement purposes. Therefore, it is essential that required reports be received no later than October 31st.

(2) Some activity may be estimated for the month in which the report is submitted, if necessary, to ensure the NF 1018 is received when due. However, contractors' procedures must document the process for developing these estimates based on planned activity such as planned purchases or NASA Form 533 (NF 533) Contractor Financial Management Report cost estimates. It should be supported and documented by historical experience or other corroborating evidence, and be retained in accordance with FAR Subpart 4.7, Contractor Records Retention. Contractors shall validate the reasonableness of the estimates and associated methodology by comparing them to the actual activity once that data is available, and adjust them accordingly. In addition, differences between the estimated cost and actual cost must be adjusted during the next reporting period. Contractors shall have formal policies and procedures, which address the validation of NF 1018 data, including data from subcontractors, and the identification and timely reporting of errors. The objective of this validation is to ensure that information reported is accurate and in compliance with the NASA FAR Supplement. If errors are discovered on NF 1018 after submission, the contractor shall contact

the cognizant NASA Center Industrial Property Officer (IPO) within 30 days after discovery of the error to discuss corrective action.

(3) In addition to an annual report, if at any time during performance of the contract, NASA-owned property in the custody of the contractor has a value of $10 million or more, the contractor shall also submit a report no later than the 21st of each month in accordance with the requirements of paragraph (c)(2) of this clause.

(4) The Contracting Officer may, in NASA's interest, withhold payment until a reserve not exceeding $25,000 or 5 percent of the amount of the contract, whichever is less, has been set aside, if the Contractor fails to submit annual NF 1018 reports in accordance with NFS subpart 1845.71, any monthly report in accordance with (c)(3) of this clause, and any supplemental instructions for the current reporting period issued by NASA. Such reserve shall be withheld until the Contracting Officer has determined that NASA has received the required reports. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government right.

* * * * *

[FR Doc. 2016–30157 Filed 12–15–16; 8:45 am]

BILLING CODE 7510–13–P

Proposed Rules

Federal Register
Vol. 81, No. 242
Friday, December 16, 2016

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

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2013–BT–STD–0006]

RIN 1904–AC55

Energy Efficiency Program for Commercial and Industrial Equipment: Availability of Provisional Analysis Tools and Notice of Data Availability

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

ACTION: Reopening of public comment period.

SUMMARY: On November 1, 2016, the U.S. Department of Energy (DOE) published in the **Federal Register** a notice of data availability (NODA) pertaining to the provisional analysis of energy conservation standards for commercial and industrial fans and blowers. The notice provided an opportunity for submitting written comments, data, and information by December 1, 2016. This document announces a reopening of the public comment period for submitting comments and data on the NODA. The comment period is reopened until January 6, 2017.

DATES: The comment period for the notice of data availability published on November 1, 2016 (81 FR 75742) is reopened. DOE will accept comments, data, and information regarding this rulemaking received no later than January 6, 2017.

ADDRESSES: *Instructions:* Any comments submitted must identify the NODA for commercial and industrial fans and blowers and provide docket number EERE–2013–BT–STD–0006 and/or RIN number 1904–AC55. Comments may be submitted using any of the following methods:

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

(2) *Email: CIFB2013STD0006@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

(3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure.

The docket Web page can be found at: *https://www.regulations.gov/docket?D=EERE-2013-BT-STD-0006.* The docket Web page contains simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT:

Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–6636. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Mr. Peter Cochran, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9496. Email: *peter.cochran@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On November 1, 2016, DOE published a notice of data availability (NODA) pertaining to energy conservation standards for commercial and industrial blowers (81 FR 75742). The NODA announced the availability of provisional analysis tools and results that DOE may use to support energy conservation standards for commercial and industrial fans and blowers. The November 2016 NODA provided for the submission of public comments by December 1, 2016. The Air Conditioning, Heating, and Refrigeration Institute (AHRI), and the Air Movement and Control Association (AMCA) requested an extension of the public comment period to allow for additional time to review and evaluate the changes reflected in the provisional analysis tools and results associated with the November 2016 NODA compared to the revised provisional analysis tools and results associated with the previous NODA, which DOE published on May 1, 2015. 80 FR 24841.

In view of the requests for an additional comment period extension for the November 2016 NODA, DOE has determined that a reopening of the comment period to allow additional time for interested parties to submit comments is appropriate. Therefore, DOE is reopening the comment period until January 6, 2017, to provide interested parties additional time to prepare and submit comments. DOE further notes that any submissions of comments or other information submitted between the original comment end date and January 6, 2017, will be deemed timely filed.

Issued in Washington, DC, on November 30, 2016.

Kathleen B. Hogan,

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

[FR Doc. 2016–30299 Filed 12–15–16; 8:45 am]

BILLING CODE 6450–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

RIN 3245–AG65

Small Business Investment Companies—Administrative Fees

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to increase the Small Business Investment Company (SBIC) licensing and examination fees. The Small Business Investment Act of 1958, as amended, allows SBA to collect licensing and examination fees to offset SBA's costs associated with the administration of these two activities. SBA last increased fees for SBICs in 1996. Current fees offset less than 40% of SBA's administrative expenses related to these activities. The proposed rule would revise existing regulations to increase, over a five-year period, SBIC licensing and examination fees in order to annually recoup an estimated 70% of SBA administrative expenses related to these activities. After the five year period, the rule proposes annual increases of these fees based on inflation. To encourage investment into underserved areas, the proposed rule would establish certain examination fee discounts for SBICs that make significant low and moderate income (LMI) investments.

DATES: Comments on the proposed rule must be received on or before February 14, 2017.

ADDRESSES: You may submit comments, identified by RIN 3245–AG65, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Mark Walsh, Associate Administrator for the Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

SBA will post comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov,* please submit the information to Theresa Jamerson, Office of Investment and Innovation, 409 Third Street SW., Washington, DC 20416. Highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Theresa Jamerson, Office of Investment and Innovation, (202) 205–7563 or *sbic@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

The Small Business Investment Act of 1958, as amended, authorizes SBA to collect fees to cover the costs associated with the licensing and examination of SBICs. 15 U.S.C. 681(e)(2)(B) and 687b(b). Although SBA has regulations setting the amount of these fees, SBA has not increased licensing and examination fees for SBICs since 1996. As part of the final rule published January 31, 1996 (61 FR 3177), SBA set licensing fees ''to reflect the Agency's costs of processing applications'' and similarly set examination fees to ''produce total revenue sufficient to cover the current direct costs to SBA of conducting examinations.'' In a subsequent rule published on April 30, 1997 (62 FR 23337), SBA capped examination fees at $14,000, which lowered the fee for SBICs with over $60 million in assets. As part of the rationale for this change, the rule stated, ''many of the largest SBICs are bank-owned and do not use federal leverage, so that fees computed on the basis of total assets do not appropriately reflect the level of effort and risk associated with the examination process.'' In December 1996, only 6 of the 28 SBICs with over $60 million in assets used leverage and only 1 of the 12 SBICs with over $120 million in assets used leverage. As of September 14, 2016, 114 of the 121 SBICs with over $60 million in assets used leverage and 64 of the 66 SBICs with over $120 million in assets used leverage. Since nearly all of the SBIC program's largest SBICs now utilize leverage, the rationale stated in the 1997 rule as a basis for reducing examination fees no longer applies.

The 1997 rule, which remains in place today, does not include an inflation adjustment for these fees. Consequently, these fees have not kept pace with rising SBA costs due to changes in inflation and increased risk in its portfolio. In 1996 when the fees were most recently increased to cover SBA's costs, aggregate outstanding SBA leverage was less than $1.4 billion; this figure has grown to $10.4 billion as of June 30, 2016. Licensing and examination fees received in Fiscal Year (FY) 2015 were slightly lower than those received in FY 1999 (the earliest date fees paid and SBA expenses for these activities are readily available) because, at that time, SBA was licensing SBICs issuing Participating Securities (in addition to SBICs issuing only Debentures), which pay higher licensing and examination fees than SBICs issuing only Debentures. While licensing and examination fees have decreased, SBA's expenses related to licensing and examination activities have doubled due to inflation and the cost of obtaining necessary resources to manage SBA's increased risk.

Although fees set in 1996, as adjusted in 1997, were intended to fully reimburse SBA's costs, by FY 1999, licensing and examination fees only covered approximately 85% of SBA's related expenses. In FY 2015, licensing and examination fees covered less than 40% of SBA's related licensing and examination expenses.

In FY 2015, SBA processed 44 Management Assessment Questionnaires as part of its initial licensing review and 32 SBIC license applications in its final licensing review. SBA collected approximately $0.4 million in SBIC licensing fees, which reimbursed less than a quarter of SBA's expenses associated with licensing. In FY 2015 SBA issued 222 exam reports for over 300 operating SBICs and collected $1.8 million in examination fees, reimbursing less than half of SBA's costs associated with examination activities. SBA's Office of Inspector General (OIG) also noted the disparity between examination costs and fees collected in Audit Report 13–22: Improved Examination Quality Can Strengthen SBA's Oversight of Small Business Investment Companies (available at *http://www.sba.gov/oig/audit-report-13-22-improved-examination-quality-can-strengthen-sbas-oversight-small-business*), stating, ''while the SBA has continued to exercise its statutory authority to collect examination fees, we determined the fees were not sufficient to keep pace with rising costs.'' OIG Audit Report 13–22 at 8.

The primary reason that licensing and examination fees do not cover the current cost of these activities is inflation. Another factor is the increased number of SBICs utilizing higher amounts of leverage. Since 1996 (when the fees were last increased), the number of leveraged SBICs with assets over $60 million has risen from 6 SBICs in 1996 to 114 in September 2016. SBA applies a higher level of credit analysis to leveraged SBICs than non-leveraged SBICs in both licensing and exams. Another factor is that SBA has intensified its licensing activities in the past ten years due to the increased amounts of leverage sought by applicants and in order to improve the quality of its SBIC portfolio. SBA has adopted many industry best practices in its licensing process, including accessing relevant private equity performance resources and benchmarking applicants to industry performance. These industry-standard best practices cost money. For example, SBA spent over $100,000 for information subscription services to support licensing activities in FY 2016.

However, SBICs ultimately benefit financially from improvements in the quality of the SBIC program portfolio through lower annual charges on SBA-guaranteed debenture leverage. SBA formulates the annual charge each year to keep the program at zero subsidy cost. The SBIC debenture leverage annual charge has decreased from 1% in FY 1999 to an annual charge of 0.347% in FY 2017, reflecting improvements to the SBIC debenture portfolio.

Even with these improvements, SBA recognizes that its oversight capabilities must continue to improve, particularly in the areas of technology and training in connection with its licensing and examination activities. As indicated by the OIG's report, ''without proper training and technology examiners may not effectively identify all regulatory violations as intended by the Act.'' OIG Audit Report 13–22 at 11. Testimony to the House Small Business Committee on behalf of the Small Business Investor Alliance in July 2013 also indicated that the SBIC Program has ''a number of major technological and information systems challenges.'' *Examining the Small Business Investment Company Program: Hearing Before the House Subcommittee on Investigations, Oversight and Regulations,* 113th Congress (Statement by Steven Brown, President, Trinity Capital Investment, testifying on behalf of the Small Business Investor Alliance), which may be found at *http://smallbusiness.house.gov/uploadedfiles/7-25-2013_steven_brown_testimony_final_july_25.pdf.* In order to overcome some of these technological challenges, SBA needs to expand its web-based reporting application to address licensing and examinations needs. These efforts are expected to increase licensing and examination costs by $500,000 annually. SBA believes that improvements in its web-based tools will facilitate the exchange and analysis of information and result in more effective licensing and examination activities, as well as improve efficiency and ease of use by SBIC program stakeholders. To address identified training needs, SBA expects to incur additional training costs amounting to between $50,000 and $100,000 to support analysts in licensing and examinations.

Finally, due to recent attrition in staffing and to address peaks in licensing, SBA expects to hire contractors to support both examinations and licensing processes. Due to the specialized skill set associated with these activities, SBA estimates additional contracting resources may cost an additional $600,000 for examinations and up to $400,000 for licensing annually.

Based on estimated costs for FY 2017, SBA projects costs exceeding $2 million for SBIC licensing activities and $4.5 million for SBIC examination activities. SBA is not currently proposing to increase fees to 100% of its anticipated costs; SBA estimates the proposed fees would recoup only 70% of its anticipated licensing and examination costs. Under this proposed rule, SBA seeks to increase SBIC licensing and examination fees in order to: (1) Recoup a significant portion of its projected expenses associated with licensing and examination activities; (2) pay for necessary technology upgrades related to licensing and examinations; (3) pay for additional licensing and examiner training; (4) pay for necessary information resources commonly available to private equity fund of funds to support due diligence, analysis and decision-making in the licensing area; and (5) pay for contractors with specialized expertise to help support staff associated with licensing and examination-related activities. SBA proposes to increase these fees over a five year period in order to provide a more gradual impact on SBICs and then annually adjust these fees for inflation beginning on October 1, 2021. SBA may consider increasing its fees to reimburse more of its expenses at a later time, but will be mindful of any impact on the level of interest in the program.

II. Section by Section Analysis

A. Indexing Fees

Section 107.50—Definition of Terms

In order to adjust licensing and examination fees to remain current with inflation after the five year period, SBA proposes to add the defined term ''Inflation Adjustment'', which would be defined as the methodology used to increase SBIC administrative fees using the consumer price index for all urban consumers (CPI–U), as calculated by the U.S. Bureau of Labor and Statistics (BLS), based on the U.S. city average for all items, not seasonally adjusted, with the base period 1982–84=100. After consulting with BLS, SBA chose this index because it reflects the average change in the prices paid for a market basket of goods and services and is most frequently used in escalation agreements, as discussed on the BLS Web site (*http://www.bls.gov/cpi/cpi1998d.htm*). Historical CPI–U values may be found at *http://data.bls.gov/timeseries/CUUR0000SA0*?. Beginning October 1, 2021, SBA would recalculate the examination and licensing fees annually to reflect increases in the CPI–U at the beginning of each government fiscal year (October 1) based on the change in the index from the previous year and round the amount to the nearest $100. If the CPI–U decreases, no change will be made to the fees. SBA will publish the resulting fees in a notice in the **Federal Register** each year prior to the date of the increase. SBA is proposing to calculate the increase based on the change from the previous year's June CPI–U to the most recent June CPI–U, which will provide sufficient time for SBA to publish the revised fee before October. For example, the CPI–U is 238.638 in June 2015 and 241.038 in June 2016, a 1.0057% increase.

B. Licensing Fees

Section 107.300—License Application Form and Fee

Regulations currently require SBIC applicants to pay a base fee of $10,000 plus an additional $5,000 if the applicant intends to operate as a limited partnership (Partnership Licensee). Most SBIC applicants are organized as limited partnerships and therefore currently pay a licensing fee of $15,000. Applicants seeking to be licensed as Early Stage SBICs are required to pay both the additional $5,000 Partnership Licensee fee and an additional $10,000 Early Stage fee, for a total of $25,000. Current regulations also include an additional $5,000 fee for applicants intending to issue Participating Securities leverage (a type of leverage, no longer available, that was designed to encourage SBICs to invest in equity securities).

Current regulations require applicants to pay the licensing fee when they submit their complete license application, which initiates the final phase in the SBIC licensing process. SBA expends significant resources prior to this submission. The first phase in the licensing process begins when a first time applicant submits its Management Assessment Questionnaire (''MAQ''), which consists of SBA Forms 2181 and exhibits A through F of SBA Form 2182, or when the management of an existing SBIC submits a request to SBA to be considered for a subsequent SBIC license. (SBIC application forms are available on SBA's Web site at *www.sba.gov/sbic.*) SBA reviews the MAQ or subsequent SBIC applicant materials, performs due diligence, analyzes the management team's performance, interviews those management teams invited for an in-person interview, and ultimately determines whether to issue a formal invitation (Green Light letter) to the

applicant to proceed to the final licensing phase of the process. Once an applicant receives a Green Light letter, the applicant typically has up to 18 months to raise the requisite private capital. During this timeframe, SBA keeps in touch with the applicant, conducts SBIC training classes, and provides guidance as needed. The applicant pays the licensing fee only at the final licensing phase, which occurs when it submits its complete license application (consisting of an updated SBA Form 2181 and complete SBA Forms 2182 and 2183) after raising sufficient private capital. A number of applicants fail to raise the requisite capital or for other reasons do not submit a license application. As a result, SBA estimates that less than half of SBIC applicants pay the licensing fee, even though SBA expends resources on all applicants.

To clarify its existing practices, the proposed rule defines SBA's licensing phases and what forms and fees are required at each phase as discussed above. SBA considered adding a fee at the beginning of the licensing process to help spread the costs across all applicants on which SBA expends resources, but decided not to pursue this approach so as to not discourage applicants from applying to the program. SBA invites comments on whether SBA should charge a fee at the first phase to help spread the costs across all applicants on which SBA expends resources.

The proposed rule would remove the additional fee currently charged to applicants seeking to operate as a Partnership Licensee, since substantially all applicants intend to operate as a Partnership Licensee and this is not a significant variable in determining costs. The proposed rule also removes the additional fee for Participating Securities Licensees, since SBA stopped issuing commitments for Participating Securities Leverage and licensing new Participating Securities SBICs as of October 1, 2004. The proposed rule increases the licensing fee to $25,000 in FY 2017, after the effective date of a final rule, with further increases of $5,000 each October for the next 4 years, resulting in a licensing fee of $45,000 by October 1, 2020. Beginning on October 1, 2021, SBA will increase the licensing fee using the Inflation Adjustment and, prior to the date of the increase, will publish the amount in a Notice in the **Federal Register**. As previously discussed, this increase will be used to offset SBA's costs associated with additional training, upgraded information technology, necessary subscription services, and specialized contractor support. Even with this increase, SBA expects these fees to offset less than half of SBA's licensing expenses by FY 2021. SBA may consider further increases in the future in order to fully cover the costs of its licensing activities as authorized by the Small Business Investment Act, but does not want to increase fees too sharply without better understanding the impact fee increases may have on application submission rates.

Section 107.410—Changes in Control of Licensee

SBA treats a change in control of a Licensee as a licensing action, since SBA must perform similar functions and processes to those in SBA's final licensing phase. Current regulations require SBICs seeking a change in control to pay a $10,000 fee, similar to the current licensing fee. Since the procedures and costs are similar to those in the final licensing process, the proposed regulations change the current fee to be equal to the licensing fee identified in proposed § 107.300.

C. Examination Fees

Section 107.692—Examination Fees

Current § 107.692(b) provides for a base examination fee calculated as a percentage of an SBIC's total assets at cost. As more specifically set forth in current § 107.692(b), the percentage decreases as the assets increase, with the maximum base examination fee set at $14,000 for SBICs with total assets greater than $60 million.

Current § 107.692(c) then provides for various adjustments to the base examination fee which are summarized in the table set forth in § 107.692(d), as shown on Table 1: Current SBIC Examination Fee Adjustments, as follows:

TABLE 1—CURRENT SBIC EXAMINATION FEE ADJUSTMENTS

Examination fee discounts	Amount of discount—% of base examination fee	Examination fee additions	Amount of addition—% of base examination fee
No prior violations	15	Partnership or limited liability company	5
Responsiveness	10	Participating Security Licensee	10
		Records/Files at multiple locations	10
		Early Stage SBIC	10

Current § 107.692(e) provides that SBA may assess an additional fee of $500 per day if SBA determines the examination is delayed due to the SBIC's lack of cooperation or the condition of its records.

Proposed § 107.692(b) would replace the base fee calculation with the following formula: Base Fee = Minimum Base Fee + 0.024% of assets at cost, but not to exceed the Maximum Base Fee. Both the Minimum Base Fee and the Maximum Base Fee would change each year as shown on Table 3: Minimum and Maximum Base Fees:

TABLE 3—MINIMUM AND MAXIMUM BASE FEES

Time period (based on the examination start date)	Minimum base fee	Maximum base fee for non-leveraged SBICs	Maximum base fee for leveraged SBICs
February 14, 2017 to September 30, 2017	$5,000	$20,000	$20,000
October 1, 2017 to September 30, 2018	6,000	22,500	26,000
October 1, 2018 to September 30, 2019	7,000	25,000	32,000

TABLE 3—MINIMUM AND MAXIMUM BASE FEES—Continued

Time period (based on the examination start date)	Minimum base fee	Maximum base fee for non-leveraged SBICs	Maximum base fee for leveraged SBICs
October 1, 2019 to September 30, 2020	8,000	27,500	38,000
October 1, 2020 to September 30, 2021	9,000	30,000	44,000

For the purposes of calculating the examination fee, the proposed rule defines Non-leveraged SBICs as SBICs that have no outstanding SBA-guaranteed leverage or leverage commitments and, in the case of SBICs that have issued leverage in the form of Participating Securities, those SBICs that have no outstanding Earmarked Assets. An SBIC that satisfies these requirements must also certify to SBA that it will not seek new SBA leverage in the future. As discussed in the 1997 rule, non-leveraged SBICs pose no credit risk to SBA and therefore require less time to examine. The lower Maximum Base Fee for non-leveraged SBICs reflects this reduced effort. The lower Maximum Base Fee for non-leveraged SBICs also provides a small incentive for leveraged SBICs to repay their leverage. By October 1, 2020, the examination fees are estimated to cover most of SBA's costs related to examination activities.

An example may be helpful to demonstrate the gradual phase-in of the proposed exam fees. Assume that in March 2019, a leveraged SBIC has $125 million in assets at cost. The Base Fee would be equal to $32,000, the Maximum Base Fee for that time period, since the Base Fee calculation ($7,000 + .024% × $125 million) computes to $37,000. If the SBIC still had $125 million in assets at cost and outstanding leverage in March 2021, the Base Fee would be $39,000, since the Base Fee calculation ($9,000 + .024% × $125 million) would compute to $39,000 and the Maximum Base Fee for leveraged SBICs would be $40,000. If the SBIC had repaid all SBA leverage, had no leverage commitments and certified that it did not intend to seek leverage in the future, it would qualify as a non-leveraged SBIC and the Base Fee would be reduced to $30,000, based on the non-leveraged Maximum Base Fee in March 2021.

In considering examination fees, SBA reviewed the expenses reported in the Form 468 related to private sector financial auditors (which perform activities similar to an examination). In FY 2015, private sector auditor expenses for SBICs ranged from $35,000 to over $65,000 (depending on the size of the fund) with an average audit cost of approximately $43,000. By FY 2021, the SBIC Base Fee would range from $9,000 to $44,000 with an expected average examination fee of $19,300. SBA believes the proposed examination fees are reasonable.

To keep the fees aligned with SBA's costs, beginning on October 1, 2021, the Base Fee would be adjusted annually by increasing both the Minimum and Maximum Base Fees using the Inflation Adjustment. For example, if the Inflation Adjustment was 1.5% between June 2020 and June 2021, the Minimum Base Fee beginning in FY 2022 would be $9,100 and the Maximum Base Fee would be $30,600 for non-leveraged SBICs and $44,900 for leveraged SBICs.

Consistent with current regulations, proposed § 107.692(b) only computes a Base Fee. That Base Fee is then increased or decreased using the adjustments defined in § 107.692(c) to determine the final examination fee. Proposed § 107.692(c) would change the examination fee adjustments to better reflect SBA costs and provide certain incentives to SBICs. These changes are identified below:

• *Low and Moderate Income (LMI) Investing Discount:* Proposed § 107.692(c)(2) would apply a discount of 1% of the Base Fee for every $10 million in LMI Investments (in dollars at cost) financed since the Licensee's last examination up to a maximum 10% of the Base Fee. SBA will not spend any less time or resources examining SBICs with LMI Investments as a result of this discount, but is including the discount in order to provide an incentive to SBICs to make LMI Investments.

• *Remove Fully-responsive Discount and Non-responsiveness Addition:* Current regulations provide a 15% discount if the SBIC is ''fully responsive to the letter of notification of examination.'' Most SBICs currently receive this discount, and the proposed Base Fee already reflects the cost efficiencies resulting from responsiveness. To compensate SBA for the additional time associated with SBICs that are not responsive, proposed § 107.692(c)(3) would add 15% of the Base Fee for non-responsiveness or ''not fully responsive to the letter of notification of examination.''

• *Remove Additions for Partnership and LLC:* Current regulations identify additions to the Base Fee for SBICs organized as partnerships or limited liability companies (LLCs). The proposed rule would remove these additional fees from § 107.692(c). Since substantially all SBICs are organized as partnerships or LLCs, the cost to SBA of examining SBICs with this structure is reflected in the proposed Base Fee.

• *Remove Additions for Participating Securities Licensees and Early Stage SBICs:* Current regulations include additions to the Base Fee if the SBIC is authorized to issue Participating Securities or is licensed as an Early Stage SBIC. SBA promulgated these additional fees because these types of SBICs were perceived to engage in particularly complex financing transactions. However, given the sophistication of the financing transactions of many of today's SBICs, whether standard debenture SBICs or otherwise, SBA no longer sees a need for this fee adjustment and proposes to remove it from § 107.692(c).

• *Unresolved Finding Addition:* SBA expends significant time monitoring and resolving examination findings that have remained unresolved for many months, and in some cases, years. SBA believes that SBICs should resolve all examination findings within 90 days from notification. To encourage SBICs to resolve findings in a timely manner, proposed § 107.692(c)(5) would assess an additional fee equal to 5% of the Base Fee for every 30 calendar days or portion thereof for each examination finding that remains unresolved after a 90 calendar day grace period after the SBIC is notified that corrective action must be taken to resolve an examination finding, unless SBA ultimately resolves the finding in the SBIC's favor.

As an example, if an SBIC is notified on May 1, 2018 of an examination finding that requires resolution, the SBIC would have 90 calendar days (through July 30, 2018) to resolve the finding. If the SBIC does not resolve the examination finding until September 10, 2018, the SBIC would have taken 132 days to resolve the finding, or 42 days

beyond the 90 calendar day cure period. If the SBIC's base examination fee was $20,000, SBA would assess an additional fee of $2,000 calculated as follows:

	First 30 days:	$1,000	(5% of Base Fee)
+	Next 12 days:	$1,000	
	Total Unresolved Finding Addition:	$2,000	

If the SBIC had two findings that each took 132 days to resolve, the total unresolved finding addition would be $4,000. There would be no additional charge if SBA ultimately resolved the finding in the SBIC's favor.

Proposed § 107.692(c)(1) keeps the 15% discount for SBICs that have no outstanding regulatory violations at the time of the commencement of the examination and no violations as a result of the most recent prior examination. Proposed § 107.692(c)(5) retains the 10% addition charged to SBICs that maintain records located in multiple locations. SBA believes both these adjustments continue to be appropriate. A summary of the resulting proposed examination fee discounts and additions is summarized in Table 4: Proposed Examination Fee Discounts and Additions, below:

TABLE 4—PROPOSED EXAMINATION FEE DISCOUNTS AND ADDITIONS

Examination fee discounts	Amount of discount—% of base fee	Examination fee additions	Amount of addition—% of base fee
No outstanding violations; no violations in prior exam.	15%	Non-responsive	15%
LMI Investments	1% of Base Fee for every $10 million in LMI Investments funded since the last examination up to a maximum discount of 10% of Base Fee.	Records/Files at multiple locations.	10%
		Unresolved Findings	5% of Base Fee for every 30 days or portion thereof beyond the 90 day grace period for each unresolved finding

Just as with current § 107.692, the final examination fee is calculated by taking the Base Fee determined under § 107.692(b) and adding or deducting the adjustments identified in proposed § 107.692(c). The following example demonstrates this calculation. Assume that in March 2019, a leveraged SBIC has $125 million in assets at cost. The Base Fee calculation ($8,500 + .024% × $200 million) computes to $38,500. Since the Base Fee may not exceed the Maximum Base Fee for the relevant time period, the Base Fee would be equal to $30,000. If the SBIC is non-responsive to the examiner's requests, has records in multiple locations, and does not qualify for any of the proposed discounts, the examination fee would be calculated as follows:

	$30,000	Base Fee determined per proposed § 107.692(b)
+	$ 4,500	15% addition for non-responsiveness per proposed § 107.692(c)(3)
+	$ 3,000	10% addition for records in multiple locations per proposed § 107.692(c)(4)
	$37,500	Examination Fee

Proposed § 107.692(e) changes the current $500 per day delay fee to $700 per day, which will be adjusted annually using the Inflation Adjustment, beginning on October 1, 2021 to coincide with the date on which the other fee inflation adjustments are computed.

Compliance With Executive Orders 12866, 12988 and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612) Executive Order 12866

The Office of Management and Budget has determined that this rule is not a ''significant'' regulatory action under Executive Order 12866. However, to provide additional transparency for the SBIC community, a Regulatory Impact Analysis is set forth below.

1. Necessity of Regulation

The Small Business Investment Act authorizes SBA to collect administrative fees to cover licensing and examination costs. Currently, licensing fees cover less than a quarter of SBA's licensing costs and examination fees cover less than half of examination costs. It is critical that SBA increase fees in order to (1) improve its technology for both licensing and examinations; (2) improve examiner training; (3) pay for necessary information subscription services; and (4) provide contractor resources to support licensing and examination activities.

2. Alternative Approaches to the Regulation

A. Licensing Fees

SBA considered several alternatives to the proposed regulations regarding licensing fees. SBA first considered indexing the licensing fees for inflation from 1996 (the year in which SBA most recently raised licensing fees) to 2017. This alternative did not produce sufficient fees to offset SBA licensing costs and produced lower licensing fees

than those in the proposed rule. SBA therefore rejected the option of adjusting the current fees only for inflation.

Given its technology and processing time concerns, SBA considered higher licensing fees than those in the proposed rule in order to obtain the same technology and resources utilized by industry peers and further use of contractor support to reduce times in the licensing process. Although increasing fees even higher than SBA is proposing would provide more resources, SBA believes the proposed fee increases would be sufficient to meet essential needs while remaining well within the ability of qualified applicants to pay.

SBA considered adding a fee at the first licensing phase (Initial Review), but was concerned that this might substantially reduce the number of applicants to the program. SBA invites comments from industry as to whether SBA should add a fee at the first licensing phase to help spread costs across all applicants on which SBA expends resources.

SBA also considered implementing a larger increase in FY 2017 in order to offset costs more quickly. SBA opted to pursue the gradual increase identified in the proposed rule to allow potential applicants time to adjust to these increases.

B. Examination Fees

SBA considered several alternatives to the proposed regulations regarding examination fees. SBA considered indexing the fees utilizing the existing table in current § 107.692(b) to reflect inflation from 1997 to 2017. This alternative did not produce sufficient fees to offset SBA costs in examinations. In assessing the reasons for this, SBA analyzed the SBIC portfolios from both periods, and recognized that the SBIC portfolio in 1997 was significantly different than today. In 1997, most of the SBICs with the highest total assets were bank-owned SBICs that did not issue SBA leverage and therefore required less time and resources for SBA to examine. Today, most of the highest-asset SBICs have significant amounts of SBA leverage. Therefore, merely indexing the existing fees would not appropriately reflect the costs associated with examinations.

SBA also considered proposing examination fee increases that were only sufficient to cover current costs and did not cover additional money needed to address technology upgrades, training, or contractor support. SBA rejected this alternative for three reasons. First, the OIG indicated the need for improved technology and training for examiners and suggested that SBA increase its fees to cover these costs. SBA agrees that such resources would improve the examination function. Second, SBA believes its proposed examination fees are less than fees charged for similar activities such as financial audits. SBA calculated the median private sector financial audit fee paid by SBICs in FY 2015 to be $43,000, where the proposed fees would result in an average Base Fee of $19,300 in FY 2021. Third, while SBA's outstanding leverage in its operating portfolio has more than tripled from $3.1 billion at the end of September 30, 2000 to $10.4 billion as of June 30, 2016, the number of personnel in SBIC Examinations has declined by over a third. In order to continue to monitor the SBIC program at the same level as in previous years, SBA will likely need to hire contractors with specialized skills to support this function.

SBA also considered a flat examination fee, regardless of the asset cost. SBA believes its examination activities are similar to financial auditor or bank examiner activities, which typically are based on asset cost and therefore rejected this alternative.

SBA considered increasing the fees to cover most of its cost in FY 2017, but believes that a gradual increase over a five year period would allow SBICs time to budget and adjust to the higher fees.

3. Potential Benefits and Costs

SBA anticipates this proposed rule may benefit the taxpayer by covering a larger portion of SBIC program administrative costs through the collection of an additional estimated $3 million to $4 million per year by October 2020. As noted above, these increased fees will (1) improve SBIC program technology for both licensing and examinations, (2) improve examiner training, (3) pay for necessary information subscription services, and (4) provide contractor resources to support licensing and examination activities. Collections are expected to increase annually each year beginning in October 2021 based on the CPI–U Inflation Adjustment.

The proposed rule would increase licensing costs for applicants and examination costs for SBICs. The proposed rule would, by October 2020, increase licensing costs by $30,000 for all applicants that submit a complete license application. Based on the proposed rule, SBA estimates that by October 2020, the average non-leveraged examination fee would increase by $5,100 and the average examination fee for leveraged SBICs would increase by $12,100 based on FY 2015 examinations data. These fees would further impact SBICs through annual increases to reflect inflation.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action is included above in the Regulatory Impact Analysis under Executive Order 12866.

In considering this proposed rule, SBA talked with fund of fund managers, auditors, and contractors to determine whether the proposed fees were reasonable. In reviewing organizational costs for SBIC applicants, including legal and other professional costs, SBIC applicants often incur organizational costs amounting to around $500,000. The proposed increased licensing fee represents a small percentage of the total organizational costs typically incurred by SBIC applicants. SBA also compared Federal bank examiner fees and SBIC auditor fees (based on the SBIC annual Financial Reporting Form 468s submitted in 2015) with proposed SBIC examination fees. SBA believes the proposed licensing and examination fees are reasonable in comparison to the market.

Executive Order 12988

This action would meet applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action would not have retroactive or presumptive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that the rule would 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. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this proposed rule has no federalism implications warranting the preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule would not impose any new reporting or recordkeeping requirements.

Regulatory Flexibility Act, 5 U.S.C. 601–612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their

actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an Initial Regulatory Flexibility Act (IRFA) analysis which describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, § 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This proposed rule would affect all applicants that submit applications at final licensing (which averaged 35 per year for FYs 2013 to 2015), and all operating SBICs (currently approximately 300). SBA estimates that approximately 98% of these SBICs are small entities. Therefore, SBA has determined that this proposed rule does have an impact on a substantial number of small entities. However, SBA has determined that the impact on entities affected by the rule is not significant.

As noted above, proposed § 107.300 would increase licensing costs by $30,000 by October 1, 2020 for all applicants that submit a license application, which represents less than 0.1% of the average applicant's Regulatory Capital based on newly licensed SBICs between October 1, 2014 and June 30, 2016. Many applicants have organizational costs totaling around $500,000, and some have far in excess of that amount. The proposed FY 2021 licensing fee of $45,000 would represent a small fraction of those costs.

SBA estimates that proposed § 107.692 would eventually increase the average examination fee by $5,100, representing approximately 0.02% of the average non-leveraged SBIC's Regulatory Capital, and the average leveraged SBIC examination fee by $12,100, representing approximately 0.01% of the average total capital under management (Regulatory Capital and outstanding SBA guaranteed leverage). As a point of comparison, most SBIC managers charge management fees of approximately 2% of capital under management. (Management fees, like the examination fees, are paid by the SBIC.) For a leveraged SBIC with $50 million in Regulatory Capital and using 2 tiers of leverage charging a 2% management fee, the management fee would equal $3 million a year. If the leveraged SBIC had assets at cost of $150 million, no regulatory violations, and did not incur any exam fee additions, the exam fee in FY 2021 would amount to $37,400 ($44,000 minus the 15% discount for no violations), representing 0.025% of the SBIC's total capital. The examination fee would be a very small percentage of the SBIC's expenses.

SBA believes that most applicants with sufficient private equity experience and capital raising ability will not be discouraged from applying to the program based on the proposed administrative fee increases. SBA asserts that the economic impact of the rule is minimal. Accordingly, the Administrator of the SBA certifies that this proposed rule would not have a significant impact on a substantial number of small entities.

List of Subjects in 13 CFR Part 107

Examination fees, Investment companies, Loan programs—business, Licensing fees, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 107 as follows:

PART 107—SMALL BUSINESS INVESTMENT COMPANIES

■ 1. The authority citation for part 107 continues to read as follows:

Authority: 15 U.S.C. 681, 683, 687(c), 687b, 687d, 687g, 687m.

■ 2. Amend § 107.50 by adding a definition of ''Inflation Adjustment'' to read as follows:

§ 107.50 Definitions of terms.

* * * * *

Inflation Adjustment is the methodology used to increase SBIC administrative fees using the Consumer Price Index for Urban Consumers (CPI–U), calculated by the U.S. Bureau of Labor and Statistics (BLS), using the U.S. city average for all items, not seasonally adjusted, with the base period of 1982–84=100. To calculate the Inflation Adjustment, each year, SBA will divide the CPI–U from the most recent June by the CPI–U from June of the preceding year. If the result is greater than 1, SBA will increase the relevant fees as follows:

(1) Multiply the result by the current fee; and

(2) Round to the nearest $100.

* * * * *

■ 3. Revise § 107.300 to read as follows:

§ 107.300 License application form and fee.

SBA evaluates license applicants in two review phases: (1) Initial review and (2) final licensing, as follows:

(a) *Initial review.* Except as provided in this paragraph, SBIC applicants must submit a MAQ. MAQ means the Management Assessment Questionnaire in the form approved by SBA and available on SBA's Web site at *www.sba.gov/sbic.* An applicant under Common Control with one or more Licensees must submit a written request to SBA to be considered for a license and is exempt from the requirement in this paragraph to submit a MAQ unless otherwise determined by SBA in SBA's discretion.

(b) *Final licensing.* (1) An applicant may proceed to the final licensing phase only if notified in writing by SBA that it may do so. Following receipt of such notice, in order to proceed to the final licensing phase, the applicant must submit (i) a complete license application, in the form approved by SBA and available on SBA's Web site at *www.sba.gov/sbic,* within the timeframe identified by SBA and (ii) the Licensing Fee. The Licensing Fee means a non-refundable fee (determined as of the date SBA accepts the application) fee adjusted annually as follows:

Time period	Licensing fee
February 14, 2017 to September 30, 2017	$25,000
October 1, 2017 to September 30, 2018	30,000
October 1, 2018 to September 30, 2019	35,000
October 1, 2019 to September 30, 2020	40,000
October 1, 2020 to September 30, 2021	45,000

(2) Beginning on October 1, 2021, SBA will annually adjust the fee using the Inflation Adjustment and will publish a Notice prior to such adjustment in the **Federal Register** identifying the amount of the fee.

■ 4. In § 107.410, revise paragraph (b) to read as follows:

§ 107.410 Changes in Control of Licensee (through change in ownership or otherwise).

* * * * *

(b) *Fee.* A processing fee equal to the Licensing Fee defined in § 107.300(b) must accompany any application for approval of one or more transactions or events that will result in a transfer of Control.

■ 5. In § 107.692, revise paragraphs (b) through (e) to read as follows:

§ 107.692 Examination Fees.

* * * * *

(b) *Base fee.* (1) The Base Fee will be assessed based on your total assets (at cost) as of the date of your latest certified financial statement, including if requested by SBA in connection with the examination, a more recently submitted interim statement. For purposes of this § 107.692, Base Fee means the Minimum Base Fee plus 0.024% of assets at cost, rounded to the nearest $100, not to exceed the Maximum Base Fee. The Minimum and Maximum Base Fees are adjusted annually as follows:

Time period (Based on the examination start date)	Minimum base fee	Maximum base fee for non-leveraged SBICs	Maximum base fee for leveraged SBICs
February 14, 2017 to September 30, 2017	$5,000	$20,000	$20,000
October 1, 2017 to September 30, 2018	6,000	22,500	26,000
October 1, 2018 to September 30, 2019	7,000	25,000	32,000
October 1, 2019 to September 30, 2020	8,000	27,500	38,000
October 1, 2020 to September 30, 2021	9,000	30,000	44,000

(2) In the table in paragraph (b)(1) of this section, a Non-leveraged SBIC means any SBIC that, as of the date of the examination, has no outstanding Leverage or Leverage commitment, has no Earmarked Assets, and certifies to SBA that it will not seek Leverage in the future. Beginning on October 1, 2021, SBA will annually adjust the Minimum Base Fee and Maximum Base Fees using the Inflation Adjustment and will publish a Notice prior to such adjustment in the **Federal Register** identifying the amount of the fees.

(c) *Adjustments to base fee.* In order to determine the amount of your examination fee, your Base Fee, as determined in paragraph (b) of this section, will be adjusted (increased or decreased) based on the following criteria:

(1) If you have no outstanding regulatory violations at the time of the commencement of the examination and SBA did not identify any violations as a result of the most recent prior examination, you will receive a 15% discount on your Base Fee;

(2) If you have funded at least $10 million in LMI Investments at cost since the last examination, you will receive a 1% discount for every $10 million in LMI Investments made since the last examination up to a maximum of a 10% discount on your Base Fee;

(3) If you were not fully responsive to the letter of notification of examination (that is, you did not provide all requested documents and information within the time period stipulated in the notification letter in a complete and accurate manner, or you did not prepare or did not have available all information requested by the examiner for on-site review), you will pay an additional charge equal to 15% of your Base Fee;

(4) If you maintain your records/files in multiple locations (as permitted under § 107.600(b)), you will pay an additional charge equal to 10% of your Base Fee; and

(5) For any regulatory violation that remains unresolved 90 days from the date SBA notified you that you must take corrective action (as established by the date of the notification letter), you will pay an additional charge equal to 5% of the Base Fee for every 30 days or portion thereof that the violation remains unresolved after the 90 day cure period, unless SBA resolves the finding in your favor.

(d) *Fee discounts and additions table.* The following table summarizes the discounts and additions noted in paragraph (c) of this section:

Examination fee discounts	Amount of discount—% of base fee	Examination fee additions	Amount of addition—% of base fee
No outstanding violations; no violations in prior exam.	15	Non-responsive	15
LMI Investments	1% of Base Fee for every $10 million in LMI Investments made since the last examination up to a maximum discount of 10% of Base Fee.	Records/Files at multiple locations	10
		Unresolved Findings	5% of Base Fee for every 30 days or portion thereof beyond the 90 day grace period for each unresolved finding.

(e) *Delay fee.* If, in the judgment of SBA, the time required to complete your examination is delayed due to your lack of cooperation or the condition of your records, SBA may assess an additional fee of $700 per day. Beginning on October 1, 2021, SBA will annually adjust this fee using the Inflation Adjustment and will publish a Notice prior to such adjustment in the **Federal Register** identifying the amount of the fee.

Dated: November 17, 2016.

Maria Contreras-Sweet,

Administrator.

[FR Doc. 2016–30104 Filed 12–15–16; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9438; Directorate Identifier 2016–NM–109–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–400 series airplanes. This proposed AD was prompted by reports of interruptions in the airstair door operation. This proposed AD would require repetitive inspections and modification of the handrail hardware. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9438; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Cesar A. Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7318; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9438; Directorate Identifier 2016–NM–109–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2015–02, dated January 27, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes. The MCAI states:

> A number of airstair door operation interruptions have been reported. In one case, the airstair door could not be opened. It was found that the airstair door handrail holder bracket was deformed and became lodged into the adjacent wardrobe bulkhead, which prevented the door from opening.
>
> On airstair doors with Jetway Compatible option, a deformed handrail holder bracket or a failure of the pin retainer bracket can interfere with the operation of the airstair door and prevent it from opening.
>
> The airstair door is classified as an emergency exit. The inability to open an emergency exit could impede evacuation in the event of an emergency.
>
> This [Canadian] AD mandates the repetitive inspection of airstair door handrail hardware, and the modification of the handrail stowage hardware.

Required actions include applicable corrective actions (replacing or removing brackets, installing lanyards, adjusting pins, and adjusting affected parts of the assembly). You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9438.

Related Service Information Under 1 CFR Part 51

We reviewed Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016. This service information describes procedures for a general visual inspection to detect deformities and cracks of the forward and aft handle holder brackets on the airstair handrail; a detailed visual inspection of the forward and aft pin retainer brackets for the condition of the lanyards and the pins; a check for unobstructed movement of the pin retainer brackets; and rework of the airstair door handrail to prevent damage to the bulkhead and to prevent the door from jamming once the handrails are stowed. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified

of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD affects 82 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Repetitive Inspections	1 work-hour × $85 per hour = $85 per inspection cycle.	$0	$85 per inspection cycle.	$6,970 per inspection cycle.
Modification	3 work-hours × $85 per hour = $255	1,556	$1,811	$148,502.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2016–9438; Directorate Identifier 2016–NM–109–AD.

(a) Comments Due Date

We must receive comments by January 30, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes, certificated in any category, serial numbers 4001 through 4473 inclusive, equipped with Jetway Compatible Passenger Airstair Door Modsum 4–422100 or Modsum 4–458687.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Reason

This AD was prompted by reports of interruptions in the airstair door operation, including one case where the door would not open. The airstair door is classified as an emergency exit. We are issuing this AD to ensure the ability to evacuate passengers through the airstair door in the event of an emergency.

(f) Compliance

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

(g) Repetitive Inspections of the Forward and Aft Handle Holder Brackets and Forward and Aft Pin Retainer Brackets, Repetitive Checks, and Corrective Actions

Within 600 flight hours after the effective date of this AD, perform a general visual inspection of the forward and aft handle holder brackets for damage, such as visible cracks and deformation; a detailed visual inspection of the forward and aft pin retainer brackets to make sure that both lanyards are installed and to make sure that the head of each pin is installed correctly; a check of the pin retainer brackets for unobstructed movement; an operational check of the forward passenger door; and all applicable corrective actions; in accordance with PART A1 and PART A2 of the Accomplishment Instructions of Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016, except as required by paragraphs (g)(1), (g)(2), and (g)(3) of this AD. Do all applicable corrective actions before further flight. Repeat the inspections and checks thereafter at intervals not to exceed 600 flight hours until the terminating action required by paragraph (h) of this AD is accomplished.

(1) If one or both lanyards are missing, before further flight, install lanyards as specified in, and in accordance with PART A1 of the Accomplishment Instructions of Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016.

(2) If a pin is not installed correctly, as specified in PART A1 of the Accomplishment Instructions of Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016, before further flight, adjust the affected pin until it is installed correctly as specified in, and in accordance with PART A1 of the Accomplishment Instructions Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016.

(3) If a pin retainer bracket does not rotate freely, before further flight, adjust affected parts of the assembly until the pin retainer bracket rotates freely as specified in, and in accordance with PART A1 of the Accomplishment Instructions of Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016.

(h) Terminating Action

Within 6,000 flight hours or 36 months, whichever occurs first, after the effective date

of this AD: Incorporate ModSum 4–903234 to modify installed Jetway Compatible Handrail Stowage Bracket, in accordance with PART A3 of the Accomplishment Instructions of Bombardier Service Bulletin 84–52–79, Revision C, dated February 2, 2016. Incorporating ModSum 4–903234 terminates the actions required by paragraph (g) of this AD.

(i) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraph (i)(1), (i)(2), or (i)(3) of this AD.

(1) Bombardier Service Bulletin 84–52–79, dated May 1, 2014.

(2) Bombardier Service Bulletin 84–52–79, Revision A, dated November 18, 2014.

(3) Bombardier Service Bulletin 84–52–79, Revision B, dated April 8, 2015.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2015–02, dated January 27, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9438.

(2) For service information identified in this NPRM, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29671 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9498; Directorate Identifier 2016–NM–105–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A321 series airplanes. This proposed AD was prompted by a determination from fatigue testing on the Model A321 airframe that cracks could develop in the cabin floor beam junction at certain fuselage frame locations. This proposed AD would require repetitive inspections for cracking in the cabin floor beam junction at certain fuselage frame locations, and repair if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9498; Directorate Identifier 2016–NM–105–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2016–0105, dated June 6, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe

condition on all Airbus Model A321 series airplanes. The MCAI states:

Following the results of a new full scale fatigue test campaign on the A321 airframe in the context of the A321 extended service goal, it was identified that cracks could develop in the cabin floor beam junctions at fuselage frame (FR) 35.1 and FR 35.2, on both left hand (LH) and right hand (RH) sides, also on aeroplanes operated in the context of design service goal.

This condition, if not detected and corrected, could reduce the structural integrity of the fuselage.

Prompted by these findings, Airbus developed an inspection programme, published in Service Bulletin (SB) A320–53–1317, SB A320–53–1318, SB A320–53–1319, and SB A320–53–1320, each containing instructions for a different location.

For the reasons described above, this [EASA] AD requires repetitive detailed inspections (DET) of the affected cabin floor beam junctions and [for cracking], depending on findings, accomplishment of a repair.

This [EASA] AD is considered an interim action, pending development of a permanent solution.

* * * * *

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498.

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information, which describes procedures for inspections for cracking on the frame to cabin floor beam junction at certain fuselage frame locations, and repairs.

- Airbus Service Bulletin A320–53–1317, dated December 15, 2015 (FR 35.1 on the right-hand side).
- Airbus Service Bulletin A320–53–1318, dated October 9, 2015 (FR 35.1 on the left-hand side).
- Airbus Service Bulletin A320–53–1319, dated October 9, 2015 (FR 35.2 on the right-hand side).
- Airbus Service Bulletin A320–53–1320, dated October 9, 2015 (FR 35.2 on the left-hand side).

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD affects 175 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	6 work-hours × $85 per hour = $510 per inspection cycle.	$0	$510 per inspection cycle	$89,250 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2016–9498; Directorate Identifier 2016–NM–105–AD.

(a) Comments Due Date

We must receive comments by January 30, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a determination from fatigue testing on the Model A321 airframe that cracks could develop in the

cabin floor beam junction at certain fuselage frame locations. We are issuing this AD to detect and correct cracking in the cabin floor beam junction at certain fuselage frame locations, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Repetitive Inspections

Before exceeding 36,900 total flight cycles since first flight of the airplane, or within 2,100 flight cycles after the effective date of this AD, whichever occurs later: Do a detailed inspection for cracking of the frame to cabin floor beam junction on the aft and forward sides at frame (FR) 35.1 and FR 35.2 on the left-hand and right-hand sides, in accordance with the Accomplishment Instructions of the Airbus service information specified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD. Repeat the inspection of the frame to cabin floor beam junction on the aft and forward sides at FR 35.1 and FR 35.2 on the left-hand and right-hand sides thereafter at intervals not to exceed 15,300 flight cycles.

(1) Airbus Service Bulletin A320–53–1317, dated December 15, 2015 (FR 35.1 right-hand side).

(2) Airbus Service Bulletin A320–53–1318, dated October 9, 2015 (FR 35.1 left-hand side).

(3) Airbus Service Bulletin A320–53–1319, dated October 9, 2015 (FR 35.2 right-hand side).

(4) Airbus Service Bulletin A320–53–1320, dated October 9, 2015 (FR 35.2 left-hand side).

(h) Repair

If any crack is found during any inspection required by paragraph (g) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). Although the service information specified in paragraph (g) of this AD specifies to contact Airbus for repair instructions, and specifies that action as ''RC'' (Required for Compliance), this AD requires repair as specified in this paragraph. Repair of an airplane as required by this paragraph does not constitute terminating action for the repetitive actions required by paragraph (g) of this AD, unless specified otherwise in the instructions provided by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) Contacting the Manufacturer: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) Required for Compliance (RC): Except as required by paragraph (h) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0105, dated June 6, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29676 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–8428; Directorate Identifier 2014–NM–032–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposal to supersede Airworthiness Directive (AD) 2011–17–09 for all Airbus Model A330–200, –200 Freighter, and –300 series airplanes; and AD 2012–25–12 for all Airbus Model A330–200 and –300 series airplanes. The notice of proposed rulemaking (NPRM) proposed to require revising the maintenance or inspection program, as applicable, to incorporate new or revised airworthiness limitation requirements. The NPRM was prompted by revisions to certain airworthiness limitations items (ALI) documents, which specify more restrictive instructions and/or airworthiness limitations. This action revises the NPRM by proposing to require revising the maintenance or inspection program, as applicable, to incorporate more restrictive, instructions and/or airworthiness limitations that the manufacturer has recently issued. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this SNPRM by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For Airbus service information identified in this SNPRM, contact

Airbus service information identified in this final rule, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.com.*

For Messier-Bugatti-Dowty service information identified in this SNPRM, contact Messier-Bugatti USA, One Carbon Way, Walton, KY 41094; telephone 859–525–8583; fax 859–485 8827; email *americascsc@safranmbd.com.*

You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–8428; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2015–8428; Directorate Identifier 2014–NM–032–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We issued an NPRM to amend 14 CFR part 39 to supersede AD 2011–17–09, Amendment 39–16773 (76 FR 53305, August 26, 2011) (''AD 2011–17–09''); and AD 2012–25–12, Amendment 39–17293 (77 FR 75825, December 26, 2012) (''AD 2012–25–12''). AD 2011–17–09 applies to all Airbus Model A330–200 series airplanes, –200 Freighter, and –300 series airplanes. AD 2012–25–12 applies to all Airbus Model A330–200 and –300 series airplanes. The NPRM published in the **Federal Register** on January 13, 2016 (81 FR 1570) (''the NPRM''). The NPRM was prompted by revisions to certain airworthiness limitations items (ALI) documents, which specify more restrictive instructions and/or airworthiness limitations. The NPRM proposed to require revising the maintenance or inspection program, as applicable, to incorporate new or revised airworthiness limitation requirements.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive, 2014–0009, dated January 8, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Model A330–200, –200 Freighter, and –300 series airplanes; and Model A340–200, –300, –500, and –600 series airplanes. The MCAI states:

> The airworthiness limitations for Airbus aeroplanes are currently published in Airworthiness Limitations Section (ALS) documents.
>
> The instructions and airworthiness limitations applicable to the Safe Life Airworthiness Limitation Items (SL ALI) are given in Airbus A330 ALS Part 1 and A340 ALS Part 1, which are approved by EASA.
>
> The revision 07 of Airbus A330 and A340 ALS Part 1 introduces more restrictive instructions and/or airworthiness limitations. Failure to comply with this revision could result in an unsafe condition.
>
> For the reason described above, this [EASA] AD retains the requirements of EASA AD 2012–0179, which is superseded, and requires accomplishment of the actions specified in Airbus A330 or A340 ALS Part 1 revision 07.
>
> In addition, this [EASA] AD also supersedes EASA AD 2011–0122–E and EASA AD 2011–0212, whose requirements have been transferred into Airbus A330 and A340 ALS Part 1 revision 07.

The unsafe condition is fatigue cracking, accidental damage, and corrosion in certain principal structural elements, and possible failure of certain life limited parts, which could result in reduced structural integrity of the airplane.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–8428.

Actions Since the NPRM Was Issued

Since we issued the NPRM, Airbus has issued Airbus A330 ALS Part 1, Safe Life Airworthiness Limitation Items (SL–ALI), Revision 08, dated April 11, 2016, which specifies more restrictive instructions and/or airworthiness limitations.

Related Rulemaking

We are considering similar rulemaking for Model A340–200, –300, –500, and –600 series airplanes that would revise the maintenance or inspection program, as applicable, to incorporate more restrictive instructions and/or airworthiness limitations. Currently, there are no U.S.-registered Model A340 series airplanes.

Airworthiness Limitations Based on Type Design

The FAA recently became aware of an issue related to the applicability of ADs that require incorporation of an ALS revision into an operator's maintenance or inspection program.

Typically, when these types of ADs are issued by civil aviation authorities of other countries, they apply to all airplanes covered under an identified type certificate (TC). The corresponding FAA AD typically retains applicability to all of those airplanes.

In addition, U.S. operators must operate their airplanes in an airworthy condition, in accordance with 14 CFR 91.7(a). Included in this obligation is the requirement to perform any maintenance or inspections specified in the ALS, and in accordance with the ALS as specified in 14 CFR 43.16 and 91.403(c), unless an alternative has been approved by the FAA.

When a TC is issued for a type design, the specific ALS, including revisions, is a part of that type design, as specified in 14 CFR 21.31(c).

The sum effect of these operational and maintenance requirements is an obligation to comply with the ALS defined in the type design referenced in the manufacturer's conformity statement. This obligation may introduce a conflict with an AD that requires a specific ALS revision if new airplanes are delivered with a later revision as part of their type design.

To address this conflict, the FAA has approved alternative methods of compliance (AMOCs) that allow operators to incorporate the most recent ALS revision into their maintenance/inspection programs, in lieu of the ALS revision required by the AD. This eliminates the conflict and enables the operator to comply with both the AD and the type design.

However, compliance with AMOCs is normally optional, and we recently became aware that some operators choose to retain the AD-mandated ALS revision in their fleet-wide maintenance/inspection programs, including those for new airplanes delivered with later ALS revisions, to help standardize the maintenance of the fleet. To ensure that operators comply with the applicable ALS revision for newly delivered airplanes containing a later revision than that specified in an AD, we plan to limit the applicability of ADs that mandate ALS revisions to those airplanes that are subject to an earlier revision of the ALS, either as part of the type design or as mandated by an earlier AD.

This SNPRM therefore applies to Model A330–200, –200 Freighter, and –300 series airplanes with an original certificate of airworthiness or original export certificate of airworthiness that was issued on or before the date of approval of the ALS revision identified in this SNPRM. Operators of airplanes with an original certificate of airworthiness or original export certificate of airworthiness issued after that date must comply with the airworthiness limitations specified as part of the approved type design and referenced on the TC data sheet.

Related Service Information Under 1 CFR Part 51

Airbus has issued Airbus A330 ALS Part 1, SL–ALI, Revision 08, dated April 11, 2016. Messier-Bugatti-Dowty has issued Service Letter A33–34 A20, Revision 7, including Appendices A through F, dated July 20, 2012. This service information describes Safe Life Airworthiness Limitation Items SL–ALI for the landing gear. This service information is distinct since it was issued by two different manufacturers for different purposes.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Comments

We gave the public the opportunity to participate in developing this proposed AD. We considered the comments received.

Request To Specify New Service Information

Air France requested that we revise paragraph (i) of the proposed AD to include Messier-Bugatti-Dowty Service Letter A33–34 A20, Revision 7, including Appendices A through F, dated July 20, 2012, as the required service information.

We agree with the commenter's request. The changes in Messier-Bugatti-Dowty Service Letter A33–34 A20, Revision 7, including Appendices A through F, dated July 20, 2012, do not specify additional work. We have revised paragraph (i) of this proposed AD to specify using Messier-Dowty Service Letter A33–34 A20, Revision 5, including Appendices A through F, dated July 31, 2009; or Messier-Bugatti-Dowty Service Letter A33–34 A20, Revision 7, including Appendices A through F, dated July 20, 2012.

Requests To Specify Airbus A330 Variations

Air France requested that we revise paragraph (k) of the proposed AD to list all of the Airbus A330 variations to Airbus A330 ALS Part 1, SL–ALS, Revision 07, dated September 23, 2013, applicable at the effective date of this AD. Air France submitted a list of the requested variations.

American Airlines (AAL) requested that we add three Airbus A330 variations to paragraph (k) of the proposed AD. AAL stated that the NPRM does not include two variation documents that AAL currently utilizes as part of its approved maintenance program.

We partially agree with the commenters' requests. Airbus has issued A330 ALS Part 1, SL–ALI, Revision 08, dated April 11, 2016. Therefore, the variations for Airbus A330 ALS Part 1, SL–ALI, Revision 07, dated September 23, 2013, are no longer applicable to this SNPRM.

We have changed paragraph (k) of this proposed AD to reference Airbus A330 ALS Part 1, SL–ALI, Revision 08, dated April 11, 2016. We have also changed paragraph (c) of this proposed AD to reference the date of April 11, 2016, for the certificate of airworthiness.

FAA's Determination and Requirements of This SNPRM

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Certain changes described above expand the scope of the NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

This SNPRM would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this SNPRM, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an AMOC according to paragraph (m)(1) of this proposed AD. The request should include a description of changes to the required actions that will ensure the continued damage tolerance of the affected structure.

Costs of Compliance

We estimate that this SNPRM affects 82 airplanes of U.S. registry.

The actions that are required by AD 2011–17–09, and retained in this SNPRM, take about 1 work-hour per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the actions that are required by AD 2011–17–09 is $85 per product.

The actions that are required by AD 2012–25–12, and retained in this SNPRM, take about 16 work-hours per product (2 main landing gear (MLG) bogie beams per airplane), at an average labor rate of $85 per work-hour. Required parts cost about $255,000 per MLG bogie beam. Based on these figures, the estimated cost of the actions that are required by AD 2012–25–12 is up to $256,360 per MLG bogie beam.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this SNPRM. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this SNPRM on U.S. operators to be $6,970, or $85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I,

section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2011–17–09, Amendment 39–16773 (76 FR 53305, August 26, 2011); and AD 2012–25–12, Amendment 39–17293 (77 FR 75825, December 26, 2012); and adding the following new AD:

Airbus: Docket No. FAA–2015–8428; Directorate Identifier 2014–NM–032–AD.

(a) Comments Due Date

We must receive comments by January 30, 2017.

(b) Affected ADs

This AD replaces AD 2011–17–09, Amendment 39–16773 (76 FR 53305, August 26, 2011) (''AD 2011–17–09''); and AD 2012–25–12, Amendment 39–17293 (77 FR 75825, December 26, 2012) (''AD 2012–25–12'').

(c) Applicability

This AD applies to the Airbus airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category, with an original certificate of airworthiness or original export certificate of airworthiness issued on or before April 11, 2016.

(1) Airbus Model A330–201, –202, –203, –223, and –243 airplanes.

(2) Airbus Model A330–223F and –243F airplanes.

(3) Airbus Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 05, Periodic inspections.

(e) Reason

This AD was prompted by revisions to certain airworthiness limitations items (ALI) documents, which specify more restrictive instructions and/or airworthiness limitations. We are issuing this AD to detect and correct fatigue cracking, accidental damage, or corrosion in principal structural elements, and possible failure of certain life limited parts, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Maintenance Program Revision, With New Terminating Action

This paragraph restates the requirements of paragraph (h) of AD 2011–17–09, with new terminating action. Within 3 months after September 30, 2011 (the effective date of AD 2011–17–09): Revise the maintenance program by incorporating Airbus A330 ALS Part 1, ''Safe Life Airworthiness Limitation Items (SL–ALI), Revision 05, dated July 29, 2010. Comply with all Airbus A330 ALS Part 1, SL–ALI, Revision 05, dated July 29, 2010, at the times specified therein. Accomplishing the actions specified in paragraph (k) of this AD terminates the requirements of this paragraph.

(h) Retained Limitation of No Alternative Intervals or Limits, With No Changes

This paragraph restates the requirements of paragraph (i) of AD 2011–17–09, with no changes. Except as provided by paragraph (m) of this AD, after accomplishment of the actions specified in paragraph (g) of this AD, no alternatives to the maintenance tasks, intervals, or limitations specified in paragraph (g) of this AD may be used.

(i) Retained Bogie Beam Replacement, With Specific Delegation Approval Language, New Terminating Action, and New Service Information

This paragraph restates the requirements of paragraph (g) of AD 2012–25–12, with specific delegation approval language and terminating action and new service information. For airplanes identified in paragraphs (c)(1) and (c)(3) of this AD: At the later of the times specified in paragraphs (i)(1) and (i)(2) of this AD, replace all main landing gear (MLG) bogie beams having part number (P/N) 201485300, 201485301, 201272302, 201272304, 201272306, or 201272307, except those that have serial number (S/N) S2A, S2B, or S2C, as identified in Messier-Dowty Service Letter A33–34 A20, Revision 5, including Appendices A through F, dated July 31, 2009; or Messier-Bugatti-Dowty Service Letter A33–34 A20, Revision 7, including Appendices A through F, dated July 20, 2012; with a new or serviceable part, using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or the European Aviation Safety Agency (EASA) (or its delegated agent). As of the effective date of this AD, the applicable MLG bogie beams specified in this paragraph must be replaced using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA Design Organization Approval (DOA). Accomplishing the actions specified in paragraph (k) of this AD terminates the requirements of this paragraph.

(1) At the applicable time specified in paragraphs (i)(1)(i), (i)(1)(ii), and (i)(1)(iii) of this AD.

(i) For Model A330–201, –202, –203, –223, –243 series airplanes, weight variant (WV)02x, WV05x (except WV058), and WV06x series: Before the accumulation of a life limit of 50,000 landings or 72,300 total flight hours, whichever occurs first from the first installation of a MLG bogie beam on the airplane.

(ii) For Model A330–201, –202, –203, –223, –243 WV058 series airplanes: Before the accumulation of a life limit of 50,000 landings or 57,900 total flight hours, whichever occurs first from the first installation of a MLG bogie beam on the airplane.

(iii) For Model A330–301, –302, –303, –321, –322, –323, –341, –342, –343 series airplanes, WV00x, WV01x, WV02x, and WV05x series: Before the accumulation of a life limit of 46,000 landings or 75,000 total flight hours, whichever occurs first from the first installation of a MLG bogie beam on the airplane.

(2) Within 6 months after January 30, 2013 (the effective date of AD 2012–25–12).

(j) Retained Parts Installation Limitation, With New Terminating Action

This paragraph restates the requirements of paragraph (h) of AD 2012–25–12, with new

terminating action. For airplanes identified in paragraphs (c)(1) and (c)(3) of this AD, as of January 30, 2013 (the effective date of AD 2012–25–12), a MLG bogie beam having any part number identified in paragraph (i) of this AD may be installed on an airplane, provided its life has not exceeded the life limit specified in paragraphs (i)(1)(i), (i)(1)(ii), and (i)(1)(iii) of this AD, and is replaced with a new or serviceable part before reaching the life limit specified in paragraphs (i)(1)(i), (i)(1)(ii), and (i)(1)(iii) of this AD. Accomplishing the actions specified in paragraph (k) of this AD terminates the requirements of this paragraph.

(k) New Maintenance or Inspection Program Revision

Within 3 months after the effective date of this AD: Revise the maintenance or inspection program, as applicable, by incorporating the information in Airbus A330 ALS Part 1, SL–ALI, Revision 08, dated April 11, 2016. The initial compliance times for the actions specified in Airbus A330 ALS Part 1, SL–ALI, Revision 08, dated April 11, 2016, are at the times specified in Airbus A330 ALS Part 1, SL–ALI, Revision 08, dated April 11, 2016, or within 3 months after the effective date of this AD, whichever occurs later. Accomplishing the actions specified in this paragraph terminates the requirements specified in paragraphs (g) through (j) of this AD.

(l) New Limitation of No Alternative Actions or Intervals

After the maintenance or inspection program, as applicable, has been revised, as required by paragraph (k) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an AMOC in accordance with the procedures specified in paragraph (m)(1) of this AD.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Related Information

(1) For Airbus service information identified in this AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.com.*

(2) For Messier-Bugatti-Dowty service information identified in this AD, contact Messier-Bugatti USA, One Carbon Way. Walton, KY 41094; telephone 859–525–8583; fax 859–485 8827; email *americascsc@safranmbd.com.*

(3) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 22, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28802 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9439; Directorate Identifier 2016–NM–170–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 airplanes. This proposed AD was prompted by a report indicating that during an airplane inspection in production, the variable frequency starter generator (VFSG) power feeder cables were found to contain terminal lugs incorrectly installed common to terminal blocks located in the wing front spar. This proposed AD would require a general visual inspection of the wings, section 16, terminal lugs at the terminal power block of the VFSG power feeder cable for correct installation and if required, applicable corrective actions. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 30, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone: 562–797–1717; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9439.

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–2016–9439; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Brendan Shanley, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6492; fax: 425–917–6590; email: *brendan.shanley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9439; Directorate Identifier 2016–NM–170–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received a report indicating that during an airplane inspection in production, the variable frequency starter generator (VFSG) power feeder cables were found to contain terminal lugs incorrectly installed common to terminal blocks located in the wing front spar; the lugs were close to the structure causing the lug sleeve to come in contact with adjacent fasteners. The installation procedures have been corrected on subsequent production airplanes. Operators have not reported any issues with the power feeder cables. This condition, if not corrected, could result in electrical arcing in a flammable leakage zone which could result in an electrical short and the possible introduction of energy into the main fuel tanks.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin B787–81205–SB240027–00, Issue 002, dated September 6, 2016. The service information describes procedures for a general visual inspection of the right and left wing, section 16, VFSG power feeder cable terminal lugs for correct installation and corrective actions. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9439.

The phrase ''corrective actions'' is used in this proposed AD. Corrective actions correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Costs of Compliance

We estimate that this proposed AD affects 6 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	8 work-hours × $85 per hour = $680	$0	$680	$4,080

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Rework Wing Terminal Lugs	9 work-hours × $85 per hour = $765 [1]	$0	$765

[1] Labor costs are specific to each wing (left or right.)

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and

Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2016–9439; Directorate Identifier 2016–NM–170–AD.

(a) Comments Due Date

We must receive comments by January 30, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin B787–81205–SB240027–00, Issue 002, dated September 6, 2016.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by a report indicating that during an airplane inspection in production, the variable frequency starter generator (VFSG) power feeder cables were found to contain terminal lugs incorrectly installed common to terminal blocks located in the wing front spar; the lugs were close to the structure causing the lug sleeve to come in contact with adjacent fasteners. We are issuing this AD to detect and correct incorrectly installed terminal lugs which may contact adjacent structure and be damaged. Damaged terminal lugs could cause electrical arcing in a flammable leakage zone which could result in an electrical short and the possible introduction of energy into the main fuel tanks.

(f) Compliance

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

(g) Inspection of Terminal Lugs and Corrective Actions

Within the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin B787–81205–SB240027–00, Issue 002, dated September 6, 2016: Do a general visual inspection of the right and left wing, section 16, VFSG power feeder cable terminal lugs at the terminal block for correct installation and do all applicable corrective actions in accordance with Boeing Alert Service Bulletin B787–81205–SB240027–00, Issue 002, dated September 6, 2016. Do all applicable corrective actions before further flight.

(h) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin B787–81205–SB240027–00, Issue 001, dated January 21, 2014.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Brendan Shanley, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6492; fax: 425–917–6590; email: *brendan.shanley@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone: 562–797–1717; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 1, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29670 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9435; Directorate Identifier 2016–NM–108–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2012–22–15 for all Fokker Services B.V. Model F28 Mark 0070 and Mark 0100 airplanes. AD 2012–22–15 currently requires revising the maintenance program to incorporate the limitations, tasks, thresholds, and intervals specified in certain revised Fokker maintenance review board (MRB) documents. Since we issued AD 2012–22–15, we received new revisions of airworthiness limitations items (ALI) documents, which introduce new and more restrictive maintenance requirements and airworthiness limitations. This proposed AD would require revising the maintenance or inspection program to incorporate new maintenance requirements and airworthiness limitations. We are proposing this AD to prevent the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 30, 2017.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: *technicalservices@fokker.com;* Internet *http://www.myfokkerfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9435; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9435; Directorate Identifier 2016–NM–108–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On October 30, 2012, we issued AD 2012–22–15, Amendment 39–17252 (77 FR 68063, November 15, 2012) (''AD 2012–22–15''). AD 2012–22–15 requires actions intended to address an unsafe condition on all Fokker Services B.V. Model F28 Mark 0070 and Mark 0100 airplanes.

Since we issued AD 2012–22–15, we received Fokker Services Engineering Reports that consist of new and more restrictive airworthiness limitations (ALS).

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive AD 2016–0125, dated June 21, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Fokker Services B.V. Model F28 Mark 0070 and Mark 0100 airplanes. The MCAI states:

> Fokker Services recently published issue 15 of Engineering Report SE–623, containing Airworthiness Limitation Items (ALIs) and Safe Life Items (SLIs). This report is Part 2 of the Airworthiness Limitations Section (ALS Part 2) of the Instructions for Continued Airworthiness, referred to in Section 06, Appendix 1, of the Fokker 70/100 Maintenance Review Board document.
>
> The complete ALS currently consists of:
>
> Part 1—Report SE–473, Certification Maintenance Requirements (CMRs)—reference: EASA AD 2015–0027 [which corresponds to FAA AD 2016–11–22, Amendment 39–18549 (81 FR 36438, June 7, 2016)].
>
> Part 2—Report SE–623, ALIs and SLIs—reference: EASA AD 2014–0224 [which corresponds to FAA AD 2012–22–15], and
>
> Part 3—Report SE–672, Fuel ALIs and CDCCLs—reference: EASA AD 2015–0032 [which corresponds to FAA AD 2016–11–15, Amendment 39–18542 (81 FR 36447, June 7, 2016)].
>
> The instructions contained in those reports have been identified as mandatory actions for continued airworthiness. Failure to accomplish these actions could result in an unsafe condition.
>
> EASA previously issued AD 2014–0224, requiring the actions described in ALS Part 1 (report SE–473 issue 10), Part 2 (report SE–623 issue 13) and Part 3 (report SE–672 issue 4). Since that [EASA] AD was issued, ALS Part 1 was revised (SE–473 issue 11) and EASA issued AD 2015–0027 accordingly. ALS Part 3 was also revised (SE–672 issue 5) and EASA issued AD 2015–0032 accordingly.
>
> For the reasons described above, this [EASA] AD retains part of the requirements of [EASA] AD 2014–0224, which is superseded, and requires implementation of the maintenance actions as specified in ALS Part 2 of the Instructions for Continued Airworthiness, Fokker Services Engineering Report SE–623 at issue 15 (hereafter referred to as 'ALS Part 2' in this [EASA] AD).

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9435.

Related Service Information Under 1 CFR Part 51

Fokker Services B.V. has issued Fokker Services B.V. Engineering Report SE–623, ''Fokker 70/100 ALI's and SLI's,'' Issue 16, issued June 3, 2016. The service information describes new and more restrictive maintenance requirements and airworthiness limitations. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (m)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Costs of Compliance

We estimate that this proposed AD affects 15 airplanes of U.S. registry.

The actions required by AD 2012–22–15, and retained in this proposed AD, take about 1 work-hour per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the actions that are

required by AD 2012–22–15 is $85 per product.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $1,275, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2012–22–15, Amendment 39–17252 (77 FR 68063, November 15, 2012), and adding the following new AD:

Fokker Services B.V.: Docket No. FAA–2016–9435; Directorate Identifier 2016–NM–108–AD.

(a) Comments Due Date

We must receive comments by January 30, 2017.

(b) Affected ADs

(1) This AD replaces AD 2012–22–15, Amendment 39–17252 (77 FR 68063, November 15, 2012) (''AD 2012–22–15'').

(2) This AD affects AD 2012–12–07, Amendment 39–17087 (77 FR 37788, June 25, 2012) (''AD 2012–12–07'').

(3) This AD affects AD 2008–06–20 R1, Amendment 39–16089 (74 FR 61018, November 23, 2009) (''AD 2008–06–20 R1'').

(c) Applicability

This AD applies to Fokker Services B.V. Model F28 Mark 0070 and Mark 0100 airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a revision of an airworthiness limitations items (ALI) document, which introduces new and more restrictive maintenance requirements and airworthiness limitations. We are issuing this AD to prevent reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Maintenance Program Revision, With Revised Compliance Language

This paragraph restates the requirements of paragraph (i) of AD 2012–22–15, with revised compliance language. Within 3 months after December 20, 2012 (the effective date of AD 2012–22–15), revise the maintenance program to incorporate the airworthiness limitations specified in Fokker Report SE–623, ''Fokker 70/100 Airworthiness Limitation Items and Safe Life Items,'' Issue 13, released August 25, 2014 (''Fokker Report SE–623, Issue 13''). For all tasks and retirement lives identified in Fokker Report SE–623, Issue 13, the initial compliance times start from the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD, and the repetitive inspections must be accomplished thereafter at the applicable interval specified in Fokker Report SE–623, Issue 13. Accomplishing the revision required by paragraph (k) of this AD terminates the requirements of this paragraph.

(1) Within 3 months after December 20, 2012 (the effective date of AD 2012–22–15).

(2) At the time specified in Fokker Report SE–623, Issue 13.

(h) Retained Corrective Actions, With Specific Delegation Approval Language

This paragraph restates the requirements of paragraph (j) of AD 2012–22–15, with specific delegation approval language. If any discrepancy, as defined in Fokker Report SE–623, Issue 13, is found during accomplishment of any task specified in Fokker Report SE–623, Issue 13: Within the applicable compliance time specified in Fokker Report SE–623, Issue 13, accomplish the applicable corrective actions in accordance with Fokker Report SE–623, Issue 13.

(1) If no compliance time is identified in Fokker Report SE–623, Issue 13, accomplish the applicable corrective actions before further flight.

(2) If any discrepancy is found and there is no corrective action specified in Fokker Report SE–623, Issue 13: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Fokker Services' EASA Design Organization Approval (DOA).

(i) Retained ''No Alternative Actions or Intervals,'' With a New Exception

This paragraph restates the requirements of paragraph (k) of AD 2012–22–15, with a new exception. Except as required by paragraph (k) of this AD, after accomplishing the revision required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (m)(1) of this AD.

(j) Retained Method of Compliance With AD 2008–06–20, With Revised Compliance Language

This paragraph restates the requirements of paragraph (m) of AD 2012–22–15, with revised compliance language. Accomplishing the actions specified in paragraph (g) of this AD terminates the requirements of paragraphs (f)(1) through (f)(5) of AD 2008–06–20 R1.

(k) New Requirement of This AD: Maintenance or Inspection Program Revision

Within 30 days of the effective date of this AD, revise the maintenance or inspection program, as applicable, to incorporate the ALI instructions specified in Fokker Services B.V. Engineering Report SE–623, ''Fokker 70/100 ALI's and SLI's,'' Issue 16, issued June 3, 2016 (''Fokker Services B.V. Engineering

Report SE–623, Issue 16''). Accomplishing the revision required by this paragraph terminates the requirements of paragraph (g) of this AD. Accomplishing the revision required by this paragraph also terminates the requirements of paragraph (g) of AD 2012–12–07.

(1) The initial compliance times for the tasks specified in Fokker Services B.V. Engineering Report SE–623, Issue 16, are at the later of the applicable compliance times specified in Fokker Services B.V. Engineering Report SE–623, Issue 16, or within 30 days after the effective date of this AD, whichever is later.

(2) If any discrepancy is found, before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Fokker B.V. Service's EASA DOA.

(l) No Alternative Actions or Intervals

After the maintenance or inspection program, as applicable, has been revised as required by paragraph (k) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an AMOC in accordance with the procedures specified in paragraph (m)(1) of this AD.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Fokker B.V. Services' EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0125, dated June 21, 2016, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9435.

(2) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: *technicalservices@fokker.com;* Internet *http://www.myfokkerfleet.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 17, 2016.

Phil Forde,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28669 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 216

[Docket No. FDA–2016–N–3464]

RIN 0910–AH29

List of Bulk Drug Substances That Can Be Used To Compound Drug Products in Accordance With Section 503A of the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA or Agency) is proposing a regulation to identify an initial list of bulk drug substances that can be used to compound drug products in accordance with certain compounding provisions of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), although they are neither the subject of an applicable United States Pharmacopeia (USP) or National Formulary (NF) monograph nor components of FDA-approved drugs. Specifically, the Agency proposes to place six bulk drug substances on the list. This proposed rule also identifies four bulk drug substances that FDA has considered and proposes not to include on the list. Additional substances nominated by the public for inclusion on this list are currently under consideration and will be the subject of a future rulemaking.

DATES: Submit either electronic or written comments on the bulk drug substances list by March 16, 2017. See section VI for the proposed effective date of a final rule based on this proposed rule.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–N–3464 for ''List of Bulk Drug Substances That Can Be Used To Compound Drug Products in Accordance With Section 503A of the Federal Food, Drug, and Cosmetic Act.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

James Flahive, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5108, Silver Spring, MD 20993–0002, 301–796–9293.

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I. Executive Summary

A. Purpose of the Proposed Rule

FDA is proposing to amend its regulations to add a list of bulk drug substances that can be used in compounding under section 503A of the FD&C Act (21 U.S.C. 353a) (referred to as ''the 503A Bulks List''). Bulk drug substances that appear on the 503A Bulks List can be used to compound drug products subject to the conditions of section 503A, although those substances are not the subject of a USP or NF monograph or components of approved drug products.

B. Summary of the Major Provisions of the Proposed Rule

FDA is proposing to establish the criteria by which bulk drug substances will be evaluated for inclusion on the 503A Bulks List. Based on the results of its evaluation of nominated bulk drug substances to date, as well as consultation with the Pharmacy Compounding Advisory Committee (PCAC), FDA is also proposing to include six bulk drug substances on the list: Brilliant Blue G, also known as Coomassie Brilliant Blue G–250; cantharidin (for topical use only); diphenylcyclopropenone (for topical use only); N-acetyl-D-glucosamine (for topical use only); squaric acid dibutyl ester (for topical use only); and thymol iodide (for topical use only) and that four other substances not be included on the list: Oxitriptan, piracetam, silver protein mild, and tranilast.

C. Legal Authority

Section 503A of the FD&C Act, in conjunction with our general rulemaking authority in section 701(a) of the FD&C Act (21 U.S.C. 371(a)), serves as our principal legal authority for this proposed rule.

D. Costs and Benefits

FDA is proposing to place six bulk substances on the 503A Bulks List and not to place four bulk substances on the 503A Bulks List. Because we lack sufficient information to quantify the costs and benefits of this proposed rule, we include a qualitative description of potential benefits and potential costs. We expect that the rule would affect compounding pharmacies and other entities that market the affected substances or drug products made from the affected substances, consumers of drug products containing the affected drug substances, and payers that cover these drug products or alternative drug products.

II. Table of Abbreviations and Acronyms Commonly Used in This Document

5-HTP 5-hydroxytryptophan
BLA Biologics License Application
CFR Code of Federal Regulations
CSA Controlled Substances Act
DPCP Diphenylcyclopropenone
DQSA Drug Quality and Security Act
FD&C Act Federal Food, Drug, and Cosmetic Act
FDA Food and Drug Administration
IND Investigational New Drug
NAG N-acetyl-D-glucosamine
NAICS North American Industry Classification System
NF National Formulary
NPRM Notice of Proposed Rulemaking
OTC Over-The-Counter
PCAC Pharmacy Compounding Advisory Committee
PHS Act Public Health Service Act
PRESTO Prevention of REStenosis with Tranilast and its Outcomes
RFA Regulatory Flexibility Analysis
SADBE Squaric acid dibutyl ester
SBA Small Business Administration
UGT1A1 Uridine diphosphate glucuronosyltransferase 1A1
UK United Kingdom
USP United States Pharmacopeia

III. Background

A. Statutory and Regulatory Background

Section 503A of the FD&C Act (21 U.S.C. 353a) describes the conditions under which a compounded drug product may qualify for an exemption from certain sections of the FD&C Act. Those conditions include that a licensed pharmacist in a State-licensed pharmacy or Federal facility or a licensed physician compounds the drug product using bulk drug substances that: (1) Comply with the standards of an applicable USP or NF monograph,[1] if a

[1] FDA has interpreted the statutory language ''applicable USP or NF monographs'' to refer to official USP or NF drug substance monographs. Therefore, a substance that is the subject of a dietary supplement monograph, but not a USP or NF drug substance monograph, does not satisfy the

monograph exists, and the USP chapter on pharmacy compounding; (2) if such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary; or (3) if such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, that appear on the 503A Bulks List. See section 503A(b)(1)(A)(i) of the FD&C Act. This proposed rule proposes criteria for evaluating substances for inclusion on the 503A Bulks List and identifies six substances the Secretary proposes to place on the list. The Agency considered four other substances and is proposing not to include those substances on the 503A Bulks List. Additional substances are under evaluation, and new substances may be added to the list through subsequent rulemaking.

Section 503A adopts the definition of ''bulk drug substance'' in FDA's drug establishment registration and listing regulations, which was codified at § 207.3(a)(4) (21 CFR 207.3(a)(4)) at the time section 503A was enacted. See section 503A(b)(1)(A) of the FD&C Act. Under the definition, bulk drug substance means any substance that is represented for use in a drug and that, when used in the manufacturing, processing, or packaging of a drug, becomes an active ingredient or a finished dosage form of the drug, but the term does not include intermediates used in the synthesis of such substances.

On August 31, 2016, FDA published a final rule in the **Federal Register** to update its registration and listing regulations in part 207 (21 CFR part 207), which included minor changes to the definition of bulk drug substance and moved the definition to § 207.3 (see 81 FR 60170). This definition becomes effective on November 29, 2016. As set forth in § 207.3, ''bulk drug substance,'' as referenced in section 503A(b)(1)(A) of the FD&C Act, means the same as ''active pharmaceutical ingredient'' as defined in § 207.1(b). An ''active pharmaceutical ingredient'' is any substance that is intended for incorporation into a finished drug product and is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body. Active pharmaceutical ingredient does not include intermediates used in the synthesis of the substance (§ 207.1).

Inactive ingredients used in compounded drug products, such as flavorings, dyes, or diluents, need not appear on the 503A Bulks List to be eligible for use in compounding drug products and will not be included on the list.

B. Regulatory History of the 503A Bulks List

Section 503A of the FD&C Act was enacted in 1997. In the **Federal Register** of April 7, 1998 (63 FR 17011), FDA invited all interested persons to nominate bulk drug substances for inclusion on the 503A Bulks List. In 1998, FDA received nominations for 41 different drug substances. Ten of these drug substances were the subject of an applicable USP or NF monograph or were components of FDA-approved drugs and did not need to go on the list to be used in compounding. After evaluating the nominated drug substances and consulting with the PCAC as required by section 503A(c)(2), FDA published a proposed rule listing 20 drug substances for potential inclusion on the initial section 503A Bulks List (64 FR 996, January 7, 1999) (the 1999 Proposed 503A Bulks List). The proposed rule also described 10 nominated drug substances that were still under consideration for the 503A Bulks List. The PCAC reconvened in May 1999 to discuss bulk drug substances included in the proposed rule, in addition to other bulk drug substances (see 64 FR 19791, April 22, 1999).

In February 2001, the U.S. Court of Appeals for the Ninth Circuit held that certain provisions of section 503A of the FD&C Act were unconstitutional restrictions on commercial speech. (See *Western States Med. Ctr.* v. *Shalala,* 238 F.3d 1090 (9th Cir. 2001).) Furthermore, the Ninth Circuit held that the advertising and solicitation provisions could not be severed from the rest of section 503A and, as a result, found section 503A of the FD&C Act to be invalid in its entirety. In April 2002, the U.S. Supreme Court affirmed the Ninth Circuit's decision that the advertising and solicitation provisions were unconstitutional; it did not, however, rule on the severability of section 503A of the FD&C Act. (See *Thompson* v. *Western States Med. Ctr.,* 535 U.S. 357 (2002).) In 2008, the U.S. Court of Appeals for the Fifth Circuit held that compounded drugs are subject to regulation by FDA, and that the advertising and solicitation provisions are severable from the rest of section 503A of the FD&C Act. (See *Medical Ctr. Pharm.* v. *Mukasey,* 536 F.3d 383 (5th Cir. 2008).)

Following a fungal meningitis outbreak in September 2012, FDA sought legislation to, among other things, resolve the split in the Circuits to clarify that section 503A of the FD&C Act was valid nationwide. On November 27, 2013, President Obama signed the Drug Quality and Security Act (Pub. L. 113–54) (DQSA), which contains important provisions relating to the oversight of human drug product compounding. Among other things, the DQSA removed from section 503A of the FD&C Act the provisions that had been held unconstitutional by the U.S. Supreme Court in 2002. By removing these provisions, the DQSA clarified that section 503A of the FD&C Act applies nationwide.

C. Requests for Nominations

Because of the amount of time that had passed between the publication of the 1999 proposed rule and the enactment of the DQSA, FDA felt it was necessary to begin again to develop the 503A Bulks List. In the **Federal Register** of December 4, 2013 (78 FR 72841), FDA published a notice withdrawing the 1999 proposed rule and inviting all interested persons to nominate bulk drug substances for inclusion on the 503A Bulks List.

Over 2,000 substances were nominated. However, many of those nominations were for a substance that is the subject of an applicable USP or NF monograph or a component of an FDA-approved drug, were not for substances used in compounding as active ingredients, or did not include sufficient information for FDA to evaluate whether the substances should be proposed for inclusion on the 503A Bulks List. To improve the efficiency of the process for developing the 503A Bulks List, FDA reopened the nomination process in July 2014 (79 FR 37747, July 2, 2014) and provided a more detailed description about what information should be included in a nomination to support the Agency's evaluation. FDA stated that bulk drug substances that were previously nominated would not be further considered unless they were renominated and the new nominations were adequately supported. Substances that were already eligible for use in compounding or that were not adequately supported would not be placed on the list.

In response to that solicitation, approximately 740 unique substances were nominated. Of those substances, approximately 315 are components of an FDA-approved drug product or the

condition regarding bulk drug substances in section 503A(b)(1)(A)(i)(I) of the Act. Such a substance may only be used as a bulk drug substance under section 503A of the FD&C Act if it is a component of an FDA-approved drug product or is on the 503A Bulks List.

subject of an applicable USP or NF monograph. Such substances can be used in compounding under section 503A(b)(1)(A)(i)(I) and (II) of the FD&C Act and, therefore, are not eligible for inclusion on the 503A Bulks List.

At least one of the nominated substances is a finished drug product that was nominated by its brand name. Finished drug products are not eligible for the 503A Bulks List because they do not meet the definition of a bulk drug substance in § 207.3(4).

At least one of the nominated substances is a biological product subject to approval in a biologics license application (BLA) under section 351 of the Public Health Service (PHS) Act (42 U.S.C. 262) when used for the indication proposed in the nomination. This substance is not eligible for the 503A Bulks List because biological products subject to approval in a BLA under section 351 of the PHS Act are not eligible for the exemptions in section 503A of the FD&C Act. No biological products subject to approval in a BLA will be considered for the 503A Bulks List.

At least four of the nominated substances appear on the list published by FDA of substances that have been withdrawn or removed from the market because the drug products or components of the drug products have been found to be unsafe or not effective (section 503A(b)(1)(C) of the FD&C Act) (Withdrawn or Removed List). Such substances cannot be used in compounding under section 503A of the FD&C Act, and therefore, are not eligible for inclusion on the 503A Bulks List.

One of the nominated substances has no currently accepted medical use and is included on Schedule I of the Controlled Substances Act (CSA) (21 U.S.C. 812(c)). The CSA does not allow possession or distribution of Schedule I substances (see 21 U.S.C. 841(a)(1) and 829), except for research purposes (see 21 U.S.C. 823(f)), and Schedule I substances will not be considered for the 503A Bulks List. Those desiring to do research on a Schedule I substance may apply to do so under an investigational new drug (IND) application.

Of the substances that are not components of an approved drug product or the subject of an applicable USP or NF monograph, finished drug products, biological products subject to licensure in a BLA, and do not appear on the Withdrawn or Removed List or Schedule I of the CSA, about 350 substances were nominated with insufficient supporting evidence for FDA to evaluate them.

The remaining substances may be eligible for inclusion on the 503A Bulks List and were nominated with sufficient supporting information for FDA to evaluate them. Ten of those substances have been evaluated and are discussed in section V. The rest will be discussed in future notices of proposed rulemaking (NPRMs) after they have been evaluated. Once the Agency completes its review of the substances that were nominated for the 503A Bulks List with adequate supporting information under the July 2, 2014, request for nominations, FDA will consider additional substances nominated for inclusion on the list if they are eligible and adequate supporting information is submitted to permit FDA to meaningfully evaluate them (see section III).

With regard to the substances nominated with sufficient supporting information for FDA to evaluate them, including the 10 nominated substances discussed in this proposed rule, FDA generally does not intend to take regulatory action against a State-licensed pharmacy, Federal facility, or licensed physician for compounding a drug product using a bulk drug substance that is not the subject of an applicable USP or NF monograph or a component of an FDA-approved drug product, provided that the other conditions in section 503A and the FD&C Act are met, until the substance is addressed in a final rule. FDA is not applying this interim policy to a nominated substance however, if the Agency has identified the substance as posing a significant safety risk,[2] or if the substance was nominated without adequate support. For further information on this subject, see the guidance for industry entitled ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act'' (Ref. 1). As described in the guidance, the following categories of bulk drug substances are identified on FDA's Web site at *http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/UCM467373.pdf:* (1) The substances nominated with sufficient supporting information that are under evaluation, (2) the substances nominated with sufficient supporting information but with which FDA has identified significant safety risks relating to the use of these bulk drug substances in compounding, and (3) the substances nominated with insufficient supporting evidence for FDA to evaluate them.

[2] This is not a determination regarding whether the substances will be added to the 503A Bulks list. FDA intends to make that determination after notice and comment rulemaking, as set forth in this proposal.

IV. Legal Authority

As described in the Background section, section 503A of the FD&C Act describes the conditions that must be satisfied for human drug products compounded by a licensed pharmacist or licensed physician to be exempt from three sections of the FD&C Act (sections 501(a)(2)(B), 502(f)(1), and 505 (21 U.S.C. 351(a)(2)(B), 352(f)(1), and 355)). One of the conditions that must be satisfied for a compounded drug to qualify for the exemptions under section 503A of the FD&C Act is that a licensed pharmacist in a State-licensed pharmacy or Federal facility or a licensed physician compounds the drug product using bulk drug substances that: (1) Comply with the standards of an applicable USP or NF monograph, if a monograph exists, and the USP chapter on pharmacy compounding; (2) if such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary; or (3) if such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, that appear on the 503A Bulks List. See section 503A(b)(1)(A)(i) of the FD&C Act. Section 503A(c)(1) of the FD&C Act also states that the Secretary shall issue regulations to implement section 503A, and that before issuing regulations to implement section 503A(b)(1)(A)(i)(III) pertaining to the 503A bulks list, among other sections, the Secretary shall convene and consult an advisory committee on compounding unless the Secretary determines that the issuance of such regulations before consultation is necessary to protect the public health. Section 503A(c)(2) of the FD&C Act requires the Secretary to issue the regulations in consultation with the USP, and to include in the regulation the criteria for such substances that shall include historical use, reports in peer reviewed journals, and any other criteria the Secretary identifies. Thus, section 503A of the FD&C Act, in conjunction with our general rulemaking authority in section 701(a) of the FD&C Act, serves as our principal legal authority for this proposed rule.

V. Description of the Proposed Rule

FDA is proposing to add § 216.23 to title 21 of the Code of Federal Regulations (CFR) to set forth criteria to evaluate bulk drug substances for inclusion on the 503A Bulks List. Additionally, after considering 10 bulk drug substances for the 503A Bulks List,

FDA proposes to codify the initial 503A Bulks List to include 6 of the bulk drug substances that were considered and to identify 4 substances that were considered and would not be placed on the list. The criteria and the bulk drug substances considered for inclusion on the list are described in the paragraphs that follow.

A. Criteria for Evaluating Bulk Drug Substances for the 503A Bulks List

Section 503A(c)(2) of the FD&C Act provides that the criteria for determining which substances should appear on the 503A Bulks List shall include historical use, reports in peer reviewed medical literature, or other criteria the Secretary of Health and Human Services may identify. Consistent with the July 2, 2014, **Federal Register** notice (79 FR 37747) soliciting nominations for this list, and as presented to and discussed with the PCAC in February 2015 (Ref. 2), FDA proposes that the following criteria be used to evaluate the nominated substances:

- The physical and chemical characterization of the substance;
- Any safety issues raised by the use of the substance in compounded drug products;
- The available evidence of effectiveness or lack of effectiveness of a drug product compounded with the substance, if any such evidence exists; and
- Historical use of the substance in compounded drug products, including information about the medical condition(s) the substance has been used to treat and any references in peer-reviewed medical literature.

In evaluating candidates for the 503A Bulks List under these criteria, the Agency proposes to use a balancing test. Specifically, the Agency proposes to consider each criterion in the context of the others and balance them, on a substance-by-substance basis, to decide whether a particular substance is appropriate for inclusion on the 503A Bulks List.

Under the first criterion, the physical and chemical characterization of the substance, FDA would consider each substance's purity, identity, and quality. Based on attributes such as the substance's molecular structure, stability, melting point, appearance, likely impurities, and solubilities, FDA would determine whether the substance can be identified consistently based on its physical and chemical characteristics. If a substance cannot be well characterized chemically and physically, the Agency proposes that this criterion weigh against its inclusion on the 503A Bulks List because there can be no assurance that its properties and toxicities, when used in compounding, would be the same as the properties and toxicities reported in the literature and considered by the Agency.

Under the second criterion, FDA would consider the safety issues raised by the use of each substance in pharmacy compounding. Based on FDA's review of the substances nominated to date, it is unlikely that candidates for the 503A Bulks List will have been thoroughly investigated in in vitro or in animal toxicology studies, or that there will be well-controlled clinical trials to substantiate their safe use in humans. Thus, in evaluating list candidates, the Agency is likely to have at its disposal very limited information, or in some cases no information, of the type and quality that is ordinarily required and evaluated as part of the drug approval process.

To evaluate the safety of the substances then, the Agency proposes to rely on available information, including reports in peer-reviewed medical literature, about each substance's pharmacology, acute toxicity, repeat dose toxicity, mutagenicity, developmental and reproductive toxicity, and carcinogenicity. The Agency would also rely on reports and abstracts in the literature about adverse reactions the substances have caused in humans. In applying the safety criterion, FDA also proposes to consider the availability of approved drug products or drug products that follow an OTC monograph (OTC monograph products). The existence of approved drug products or OTC monograph products would likely weigh against inclusion on the proposed list when the toxicity of a particular substance appears to be significant or where there are other safety concerns associated with the use of the substance in compounded drug products.

Under the third criterion, FDA proposes to consider the available evidence of the substance's effectiveness or lack of effectiveness for a particular use, including reports in peer-reviewed medical literature, if any such evidence exists. In the new drug approval process, applicants are required to demonstrate effectiveness under the substantial evidence standard described in section 505(d) of the FD&C Act. FDA recognizes that few, if any, of the candidates for the 503A Bulks List will have been studied in adequate and well-controlled investigations sufficient to satisfy this standard. Thus, in its balancing of the relevant criteria, the Agency would take into account whatever relevant evidence concerning effectiveness is available.

For example, for substances that have been widely used for a long period of time, the literature may include anecdotal reports of effectiveness for a particular use or reports of one or more trials suggesting possible effectiveness. Conversely, the literature may contain anecdotal or clinical evidence that a particular bulk drug substance was not effective for a particular use (negative effectiveness data). When evaluating a bulk drug substance that is proposed for the treatment of a less serious illness, FDA would generally be more concerned about the safety of the substance than about its effectiveness. Thus, the availability of minimal effectiveness data, or the existence of mere anecdotal reports, would be less likely to preclude inclusion of the substance on the list. However, for a bulk drug substance that is proposed to treat a more serious or life-threatening disease, there may be more serious consequences associated with ineffective therapy, particularly when there are approved drug products or OTC monograph products. In those cases, the existence of approved drug products or OTC monograph products would likely weigh against inclusion on the proposed list, and the availability of minimal effectiveness data, or the presence of negative effectiveness data, would weigh more heavily against placement on the list in FDA's balancing of the relevant criteria.

Under the fourth criterion, the historical use of the substance in pharmacy compounding, FDA proposes to consider the length of time the substance has been used in pharmacy compounding, the medical conditions it has been used to treat, how widespread its use has been, including use in other countries, and any references in peer-reviewed medical literature. The Agency proposes that the longer a substance has been used in pharmacy compounding and the broader its use, the more this criterion will weigh in favor of inclusion of the substance on the list.

B. Methodology for Developing the 503A Bulks List

FDA reviewed the substances addressed in this proposed rule in the context of adequately supported nominated uses. In certain circumstances, FDA also reviewed substances in the context of unnominated or inadequately supported uses because, for example, such uses appear to be widespread, are intended to treat serious conditions, or pose serious risks to patients. The

information that FDA assessed to evaluate the substances addressed in this proposed rule under each of the proposed evaluation criteria was obtained from publicly available sources, including peer-reviewed medical literature. Some of this information was referenced in the nominations, and the remainder FDA gathered through independent searches of medical and pharmaceutical databases. FDA did not review raw data. The nature, quantity, and quality of the information FDA assessed varied considerably from substance to substance. In some cases, there were very little data. For other substances, reports in the literature were more plentiful and sometimes comprised hundreds or thousands of articles. In those cases, generally the Agency limited its review to a sample of the best literature sources available (*e.g.,* review articles in widely known, peer-reviewed journals; meta-analyses; reports of randomized controlled trials).

FDA's evaluation of the nominated substances was, necessarily, far less rigorous and less comprehensive than the Agency's review of drugs as part of the new drug approval process. The new drug approval process is conducted based on extensive data compiled and submitted with new drug and abbreviated new drug applications, which are not available for the nominated substances. Additionally, the Agency's review during the drug approval process includes premarketing evaluation of a specific drug formulation, the sponsor's chemistry and manufacturing controls, and the establishments where approved drugs will be manufactured. In contrast, these bulk drug substances will be evaluated only for possible use in compounded drugs.

Therefore, the proposed inclusion of a drug substance on the 503A Bulks List should not, in any way, be equated with or considered an FDA approval, endorsement, or recommendation of any drug compounded using the substance. Nor should it be assumed that a drug compounded using the substances on the proposed list has been proven to be safe and effective under the standards required for Agency approval. Any person who represents that a compounded drug made with a bulk drug substance that appears on this list is FDA approved, or otherwise endorsed by FDA generally, or for a particular indication, will cause the drug to be misbranded under section 502(a) and/or 502(bb) of the FD&C Act.

On February 23 and 24, 2015, and on June 17, 2015, FDA consulted with the PCAC created under section 503A(c)(1) of the FD&C Act, about the criteria proposed to evaluate substances nominated for the list and about the 10 substances that are addressed in this proposed rule (Refs. 2–4). The Agency has considered all of the PCAC's recommendations in developing this proposed rule, and the Agency intends to continue to consult with the PCAC in evaluating future candidates for the 503A Bulks List. The first 10 substances evaluated are addressed in this proposed rule. Going forward, FDA intends to publish NPRMs proposing additional substances be placed on the list or not placed on the list on a rolling basis as evaluations are completed. Depending on the length of time it takes to complete a rulemaking, multiple rulemakings may be ongoing simultaneously.

Section 503A of the FD&C Act requires that FDA create the 503A Bulks List by regulation, in consultation with the USP. See section 503A(c)(2) of the FD&C Act. To this end, FDA has been periodically meeting with USP and discussing the 503A Bulks List (Refs. 5 and 6). After publication of this NPRM, the public will have an opportunity to comment on the proposed rule. After considering the comments on this proposed rule submitted to the docket, FDA will issue the 503A Bulks List as a final rule, which will be codified in the CFR. The final version of the rule may include all, none, or only some of the substances proposed here for inclusion on the 503A Bulks List, depending on the comments received, and will also identify those substances the Agency has determined should not be placed on the list. The Agency may amend the 503A Bulks List to add or delete substances after further notice and comment rulemaking.

Individuals and organizations may petition FDA to amend the list (to add or delete bulk drug substances) at any time after the final rule is published (see 21 CFR 10.30). Individuals and organizations may also nominate new substances for the 503A Bulks List or comment on nominated substances that have not yet been addressed in an NPRM via Docket No. FDA–2015–N–3534 while that docket is open.

C. Substances Proposed for Inclusion on the 503A Bulks List

Under section 503A(c)(2) of the FD&C Act, FDA is proposing that the following six bulk drug substances, which are neither the subject of a current applicable USP or NF monograph nor components of FDA-approved drugs, be included on the 503A Bulks List, and the drug products compounded with those substances may qualify for the exemptions provided for in section 503A of the FD&C Act (*i.e.,* from sections 501(a)(2)(B), 502(f)(1), and 505 of the FD&C Act). When a salt or ester of an active moiety is listed, only that particular salt or ester may be used. The base compound and other salts or esters of the same active moiety must be evaluated separately for eligibility for the 503A Bulks List. Additionally, when a bulk drug substance is included on the 503A Bulks List subject to certain restrictions (for example, for a particular route of administration (*e.g.,* topical)), only dosage forms for that route of administration may be compounded with that bulk drug substance.

The following bulk drug substances are being proposed for the 503A Bulks List, to appear in § 216.23(a) of Title 21 of the CFR:

1. Brilliant Blue G

Brilliant Blue G, also known as Coomassie Brilliant Blue G-250,[3] was evaluated for use as a dye used in staining for visualization during ophthalmic procedures. It is well characterized physically and chemically. There are potential mutagenic and carcinogenic concerns associated with Brilliant Blue G; however, those concerns are mitigated in clinical use because the dye is immediately washed out of the eye after administration, and tissue that is stained with the dye is removed as part of the surgical procedure. Published clinical trials provide some evidence for efficacy of Brilliant Blue G in staining the internal limiting membrane. Brilliant Blue has had relatively widespread use for staining the internal limiting membrane during retinal surgery for approximately 10 years. There is one product that is FDA-approved for staining the internal limiting membrane and the anterior capsule.

FDA proposed to the PCAC that Brilliant Blue G be included on the 503A Bulks List (Ref. 7), and at its meeting on June 17, 2015, the PCAC voted to include Brilliant Blue G on the list (Ref. 4). The proposed rule would place Brilliant Blue G on the 503A Bulks List.

2. Cantharidin

Cantharidin, which is obtained from various species of blister beetle, was

[3] While there are other substances referred to by the name ''Brilliant Blue,'' only Coomassie Brilliant Blue G-250 (CAS RN 6104-58-1, UNII M1ZRX790SI) was evaluated, and the Agency is proposing only that substance for inclusion on the 503A Bulks List. The other substances referred to as ''Brilliant Blue'' would have to be nominated and separately evaluated for consideration for inclusion on the 503A Bulks List.

evaluated for topical use[4] in the treatment of warts and molluscum contagiosum. It is well characterized physically and chemically. Cantharidin is extremely toxic, due to its potential for severe irritation. However, clinical data accumulated since 1958 indicate that, with careful use under physician direction, toxicities observed with cantharidin, are no worse than and sometimes less severe than those seen with other destructive modalities in the treatment of molluscum contagiosum and warts. Evidence of some efficacy of cantharidin in the treatment of warts and molluscum contagiosum has been reported in the literature. It appears to have been widely used to treat molluscum contagiosum and warts since the 1950s. There are no approved prescription or OTC monograph products for molluscum contagiosum. For warts, there are no prescription drug products approved for use outside of the genital area. A variety of OTC monograph products containing salicylic acid are available.

FDA proposed to the PCAC that cantharidin be included on the 503A Bulks List for topical use only (Ref. 8). At the PCAC meeting on February 24, 2015, the PCAC voted to include cantharidin on the list (Ref. 3). Because the supported nominations and the Agency's review were limited to the topical use of this substance, the proposed rule would place cantharadin on the 503A Bulks List for topical use only.

3. Diphenylcyclopropenone (DPCP)

DPCP was evaluated for topical use in the treatment of alopecia areata and nongenital warts. It is well characterized physically and chemically but degrades readily by hydrolysis in an alcoholic base or exposure to light. Known safety concerns about the use of DPCP are limited to reported adverse effects primarily due to its action as a contact sensitizer to elicit contact dermatitis. Evidence of some efficacy of DPCP in the treatment of alopecia areata and recalcitrant nongenital warts has been reported in the literature. DPCP has been used to treat resistant non-genital warts and alopecia areata for over 30 years. The only FDA-approved drug product indicated for the treatment of alopecia areata is intralesional injection of corticosteroid suspensions. For warts, there are no approved prescription drug products outside of the genital area. A variety of OTC monograph products are available containing salicylic acid at percentages varying from 17 to 40 percent.

FDA proposed to the PCAC that DPCP be included on the 503A Bulks List (Ref. 8). At its meeting on February 24, 2015, the PCAC voted to include DPCP on the list (Ref. 3). Because the supported nominations and the Agency's review were limited to the topical use of this substance, the proposed rule would place DPCP on the 503A Bulks List for topical use only.

4. N-acetyl-D-glucosamine (NAG)

NAG, also known as acetyl-D glucosamine or N-acetyl glucosamine, was evaluated for topical use in the treatment of hyperpigmentation and other skin conditions. It is well characterized physically and chemically. Topical use of NAG has been associated with relatively minor and infrequent side effects. Studies have indicated that NAG may be effective for reducing diffuse and local facial hyperpigmentation. NAG has been used topically for the treatment of hyperpigmentation since the mid-2000s. There are FDA-approved drug products indicated for the treatment of hyperpigmentation and other skin conditions, which are not serious or life-threatening conditions.

FDA proposed to the PCAC that NAG be included on the 503A Bulks List for topical use only (Ref. 7). At the PCAC meeting on June 17, 2015, the PCAC voted to include NAG on the list (Ref. 4). Because the supported nominations and the Agency's review were limited to the topical use of this substance, the proposed rule would place NAG on the 503A Bulks List for topical use only.

5. Squaric Acid Dibutyl Ester (SADBE)

SADBE was evaluated for topical use in the treatment of alopecia areata and recalcitrant nongenital warts. It is well characterized physically and chemically but hydrolyzes readily in the presence of water. The adverse effects from use of SADBE are primarily related to its action as contact sensitizer. Evidence of some efficacy of SADBE in the treatment of recalcitrant nongenital warts and alopecia areata has been reported in the literature. SADBE has been used in the treatment of resistant nongenital warts and alopecia areata for 30 to 40 years. The only FDA-approved drug product indicated for the treatment of alopecia areata is intralesional injection of corticosteroid suspensions. For warts, there are no prescription drug products approved for use outside of the genital area. A variety of OTC monograph products are available containing salicylic acid at percentages varying from 17 to 40 percent.

FDA proposed to the PCAC that SADBE be included on the 503A Bulks List (Ref. 8). At its meeting on February 24, 2015, the PCAC voted to include SADBE on the list (Ref. 3). Because the supported nominations and the Agency's review were limited to the topical use of this substance, the proposed rule would place SADBE on the 503A Bulks List for topical use only.

6. Thymol Iodide

Thymol iodide was evaluated for use as a topical treatment for ulcerations and skin infections, as well as an intrapleural treatment for pleural effusions. It is well characterized physically and chemically. Reports indicate that it has been used without major complications. Literature reports some efficacy of thymol iodide for pleural effusions, which are serious and can be life-threatening conditions. Data regarding the effectiveness of thymol iodide in compounding for topical use on wounds or ulcers in various skin conditions is limited; however, these skin conditions generally are not serious or life-threatening. Thymol iodide has been in use for over 100 years. Regarding use as an antiseptic in surgery and use as an external application to wounds or ulcers in various skin conditions, approved and OTC monograph products are available. There are also FDA-approved products available to treat malignant pleural effusions.

FDA proposed to the PCAC that thymol iodide be included on the 503A Bulks List (Ref. 8). At its meeting on February 23, 2015, the PCAC voted to include thymol iodide on the list (Ref. 2). Because the supported nominations were limited to the topical use of this substance, and because pleural effusions are serious and potentially life-threatening conditions for which there are approved products available, the proposed rule would place thymol iodide on the 503A Bulks List for topical use only.

D. Substances Considered and Not Proposed for Inclusion on the 503A Bulks List

FDA is proposing that four of the bulk drug substances that it has evaluated not be included on the 503A Bulks List. Bulk drug substances that are considered for the 503A Bulks list but not placed on the list cannot be used to compound drug products that would qualify for the exemptions in section 503A. If a prescribing practitioner nevertheless believes that a patient should be treated with a drug product compounded from such a bulk drug substance, it may be possible to obtain

[4] Except where specified otherwise, ''topical use'' means for application on the skin only and does not include oral, intravaginal, or ophthalmic use.

the drug under an IND. For information about the requirements for proceeding under an IND, visit FDA's Web site at *http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/InvestigationalNewDrugINDApplication/default.htm.*

The four bulk drug substances that have been evaluated and that FDA is not proposing to place on the list, and the reasons for that proposal, are as follows:

1. Oxitriptan

Oxitriptan, also known as 5-hydroxytryptophan (5-HTP), was evaluated as a treatment for depression and insomnia. It is a hydroxylated form of a naturally occurring amino acid, tryptophan. Oxitriptan is well characterized physically and chemically. However, there are significant safety concerns related to its use. Based upon its mechanism of action, concomitant use of oxitriptan with antidepressant drugs could result in serotonin syndrome, a serious and life-threatening drug interaction. Additionally, medications used to treat depression have been linked to an increase in suicidal thinking and behavior. There are no data to suggest that oxitriptan would be free of similar risks, and compounded drugs do not include labeling that would adequately warn physicians and patients of such risks. Other potential adverse reactions include moderate gastrointestinal effects, which are common upon administration of oxitriptan.

Data supporting the efficacy of oxitriptan for depression are limited, and there is no evidence to support long-term efficacy of oxitriptan for the treatment of this chronic disease. Depression is a serious and potentially life-threatening condition, and there are multiple FDA-approved antidepressants that have been shown to be safe and effective in their approved forms that are appropriately labeled. Regarding the use of oxitriptan to treat insomnia, the clinical trials examining insomnia were too poorly designed and/or executed to assess efficacy. There are multiple FDA-approved drug products available for the treatment of insomnia. The length of time oxitriptan has been used in compounding is uncertain, although it has been discussed in scientific journals dating back approximately 40 years.

On balance, the physiochemical characteristics, the safety concerns, lack of evidence of effectiveness, and historical use of oxitriptan weigh against inclusion of this substance on the 503A Bulks List. In particular, the Agency's proposal regarding this substance is based on the seriousness of the safety concerns related to the use of oxitriptan for depression in lieu of, or causing a delay in the use of an approved product, the lack of adequate warnings that would inform patients and prescribers of the risks associated with taking an oxitriptan product, and the availability of approved drug products for the treatment of depression, a potentially life-threatening condition. FDA proposed to the PCAC that this substance not be included on the 503A Bulks List (Ref. 7). At its meeting on June 17, 2015, the PCAC voted not to include oxitriptan on the list (Ref. 4). The proposed rule would not place oxitriptan on the 503A Bulks List.

2. Piracetam

Piracetam was evaluated as a treatment for enhancing cognitive skills in treating a variety of cognitive disorders, including Alzheimer's disease. It has also been studied for treatment of coagulation disorders and vertigo. It is well characterized physically and chemically. Piracetam is approved in the United Kingdom (UK) as a prescription drug for the adjunctive treatment of cortical myoclonus. The labeling of the UK product identifies that the drug is renally excreted, that the dosage should be adjusted in the presence of renal disease, and that it is contraindicated in end-stage renal disease. Piracetam acts by multiple mechanisms to prolong bleeding time and is therefore not recommended for use by individuals with medical conditions that prolong bleeding time or that are taking concomitant anticoagulants or other medications that prolong bleeding (Ref. 9). Piracetam is not recommended for women who are pregnant, planning to become pregnant, or breastfeeding, because, according to the UK product's labeling, the drug has been shown to cross the placenta and be excreted in human milk. It is also recommended that individuals required to restrict their salt intake avoid piracetam (id.).

Piracetam was assessed for the treatment of mild cognitive impairment, a potential component of Alzheimer's disease, in a large, well-conducted, controlled clinical trial that failed to demonstrate efficacy. Studies of the efficacy of piracetam for other indications have been inconclusive, many of which were poorly designed or executed, or used flawed statistical methods to analyze the results. Piracetam's regulatory approval in the UK for the treatment of cortical myoclonus, which is not among the uses for which piracetam was nominated, was based on a single center, retrospective review of 40 patients treated with piracetam (id.). FDA-approved products are available for treatment of the conditions, and conditions related to, those for which piracetam was nominated, for example, for Alzheimer's disease, which is frequently preceded by mild cognitive impairment. Regarding historical use, piracetam has been available for approximately 40 years.

On balance, the physiochemical characteristics, safety concerns, inconclusive evidence of effectiveness, and historical use of piracetam weigh against inclusion of this substance on the list. In particular, the Agency's proposal regarding this substance is based on the limited evidence of benefit associated with piracetam, the seriousness of the conditions for which piracetam was nominated to be used, and the availability of safe and effective FDA-approved medications for many of these uses. FDA proposed to the PCAC that this substance not be included on the 503A Bulks List (Ref. 8). At its meeting on February 24, 2015, the PCAC voted not to include piracetam on the list (Ref. 3). The proposed rule would not place piracetam on the 503A Bulks List.

3. Silver Protein Mild

Silver protein mild, also known as mild silver protein, was evaluated for use as an anti-infective agent for ophthalmic use. Silver protein mild is not well characterized because the term ''silver protein mild'' is used to refer to a variety of different drug products. There are also safety concerns associated with the use of silver protein mild. It can cause argyria, which is a permanent ashen-gray discoloration of the skin, conjunctiva, and internal organs. Regarding effectiveness, silver protein mild has been found to be inferior to another treatment in clinical trials. A number of FDA-approved anti-infective agents for ophthalmic use are available and have been shown to be both safe and effective. While it has a long history of use, dating back to the early 1900s, the use of silver protein mild declined dramatically after the introduction of FDA-approved ocular anti-infectives.

On balance, the physiochemical characteristics, safety issues, questionable effectiveness, and historical use of silver protein mild weigh against inclusion of this substance on the 503A Bulks List. In particular, the Agency's proposal is based on the facts that silver protein mild is not well characterized, that in clinical trials it has been found to be inferior to another treatment and

numerically inferior to no treatment at all, and that chronic use may result in permanent discoloration of the conjunctiva, cornea, and/or lens. FDA proposed to the PCAC that this substance not be included on the 503A Bulks List (Ref. 8). At its meeting on February 23, 2015, the PCAC voted not to include silver protein mild on the list (Ref. 2). The proposed rule would not place silver protein mild on the 503A Bulks List.

4. Tranilast

Tranilast, an antiallergenic agent, was evaluated for the treatment of allergic disorders, arthritis, dry eye syndrome, keloids, and hypertrophic scars. It is approved in South Korea and Japan for the treatment of asthma, keloids, and hypertrophic scarring, and as an ophthalmic solution for allergic conjunctivitis. It is well characterized physically and chemically. However, there are significant safety concerns associated with its systemic administration. In a well-controlled clinical trial with nearly 12,000 participants (the Prevention of REStenosis with Tranilast and its Outcomes (PRESTO) Trial) (Ref. 10), tranilast was associated with significantly elevated liver enzymes (three times the upper limit of normal) in 11 percent of patients within 1 to 3 months of drug initiation, as well as anemia, renal failure, rash, and dysuria.[5] Liver toxicity is of particular concern because many of the conditions for which tranilast was nominated are chronic conditions. While there is some evidence that tranilast may be effective for allergic disorders, evidence of effectiveness for other uses is either not available or inconclusive. For allergy, arthritis, and ophthalmic indications, there are numerous FDA-approved and OTC monograph products. The length of time tranilast has been used in compounding is uncertain, although it has been discussed in scientific journals dating back approximately 40 years.

On balance, the physiochemical characteristics, safety concerns, lack of evidence of effectiveness, and historical use of tranilast weigh against inclusion of this substance on the 503A Bulks List, particularly given the seriousness of the safety concerns related to hepatotoxicity of tranilast and contraindications in pregnant and breastfeeding women, the availability of approved products for most of the proposed uses, and the lack of evidence that tranilast is effective. FDA proposed to the PCAC that this substance not be included on the 503A Bulks List (Ref. 7). However, at its meeting on June 17, 2015, the PCAC voted to include tranilast on the list for topical use only (Ref. 4).

Subsequent to that meeting, FDA reviewed the topical use of tranilast further. It obtained the label of the Japanese tranilast product, RIZABEN, but found no information on the transdermal absorption or other pharmacokinetics of tranilast when applied topically to healthy or diseased human skin (Ref. 11). The labeling of the Japanese product identifies a number of safety concerns, including a contraindication in pregnant women, especially during the first trimester of pregnancy, and in those who might be pregnant, due to evidence of teratogenicity in animal studies (id.). The labeling also states that tranilast is detected in breast milk and should be avoided by breastfeeding women. In addition, the RIZABEN label lists a drug interaction with warfarin and identifies a number of serious adverse events, particularly those that are hematologic in nature (leukopenia, thrombocytopenia, anemia, hemolytic anemia), associated with the oral use of tranilast. Safety information regarding other routes of administration is limited.

FDA also noted evidence that some increases in some liver function tests (bilirubin) are explained by tranilast inhibition of uridine diphosphate glucuronosyltransferase 1A1 (UGT1A1) especially in patients with a genotype for Gilbert's Disease. Increases in liver transaminases observed with tranilast are not typically seen with inhibition of UGT1A1. It is speculated that tranilast impairs the metabolism of drugs that are metabolized by UGT1A1. If these drugs are associated with transaminase elevations, inhibiting the drug's metabolism may lead to liver transaminitis.

As was found in the Agency's initial review and presented to the PCAC, there is no persuasive information available regarding the safety or effectiveness of topical tranilast. FDA has identified only two reports in the literature describing the efficacy and safety of tranilast administered topically for the treatment of keloids and hypertrophic scars (Refs. 12 and 13). One of those studies was an open-label trial, and the other was a case series. Between the two studies, only five patients were exposed to topical tranilast.

As stated previously, FDA has serious concerns about the safety of tranilast when administered orally. The Agency has insufficient information about the systemic absorption of topical tranilast formulations to determine whether topical administration of the drug product would present the same safety concerns. Given the lack of information available about the safety and efficacy of topical tranilast, and safety concerns related to the oral use of this product, the proposed rule would not place tranilast on the 503A Bulks List.

VI. Proposed Effective Date

The Agency proposes that any final rule based on this proposal will become effective 30 days after the date of publication of the final rule in the **Federal Register**.

VII. Analysis of Environmental Impact

FDA has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the proposed rule. We believe that this proposed rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because we find little evidence that a substantial number of small entities would be affected by the proposed rule or that the economic impact on each affected small entity would be significant, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to

[5] During the PCAC meeting on June 17, 2015, the PRESTO trial was criticized by one of the tranilast nominators as having insufficiently accounted for the medical history of the subjects, among other things (see Ref. 4). To the contrary, the five-arm trial design appears to have been properly controlled for the patients' various medical conditions, and signals of liver toxicity were consistent across arms (see Ref. 10).

prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

TABLE 1—ECONOMIC DATA: COSTS AND BENEFITS STATEMENT

Category	Primary estimate	Low estimate	High estimate	Units year dollars	Discount rate (%)	Period covered (years)	Notes
Benefits							
Annualized Monetized $ mil/year.	Not Estimated (N.E.).	.....	.....	.....	7	10	.....
Annualized Monetized $ mil/year.	N.E	.....	.....	.....	3	10	.....
Annualized Quantified.	N.E	.....	.....	.....	7	.....	.....
Annualized Quantified.	N.E	.....	.....	.....	3	.....	.....
Qualitative	Not including four bulk drug substances from the 503A Bulks List would limit the use of potentially ineffective or unsafe unapproved drugs.	.....	.....	.....	.....	.....	.....
Costs							
Annualized Monetized $ mil/year.	N.E	.....	.....	.....	7	10	.....
Annualized Monetized $ mil/year.	N.E	.....	.....	.....	3	10	.....
Annualized Quantified.	$118 to $235 one-time per firm costs.	.....	.....	2014	7	.....	.....
Annualized Quantified.	$118 to $235 one-time per firm costs.	.....	.....	2014	3	.....	.....
Qualitative	.....	.....	.....	.....	.....	.....	.....
Transfers							
Federal Annualized Monetized $ mil/year.	.....	.....	.....	.....	7	.....	.....
Federal Annualized Monetized $ mil/year.	.....	.....	.....	.....	3	.....	.....
From/To	From:	.....	.....	To:	.....	.....	.....
Other Annualized $ mil/year.	N.E	.....	.....	.....	7	.....	.....
Other Annualized Monetized $ mil/year.	N.E	.....	.....	.....	3	.....	.....

TABLE 1—ECONOMIC DATA: COSTS AND BENEFITS STATEMENT—Continued

Category	Primary estimate	Low estimate	High estimate	Units year dollars	Discount rate (%)	Period covered (years)	Notes
From/To	From: Producers of bulk drug substances not proposed for inclusion and compounding pharmacies using these substances.	.....	.....	To: Producers of alternative treatments, consumers, using these treatments and payers for these treatments.	.....	.....	.....
Effects							
State, Local, and/or Tribal Government: No effect. Small Business: Unknown effect. Wages: No effect. Growth: No effect.							

The Economic Analysis of Impacts of the proposed rule performed in accordance with Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act is available at *http://www.regulations.gov* under the docket number for this proposed rule (Ref. 14) and at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.* We invite comments on this analysis.

A. Summary of the Costs of the Rule

We lack data on the scope of the current use of the affected bulk drug substances and the number of firms that would be affected by the rule. Without this information, we cannot quantify the total potential costs of the proposed rule. Potential costs include administrative costs, additional costs for consumers and payers if alternative therapies are more costly than the affected compounded drug products, and a potential loss of producer surplus if producers use additional resources in response to the rule. We estimate that each affected firm would spend 1 to 2 hours on administrative costs to read and understand the rule. The average hourly wage for a pharmacist in 2014 equals about $57, or $114 including 100 percent overhead. Thus, each affected firm would incur administrative costs that range from $118 to $235. We request comment on the potential costs and number of firms affected by the proposed rule.

B. Summary of the Benefits of the Rule

The benefits of the rule are unquantified. We include a qualitative discussion of potential benefits. For consumers who switch to more effective treatments, there would be benefits as consumers experience better health outcomes than they do currently.

C. Summary of the Impact on Small Entities

The Regulatory Flexibility Act requires a Regulatory Flexibility Analysis (RFA) unless the Agency can certify that the proposed rule would have no significant impact on a substantial number of small entities. The Small Business Administration (SBA) establishes thresholds for small entities by North American Industry Classification System (NAICS); the SBA considers small any entity below these thresholds. Firms affected by the proposed rule would fall into three major industries, NAICS 325412 Pharmaceutical Preparation Manufacturing, NAICS 424210 Drugs and Druggists' Sundries Merchant Wholesalers, and NAICS 446110 Pharmacies and Drug Stores. The thresholds for these industries are 750 employees for NAICS 325412, 100 employees for NAICS 424210, and annual sales of $27.5 million for NAICS 446110.

We lack data on the number or size of manufacturers, wholesalers, and compounding pharmacies that would be affected by the proposed rule. Moreover, we find little evidence of widespread use of four bulk drug substances not proposed for inclusion on the 503A Bulks List. This suggests that the impact of the rule would likely not be significant on small entities. Because we find little evidence that a substantial number of small entities would be affected by the proposed rule or that the economic impact on each affected small entity would be significant, we believe that the proposed rule would not have a significant economic impact on a substantial number of small entities, but the impacts are uncertain. We request detailed comments and data on the number of small entities that would be affected by the proposed rule, as well as data on the economic impact of the proposed rule on these small entities.

IX. Paperwork Reduction Act of 1995

The submission of comments on this proposed rule would be submissions in response to a **Federal Register** notice, in the form of comments, which are excluded from the definition of ''information'' under 5 CFR 1320.3(h)(4) of Office of Management and Budget regulations on the Paperwork Reduction Act (*i.e.,* facts or opinions submitted in response to general solicitations of comments from the public, published in the **Federal Register** or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the Agency's full consideration of the

comment). The proposed rule contains no other collection of information.

X. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the proposed rule, if finalized, would not contain policies that would have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XI. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *http://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. FDA, ''Guidance for Industry: Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act,'' (*http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM469120.pdf*), 2016.

2. FDA, Transcript of the February 23, 2015, Meeting of the Pharmacy Compounding Advisory Committee (Afternoon Session), 2015, (*http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/PharmacyCompoundingAdvisoryCommittee/UCM444500.pdf*).

3. FDA, Transcript of the February 24, 2015, Meeting of the Pharmacy Compounding Advisory Committee, 2015, (*http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/PharmacyCompoundingAdvisoryCommittee/UCM444501.pdf*).

4. Transcript of the June 17, 2015, Meeting of the Pharmacy Compounding Advisory Committee (Afternoon Session), 2015, (*http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/PharmacyCompoundingAdvisoryCommittee/UCM458513.pdf*).

5. Memorandum to File on FDA Consultations with USP, September 26, 2016.

6. Letter from USP to FDA, October 7, 2016.

7. FDA Briefing Document for the June 17–18, 2015, Meeting of the Pharmacy Compounding Advisory Committee, 2015, (*http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/PharmacyCompoundingAdvisoryCommittee/UCM449535.pdf*).

8. FDA Briefing Document for the February 23–24, 2015, Meeting of the Pharmacy Compounding Advisory Committee, 2015, (*http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/PharmacyCompoundingAdvisoryCommittee/UCM433804.pdf*).

9. Obeso, J. A., et al., ''Piracetam in the Treatment of Different Types of Myoclonus,'' *Clinical Neuropharmacology,* 11(6): 529–536, 1988.

10. Holmes, D.R., Jr., M. Savage, J.M. LaBlanche, et al., ''Results of Prevention of REStenosis with Tranilast and its Outcomes (PRESTO) Trial,'' *Circulation,* 106(10): 1243–1250, 2002.

11. FDA Supplemental Review of Topical Tranilast, April 25, 2016.

12. Shigeki, S., T. Murakami, N. Yata, and Y. Ikuta, ''Treatment of Keloid and Hypertrophic Scars by Iontophoretic Transdermal Delivery of Tranilast,'' *Scandinavian Journal of Plastic and Reconstructive Surgery and Hand Surgery,* 31(2): 151–159, 1997.

13. Banov, D., F. Banov, and A.S. Bassani, ''Case Series: The Effectiveness of Fatty Acids From Pracaxi Oil in a Topical Silicone Base for Scar and Wound Therapy,'' *Dermatology and Therapy,* 4(2): 259–269, 2014.

14. Economic Analysis of Impacts.

List of Subjects in 21 CFR Part 216

Drugs, Prescription drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, the Food and Drug Administration proposes to amend 21 CFR part 216 as follows:

PART 216—HUMAN DRUG COMPOUNDING

■ 1. The authority citation for part 216 is revised to read as follows:

Authority: 21 U.S.C. 351, 352, 353a, 353b, 355, and 371.

■ 2. The heading for part 216 is revised to read as set forth above.

■ 3. Section 216.23 is added to read as follows:

§ 216.23 Bulk drug substances that can be used to compound drug products in accordance with section 503A of the Federal Food, Drug, and Cosmetic Act.

(a) The following bulk drug substances can be used in compounding under section 503A(b)(1)(A)(i)(III) of the Federal Food, Drug, and Cosmetic Act.

Brilliant Blue G, also known as Coomassie Brilliant Blue G–250.

Cantharidin (for topical use only).

Diphenylcyclopropenone (for topical use only).

N-acetyl-D-glucosamine (for topical use only).

Squaric acid dibutyl ester (for topical use only).

Thymol iodide (for topical use only).

(b) After balancing the criteria set forth in paragraph (c) of this section, FDA has determined that the following bulk drug substances will not be included on the list of substances that can be used in compounding set forth in paragraph (a) of this section:

Oxitriptan.

Piracetam.

Silver Protein Mild.

Tranilast.

(c) FDA will use the following criteria in evaluating substances considered for inclusion on the list set forth in paragraph (a) of this section:

(1) The physical and chemical characterization of the substance;

(2) Any safety issues raised by the use of the substance in compounded drug products;

(3) The available evidence of the effectiveness or lack of effectiveness of a drug product compounded with the substance, if any such evidence exists; and

(4) Historical use of the substance in compounded drug products, including information about the medical condition(s) the substance has been used to treat and any references in peer-reviewed medical literature.

(d) Based on evidence currently available, there are inadequate data to demonstrate the safety or efficacy of any drug product compounded using any of the drug substances listed in paragraph (a) of this section, or to establish general recognition of the safety or effectiveness of any such drug product. Any person who represents that a compounded drug made with a bulk drug substance that appears on this list is FDA approved, or otherwise endorsed by FDA generally or for a particular indication, will cause the drug to be misbranded under section 502(a) and/or 502(bb) of the Federal Food, Drug, and Cosmetic Act.

Dated: December 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30109 Filed 12–15–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3282 and 3284

[Docket No. FR–5848–P–01]

RIN 2502–AJ37

Manufactured Housing Program: Minimum Payments to the States

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the minimum payments to states approved as State Administrative Agencies (SAAs) under the National Manufactured Housing Construction and Safety Standards Act of 1974 in order to provide for a more equitable guarantee of minimum funding from HUD's appropriation for this program and to avoid the differing per unit payments to the states that have occurred under the present rule. This rule would base the minimum payments to states upon their participation in the production or siting of new manufactured homes, including for new manufactured homes both produced and sited in the same state.

DATES: *Comment Due Date:* February 14, 2017.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll-free, at (800) 877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Pamela Beck Danner, Administrator, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9168, Washington, DC 20410; telephone 202–708–6423. (This is not a toll-free number.) Individuals with speech or hearing impairments may access this number through TTY by calling the toll free Federal Information Relay Service at 1–800–877–8389.

SUPPLEMENTARY INFORMATION:

I. Background

On August 13, 2002 (67 FR 52832), HUD published a final rule that, among other things, established minimum payments to the states participating in the Manufactured Housing Program as an SAA. HUD's August 13, 2002, final rule was issued in accordance with section 620(e)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401–5426) (the Act), as amended.[1] In that rule, HUD determined to pay each state that, on December 27, 2000, had a fully approved state plan an amount not less than the amount paid to that state for the 12 months ending on December 26, 2000. HUD codified this rule at 24 CFR 3284.10.

On March 1, 2004 (69 FR 9740), HUD published a proposed rule to revise the minimum payments to SAAs in order to provide for a more equitable guarantee of minimum funding from HUD's appropriation for this program. Specifically, HUD proposed basing minimum payment to states on their participation in the production or siting of new manufactured homes. In explaining the reasons for its March 2004, rule, HUD stated that the August 13, 2002, rule resulted in inequitable payments between states fully approved as of December 27, 2000, and states that were not fully approved (including conditionally approved states) as of that date, and resulted in some states receiving more funding than other states for each unit of manufactured housing produced or sited in the state. In this regard, HUD explained that State A, a fully approved state in which the production and siting level had decreased by 30 percent since the rule's base year of 2000, would effectively receive a total of $16.50 (1,000 units received in 2000 × $11.50 divided by 700 units based on 30 percent reduction) per unit sited and produced in the state because that payment represented a pro rata portion of the inflated base year amount. State B, on the other hand, in which production and siting had remained steady or had increased, but which was not a fully approved state, would only be paid a total of $11.50 per unit sited and produced in State B (with no adjustment for reduced production levels) as provided by § 3282.307. HUD concluded that while it expected some inequity in payments under the August 2002 rule, it believed that the minimum fee was based on production levels that were low enough to establish a reasonable minimum payment to each approved state. HUD was not expecting, however, the extent of the imbalances that resulted from the rule. Nevertheless, HUD did not finalize the March 2004 proposed rule.

On May 2, 2014 (79 FR 25035), HUD published a proposed rule to revise the amount of the fee collected from manufacturers in accordance with section 620 of the Act. In response to HUD's proposed rule, several commenters stated that the fees paid to SAAs are not reflective of current production and shipment levels. HUD responded to these comments by stating

[1] Section 620(e)(3) of the Act provides, ''On or after the effective date of the Manufactured Housing Improvement Act of 2000 (December 27, 2000), the Secretary shall continue to fund the States having approved State plans in the amounts which are not less than the allocated amounts, based on the fee distribution system in effect on the day before such effective date.''

that it would review revisions to the current fee distribution formula to ensure that states are provided with adequate funding to perform the required SAA function. (See, 79 FR 47373, August 13, 2014).

HUD agrees that it should establish a more equitable distribution of funds. As a result, HUD is proposing to implement section 620 of the Act by establishing a formula that bases the amount paid to a state on the state's participation in the production or siting of new manufactured homes while ensuring a cumulative payment based on the amount a state received in Fiscal Year (FY) 2014, which is at least the same amount that each fully approved state received as of December 27, 2000, the date of enactment of the statute.

II. HUD Consultation With SAAs and Manufactured Housing Consensus Committee (MHCC)

HUD has worked with its partner SAAs and the MHCC to develop this proposal. In 2015, HUD elicited comments from both its partner SAAs and the MHCC on how to more equitably distribute fees among the states. At its August 2015 meeting, the MHCC considered a formula of $9.00 per transportable section located in a state, and $14.00 per transportable section manufactured in a state. Under this formula, whether a state was fully or conditionally approved would cease to affect funding. Additionally, the formula would provide that amounts states receive would not decrease below that received during FY 2014.

The MHCC unanimously referred that proposal to its Regulatory Subcommittee. At the January 2016 MHCC meeting, the Regulatory Subcommittee recommended approval of this proposal to the full MHCC. Subsequently, the entire MHCC recommended adoption of the above mentioned proposal. As a result, HUD proposes revising payments to states consistent with that proposal through this rule.

III. This Proposed Rule

HUD proposes to amend § 3282.307(b) to increase the amount paid to both fully approved and conditionally approved states for each transportable section of new manufactured housing that is produced in that state. Under HUD's proposal, § 3282.307(b) would be revised to allow for payments to states of (1) $9.00 for each transportable section of new manufactured housing that is located in that state, and (2) $14.00 for each transportable section of new manufactured housing that is produced in that state. These increased levels reflect the respective levels of responsibility of states.

HUD is also proposing to revise § 3284.10 to ensure participating states (regardless of approval status before December 27, 2000) receive a funding level no less than the cumulative amount that state received in FY 2014. HUD's approach in revising § 3284.10 builds on § 3282.307(b) which provides for distribution of a portion of the monitoring inspection fees among both fully approved and conditionally approved states. These payments have been in effect for over 20 years and are currently paid to all participating states. As a result, under HUD's proposed rule, all states receiving amounts allocated from the fees collected from manufacturers will continue to be paid amounts at least equivalent to those received in FY 2014. These proposed funding levels would also meet or exceed the allocated amounts, paid to fully approved states, based on the fee distribution system in effect on December 27, 2000, in accordance with 620(e)(3) of the Act.

In addition to being more equitable for the participating states, HUD believes that this proposed method of implementing the statutory requirement concerning minimum payments to the states would simplify the related administrative burdens of HUD and the states. For many years, HUD and the states have been making and receiving payments based on whether that state's program was fully or conditionally approved on December 27, 2000. Under this proposal, payments would continue to be made to all participating states, regardless of whether they are fully or conditionally approved, using a similar system under which HUD and the states have been operating for years. The proposed revised implementation of the statutory provision on minimum payments is similar to the same methodology used for compliance with § 3282.307. As a result, the revised approach should not require any new payment or accounting structures and states should be able to seamlessly implement the statutory requirement.

This new method of determining state payments would also largely eliminate the need for a year-end supplemental payment to states. Based on current production levels, most states would meet or exceed their FY 14 manufacturing and location levels. As a result, HUD believes that funding to states under this proposal would be more consistent, and more closely linked to their production and location levels.

As stated in this preamble, whether a state was fully or conditionally approved on December 27, 2000 would cease to be a factor in determining SAA funding. Rather, all states, including states with fully approved state plans as of December 27, 2000, would continue to receive at least the same cumulative payment they received for FY 2014. That cumulative payment is at least the same amount that each fully approved state received as of December 27, 2000, the date of enactment of the statute.

HUD developed this proposal while conservatively estimating manufactured housing production growth of 5 percent per annum. In recent years, manufactured housing growth has exceeded this 5 percent threshold.[2] Based on these projections, HUD estimates that states that have levels of production above their 2000 levels will receive more funding reflecting both their higher production and the greater responsibilities of SAAs in manufacturing states. However, based on the fee distribution formula being proposed in this rulemaking, no state which was approved prior to December 27, 2000, will see a decrease in funding, even if production levels remain below those from 2000. Based on a conservative estimate of 5 percent annual growth, and given this rule's guarantee of FY14 funding levels, no state, even those not fully approved prior to December 27, 2000, would see a decrease in funding.

IV. Specific Issues for Comment

To assist in HUD's development of this proposed rule, HUD is soliciting comments on certain features of its proposed rule. Therefore, in addition to commenting on the specific provisions of this proposed rule, HUD invites comment on the following questions and any other related matters or suggestions:

1. In determining a revised equitable fee distribution formula, what methods and data should HUD consider to increase the amounts paid to the states? For example, should HUD rely on the past three years or more of fee income data received by both fully approved and conditionally approved states in assessing the amount of the increase of the payment to each SAA?

2. Should fully approved states be entitled to higher levels of payments than conditionally approved SAAs? In addition to the number of home placements and production levels in each state, should the increase in payment consider the number of

[2] More information on Manufactured Housing production levels may be obtained via the Web site of the Manufactured Housing Institute, available at *http://www.manufacturedhousing.org/reports/*.

complaints handled by each SAA for the past three years in determining the amount of the increase (HUD would need each SAA to provide a list of all complaints handled over the past three years)?

3. Should HUD revise 24 CFR 3282.307(b) to allow the amount of the distribution of fees among the states to be established by Notice in order to more timely address changes or fluctuations in production levels, in order to assure that the states are adequately funded for the inspections and work they perform?

V. Findings and Certifications

Executive Order 12866 and Executive Order 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This proposed rule was determined to not be a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and therefore was not reviewed by OMB.

Impact on Small Entities

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule will affect only states that participate in the manufactured housing program, and will have a negligible economic impact. Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's program responsibilities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538)(UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the UMRA.

Environmental Impact

In accordance with 24 CFR 50.19(c)(6) of the HUD regulations, this rule sets forth fiscal requirements which do not constitute a development decision that affects the physical condition of specific project areas or building sites, and therefore is categorically excluded from the requirements of the National Environmental Policy Act and related federal laws and authorities.

Federalism Impact

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (2) the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

List of Subjects

24 CFR Part 3282

Manufactured home procedural and enforcement regulations, Administrative practice and procedure, Consumer protection, Intergovernmental relations, Investigations, Manufactured homes, Reporting and recordkeeping requirements.

24 CFR Part 3284

Consumer protection, Intergovernmental relations, Manufactured homes.

Accordingly, for the reasons discussed in this preamble, HUD proposes to amend 24 CFR parts 3282 and 3284 as follows:

PART 3282—MANUFACTURED HOME PROCEDURAL AND ENFORCEMENT REGULATIONS

■ 1. The authority citation for part 3282 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 42 U.S.C. 3535(d) and 5424.

■ 2. Revise § 3282.307(b) to read as follows:

§ 3282.307 Monitoring inspection fee establishment and distribution.

* * * * *

(b) The monitoring inspection fee shall be paid by the manufacturer to the Secretary or to the Secretary's Agent, who shall distribute a portion of the fees collected from all manufactured home manufacturers among the approved and conditionally-approved States in accordance with an agreement between the Secretary and the States and based upon the following formula:

(1) $9.00 of the monitoring inspection fee collected for each transportable section of each new manufactured housing unit that, after leaving the manufacturing plant in another State, is first located on the premises of a retailer, distributor, or purchaser in that state; plus

(2) $14.00 of the monitoring inspection fee collected for each transportable section of each new manufactured housing unit produced in a manufacturing plant in that State.

* * * * *

PART 3284—MANUFACTURED HOUSING PROGRAM FEE

■ 3. The authority citation for 24 CFR Part 3284 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 5419, and 5424.

■ 4. Revise § 3284.10 to read as follows:

§ 3284.10 Minimum payments to states.

For every State that has a State plan fully or conditionally approved pursuant to § 3282.302 of this chapter, HUD will pay such State annually a total amount that is the greater of either the amount of cumulative payments that State received between October 1, 2013 and September 30, 2014; or the total amount determined by adding:

(a) $9.00, if after leaving the manufacturing plant, for every transportable section that is first located on the premises of a retailer, distributor, or purchaser in that State after leaving the manufacturing plant (or $0, if it is not) during the year for which payment is received; and

(b) 14.00 for every transportable section that is produced in a manufacturing plant in that State (or $0,

if it is not) during the year for which payment is received.

Dated: November 17, 2016.

Edward L. Golding,

Principal Deputy Assistant Secretary for Housing.

[FR Doc. 2016–30153 Filed 12–15–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0988]

RIN 1625–AA09

Drawbridge Operation Regulation; Detroit River (Trenton Channel), Grosse Ile, MI

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to add permanent winter hours to the operating schedule of the Grosse Ile Toll Bridge (Bridge Road) at mile 8.8, over Trenton Channel at Grosse Ile, MI. A review of the current regulation was requested by the Grosse Ile Bridge Company, the owner of the Grosse Ile Toll Bridge (Bridge Road).

DATES: Comments and related material must reach the Coast Guard on or before: January 17, 2017.

ADDRESSES: You may submit comments identified by docket number USCG–2016–0988 using Federal eRulemaking Portal at *http://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, email *Lee.D.Soule@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
E.O. Executive order
FR Federal Register
NEPA National Environmental Policy Act of 1969
NPRM Notice of proposed rulemaking
RFA Regulatory Flexibility Act of 1980
SNPRM Supplemental notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code

II. Background, Purpose and Legal Basis

This proposed rule was requested by the Grosse Ile Bridge Company, the owner of the Grosse Ile Toll Bridge (Bridge Road) to align drawbridge operating schedules with the Wayne County Highway Bridge (Grosse Ile Parkway) Bridge at mile 5.6, at Grosse Ile. The Grosse Ile Highway Bridge is authorized to remove drawtenders and open the drawbridge if at least 12-hours advance notice is provided from December 15 through March 15 each year. This proposed rule will make the current regulation easier to follow for the mariners that use the river system. The Grosse Ile Toll Bridge (Bridge Road) was not granted permanent winter hours in the past due to regular commercial traffic that required bridge openings during the winter months. Over the past two winter seasons the commercial traffic has been reduced significantly and waterway use through this drawbridge is equivalent to the volume and type of traffic that passes through the Wayne County Highway (Grosse Ile Parkway) Bridge that has had permanent winter hours for approximately 10 years. Mariners will still be able to request bridge openings with advance notice during times of light traffic volume on the river, which is due to ice formation on the Detroit River that typically prevents most vessel traffic from navigation in the channel from December 15 through March 15 each year. Additionally, Commander, Ninth Coast Guard District has granted annual authorization to the owner/operator of the Grosse Ile Toll Bridge to assume the same schedule during the past 10 years under authority granted in 33 CFR 117.35.

III. Discussion of Proposed Rule

Currently, the regulation for Grosse Ile drawbridges (33 CFR 117.631) includes the operating schedule for the Grosse Ile Toll Bridge (Bridge Road) and the Wayne County Highway Bridge (Grosse Ile Parkway) Bridge at mile 5.6, both at Grosse Ile, MI. The purpose of this proposed rule is to establish the same permanent 12-hours advance notice for both bridges on the waterway from December 15 through March 15 each year. The only change in this proposed rule is to allow a permanent requirement for 12-hours advance notice during the winter months when ice typically prevents recreational navigation in the channel. At all times both bridges will be required to open as soon as possible for public vessels of the United States, State or local government vessels used for public safety, and vessels in distress.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders and discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a ''significant regulatory action,'' under executive order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the ability that vessels can still transit the bridge given advanced notice during times when vessel traffic is at its lowest. The proposed winter drawbridge schedule for the Grosse Ile Toll Bridge (Bridge Street) would be the same as the Wayne County Highway Bridge (Grosse Ile Parkway) Bridge.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.A above this proposed rule standardizes drawbridge schedules for both drawbridges on the waterway and would not have a significant economic impact on any vessel owner or operator because the bridges will open with advance notice during low traffic times on the waterway, or when ice conditions hinder normal navigation.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in executive order 13132.

Also, this proposed rule does not have tribal implications under executive order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This proposed rule simply promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this notice, and all public comments, are in our online docket at *http://www.regulations.gov* and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to revise 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 117.631, revise paragraph (a) to read as follows:

§ 117.631 Detroit River (Trenton Channel).

(a) The draw of the Grosse Ile Toll Bridge (Bridge Road), mile 8.8, at Grosse Ile, shall operate as follows:

(1) From March 16 through December 14—

(i) Between the hours of 7 a.m. and 11 p.m., seven days a week and holidays, the draw need open only from three minutes before to three minutes after the hour and half-hour for pleasure craft; for commercial vessels, during this period of time, the draw shall open on signal as soon as possible.

(ii) Between the hours of 11 p.m. and 7 a.m., the draw shall open on signal for pleasure craft and commercial vessels.

(2) From December 15 through March 15, no bridge tenders are required to be on duty at the bridge and the bridge shall open on signal if at least a twelve-hour advance notice is given.

* * * * *

Dated: November 30, 2016.

J.E. Ryan,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 2016–30342 Filed 12–15–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52 and 81

[EPA–HQ–OAR–2016–0515; FRL–9956–20–OAR]

RIN 2060–AT24

Determinations of Attainment by the Attainment Date, Determinations of Failure To Attain by the Attainment Date and Reclassification for Certain Nonattainment Areas for the 2006 24-Hour Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing determinations of attainment by the attainment date and determinations of failure to attain by the attainment date for eleven areas currently classified as ''Moderate'' for the 2006 24-hour fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS). Specifically, the EPA is proposing to determine that seven areas attained the 2006 24-hour $PM_{2.5}$ NAAQS by December 31, 2015, based on complete, quality-assured and certified $PM_{2.5}$ monitoring data for 2013–2015. The EPA is also proposing to determine that four areas failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by December 31, 2015. Upon finalization of such determinations of failure to timely attain the NAAQS, these four areas will be reclassified as ''Serious'' for the 2006 24-hour $PM_{2.5}$ NAAQS by operation of law. Within 18 months from the effective date of reclassification, or 2 years before the applicable Serious area attainment date, whichever is earlier, states with jurisdiction over these areas must submit State Implementation Plan (SIP) revisions that comply with the statutory and regulatory requirements for Serious $PM_{2.5}$ nonattainment areas.

DATES: Comments must be received on or before January 17, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0515, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ms. Leigh Herrington, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail code C539–01, Research Triangle Park, NC 27711, telephone (919) 541–0882; fax number: (919) 541–5315; email address: *herrington.leigh@epa.gov.*

SUPPLEMENTARY INFORMATION: This preamble is organized as follows:

I. General Information
- A. Does this action apply to me?
- B. What should I consider as I prepare my comments for the EPA?
- C. Where can I get a copy of this document and other related information?
- D. What information should I know about a possible public hearing?

II. Summary of Proposal and Background
- A. Summary of Proposal
- B. What is the background for this proposed action?

III. Criteria for Determining Whether an Area Has Attained the 2006 24-Hour $PM_{2.5}$ Standards

IV. The EPA's Proposed Action and Associated Rationale
- A. Determinations of Attainment
- B. Determinations of Failure To Attain and Reclassification

V. Summary of Proposed Actions

VI. Statutory and Executive Order Reviews
- A. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
- B. Paperwork Reduction Act (PRA)
- C. Regulatory Flexibility Act (RFA)
- D. Unfunded Mandates Reform Act (URMA)
- 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 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

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include states (typically state air pollution control agencies) and, in some cases, tribal governments. In particular, seven states [1] with one or more areas designated nonattainment and classified as ''Moderate'' for the 2006 24-hour $PM_{2.5}$ NAAQS are affected by this action. Entities potentially affected indirectly by this proposal include owners or operators of sources of emissions of direct $PM_{2.5}$ or $PM_{2.5}$ precursors (ammonia, nitrogen oxides, sulfur dioxide and volatile organic compounds) that contribute to fine particulate levels within the designated nonattainment areas the EPA is addressing in this action.

B. What should I consider as I prepare my comments for the EPA?

1. Submitting CBI. Do not submit this information to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be confidential business information (CBI). For CBI information in 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 to be CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

[1] Alaska, Arizona, California, Idaho, Pennsylvania, Tennessee and Utah.

• Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at *https://www.epa.gov/pm-pollution/particulate-matter-pm-implementation-regulatory-actions.*

D. What information should I know about a possible public hearing?

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long at (919) 541–0641 before 5 p.m. on January 3, 2017. If requested, further details concerning a public hearing for this proposed rule will be published in a separate **Federal Register** notice. For updates and additional information on a public hearing, please check the EPA's Web site for this rulemaking at *https://www.epa.gov/pm-pollution/particulate-matter-pm-implementation-regulatory-actions.*

II. Summary of Proposal and Background

A. Summary of Proposal

Clean Air Act (CAA) section 188(b)(2) requires the EPA to determine whether any $PM_{2.5}$ nonattainment area classified as ''Moderate'' attained the relevant $PM_{2.5}$ standard by the area's attainment date, and requires EPA to make such determination within 6 months after that date.[2] The CAA requires that a Moderate area that has not attained the standard by the relevant attainment date be reclassified to ''Serious.'' The 2006 24-hour $PM_{2.5}$ NAAQS are met when the 24-hour $PM_{2.5}$ NAAQS design value at each eligible monitoring site is less than or equal to 35 micrograms per cubic meter (μg/m^3), as explained in Section III of this rulemaking action.

In this notice, the EPA is proposing to find that seven Moderate areas attained the 2006 24-hour $PM_{2.5}$ NAAQS by December 31, 2015, which is the applicable attainment date for these areas. This finding is based on complete, quality-assured and certified $PM_{2.5}$ monitoring data for the 3-year period of 2013–2015.[3] The seven areas are: (1) Chico, California; (2) Imperial County, California;[4] (3) Knoxville-Sevierville-La Follette, Tennessee; (4) Liberty-Clairton, Pennsylvania; (5) Nogales, Arizona; (6) Sacramento, California; and, (7) San Francisco Bay Area, California. The EPA is also proposing to find that four Moderate areas failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by December 31, 2015: (1) Fairbanks, Alaska; (2) Logan, Utah-Idaho; (3) Provo, Utah; and, (4) Salt Lake City, Utah. As required by CAA section 188(b)(2), upon finalization of the EPA's determinations that these areas failed to attain, these four areas will be reclassified to Serious by operation of law and will be subject to all applicable Serious area attainment planning and nonattainment New Source Review (NNSR) requirements. Under CAA section 188(b)(2) and the EPA's final rule, titled ''Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements'' (81 FR 58010, August 24, 2016), a state is required to make a SIP submission to address the statutory and regulatory requirements for any newly reclassified Serious area within 18 months from the effective date of reclassification, or 2 years before the attainment date, whichever is earlier, and will be required to demonstrate that the area will attain the standard as expeditiously as practicable, but in this case no later than December 31, 2019, which is the end of the tenth calendar year following the effective date of designation of the area.

The EPA also notes that CAA section 188(d) provides a mechanism by which a state may request, and the EPA may grant, a 1-year extension of an area's attainment date if the state meets certain criteria. While the state of Idaho submitted a request for a 1-year attainment date extension for the Logan, Utah-Idaho multi-state nonattainment area, the agency has determined that the state did not meet the criteria for a Moderate area 1-year attainment date extension provided in CAA section 188(d), as explained more fully later. Accordingly, the EPA is including the Logan, Utah-Idaho nonattainment area in its list of areas for a proposed finding of failure to attain by December 31, 2015.

Table 1 provides a summary of the EPA's proposed findings that would apply to these eleven areas.

TABLE 1—2006 24-HOUR $PM_{2.5}$ NAAQS: SUMMARY OF PROPOSED FINDINGS FOR ELEVEN MODERATE NONATTAINMENT AREAS

2006 24-hour $PM_{2.5}$ NAAQS nonattainment area	2013–2015 Design value (μg/m^3)	2006 24-hour $PM_{2.5}$ NAAQS status
Chico, California	29	Attained.
Fairbanks, Alaska	124	Did not attain.
Imperial County, California	33	Attained.
Knoxville-Sevierville-La Follette, Tennessee	20	Attained.
Liberty-Clairton, Pennsylvania	33	Attained.

[2] An area's highest design value for the 24-hour $PM_{2.5}$ NAAQS is the highest of the 3-year average of annual 98th percentile 24-hour average $PM_{2.5}$ mass concentration values recorded at each eligible monitoring site (40 CFR part 50, Appendix N, 1.0(c)(2)).

[3] According to 40 CFR part 50, Appendix N, 3.0(a), ''data not certified by the reporting organization can nevertheless be used, if the deadline for certification has passed and EPA judges the data to be complete and accurate.''

[4] The EPA notes that 2013–2015 monitoring data indicate that the Imperial County, California nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS. Prior to 2013, the EPA requested that the California Air Resources Board and Imperial County Air Pollution Control District increase sampling frequency at the monitor from 1 in 3 days to daily, but CARB and ICAPCD did not start daily sampling until 2014. This does not affect the validity of the design value because daily sampling was not required under the monitoring regulations that applied at the time. Further, a separate calculation based on daily sampling data collected in 2013 at a collocated non-regulatory monitor yields a similar 98th percentile value for 2013 as the primary regulatory monitor. *See* Memo from Michael Flagg, U.S. EPA, Region IX, Air Quality Analysis Office, ''Implementation of $PM_{2.5}$ sampling frequency requirements in Imperial County,'' November 1, 2016. This memo is within the rulemaking docket.

TABLE 1—2006 24-HOUR $PM_{2.5}$ NAAQS: SUMMARY OF PROPOSED FINDINGS FOR ELEVEN MODERATE NONATTAINMENT AREAS—Continued

2006 24-hour $PM_{2.5}$ NAAQS nonattainment area	2013–2015 Design value (μg/m³)	2006 24-hour $PM_{2.5}$ NAAQS status
Logan, Utah-Idaho	* 50	Did not attain.
Nogales, Arizona	28	Attained.
Provo, Utah	* 49	Did not attain.
Sacramento, California	35	Attained.
Salt Lake City, Utah	* 45	Did not attain.
San Francisco Bay Area, California	30	Attained.

* Data submitted to the EPA's National Air Quality System (AQS) by the Utah Department of Environmental Quality for the period 2013–2015 are incomplete, meaning there are fewer than 75 percent of the necessary data required for completion. However, the valid data provided by the state and submitted to AQS for 2013–2015 show a design value greater than 35 μg/m³. The EPA's regulations governing the use of air quality data for regulatory purposes, located at 40 CFR part 50, Appendix N 4.2(b), specify that 24-hour $PM_{2.5}$ design values derived from less than complete data are valid if greater than the level of the standard. The EPA is thus basing this proposal on its determination that sufficient data exist to make findings of failure to attain and reclassifications for all Utah nonattainment areas. The EPA calculated the design values for these areas using the available $PM_{2.5}$ Federal Reference Method (FRM) data in AQS as of September 21, 2016. These design values may change as data validation efforts to include additional monitoring data are completed by Utah. A memo describing the agency's treatment of these data, titled "Utah $PM_{2.5}$ 2013–2015 24-hour Design Concentrations Memo," is included in the docket for this rulemaking.

B. What is the background for this proposed action?

This proposed action relates to the ongoing efforts of states and the EPA to implement the $PM_{2.5}$ NAAQS. Since the EPA's initial promulgation of the NAAQS to address fine particles, there have been significant rulemaking and litigation developments that affect these ongoing efforts. In order to clarify the proper application of the statutory and regulatory requirements to this action, the EPA is providing a fuller explanation of the evolving implementation efforts.

On July 18, 1997, the EPA established the first NAAQS for $PM_{2.5}$ (the 1997 $PM_{2.5}$ NAAQS), including an annual standard of 15.0 μg/m³ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and a 24-hour (or daily) standard of 65 μg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations (62 FR 38652). The EPA established the 1997 $PM_{2.5}$ NAAQS based on significant evidence and numerous health studies demonstrating the serious health effects associated with exposures to $PM_{2.5}$. To provide guidance on the CAA requirements for state and tribal implementation plans to implement the 1997 $PM_{2.5}$ NAAQS, the EPA promulgated the "Final Clean Air Fine Particle Implementation Rule" (72 FR 20586, April 25, 2007) (hereinafter, the "2007 $PM_{2.5}$ Implementation Rule"). The Natural Resources Defense Council (NRDC) subsequently filed a petition for review challenging certain aspects of this rule.

On October 17, 2006, the EPA strengthened the 24-hour $PM_{2.5}$ NAAQS by revising it to 35 μg/m³ and retained the level of the annual $PM_{2.5}$ standard at 15.0 μg/m³ (71 FR 61144). Following promulgation of a new or revised NAAQS, the EPA is required by the CAA to promulgate designations for areas throughout the U.S. in accordance with section 107(d)(1) of the CAA. On November 13, 2009, the EPA designated 31 areas across the U.S. with respect to the revised 2006 24-hour $PM_{2.5}$ NAAQS (74 FR 58688), requiring states to prepare and submit attainment plans to meet those NAAQS. At the time of those designations, the states and the EPA were operating under the interpretations of the CAA set forth in the 2007 $PM_{2.5}$ Implementation Rule, which covered issues such as the timing of attainment plan submissions, the content of attainment plan submissions, and the relevant attainment dates.

On March 2, 2012, the EPA issued its "Implementation Guidance for the 2006 Fine Particulate ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)" to provide guidance to states on the development of attainment plans to demonstrate attainment with the 2006 24-hour $PM_{2.5}$ NAAQS ("March 2012 Implementation Guidance"). This guidance largely instructed states to rely on the 2007 $PM_{2.5}$ Implementation Rule in developing SIPs to demonstrate attainment of the 2006 24-hour $PM_{2.5}$ NAAQS.

On January 4, 2013, the U.S. Court of Appeals for the D.C. Circuit issued its decision with regard to the challenge by the NRDC to the EPA's 2007 $PM_{2.5}$ Implementation Rule. In *NRDC* v. *EPA,*[5] the court held that the EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant only to the general implementation requirements of subpart 1, rather than also to the implementation requirements specific to particulate matter (PM_{10}) in subpart 4, part D of title I of the CAA ("subpart 4"). The court reasoned that the plain meaning of the CAA requires implementation of the 1997 $PM_{2.5}$ NAAQS under subpart 4 because $PM_{2.5}$ particles fall within the statutory definition of PM_{10} and thus implementation of the $PM_{2.5}$ NAAQS is subject to the same statutory requirements as the PM_{10} NAAQS. The court remanded the rule and instructed the EPA "to repromulgate these rules pursuant to Subpart 4 consistent with this opinion."[6]

As a result of the *NRDC* v. *EPA* decision, the EPA withdrew its March 2012 Implementation Guidance for implementation of the 2006 24-hour $PM_{2.5}$ NAAQS. In so doing, the EPA advised states that the statutory requirements of subpart 4 apply to attainment plans for these NAAQS and reminded the states about pre-existing EPA guidance regarding the subpart 4 requirements. One practical consequence of the application of subpart 4 to states with areas designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS is that the applicable statutory attainment date is governed by CAA section 188(c), which states that for areas classified as Moderate, the statutory attainment date is "as expeditiously as practicable, but no later than the end of the sixth calendar year after the area's designation as nonattainment." Thus, for the areas at issue in this action, the latest possible statutory Moderate area attainment date was December 31, 2015.

Consistent with the *NRDC* v. *EPA* decision, the EPA published a final rule on June 2, 2014, classifying all areas that were designated nonattainment for the 1997 and/or 2006 $PM_{2.5}$ standards at the time as "Moderate" under subpart 4.

[5] *NRDC* v. *EPA,* 706 F.3d 428 (D.C. Cir. 2013).

[6] *Id.,* 706 F.3d at 437.

The EPA also established a due date of December 31, 2014, for states to submit attainment-related and NNSR SIP elements required for these areas pursuant to subpart 4. This rulemaking did not affect the statutory attainment dates imposed in subpart 4 and merely provided states with the opportunity to update or revise any prior attainment plan submissions, if necessary, to meet subpart 4 requirements in light of the 2013 court decision. This rulemaking did not affect any action that the EPA had previously taken under CAA section 110(k) on a SIP for a $PM_{2.5}$ nonattainment area.

Currently, there are 14 nonattainment areas classified as Moderate for the 2006 24-hour $PM_{2.5}$ NAAQS, 11 of which are addressed in this notice.[7] The applicable statutory attainment date for these areas was as expeditiously as practicable but no later than December 31, 2015. Pursuant to section 188(b)(2) of the CAA, within 6 months of the Moderate area attainment date, the EPA must (1) determine whether each area attained the standard by the attainment date, and (2) reclassify as a Serious nonattainment area any area that did not attain by the attainment date.

III. Criteria for Determining Whether an Area Has Attained the 2006 24-Hour $PM_{2.5}$ Standards

Under EPA regulations at 40 CFR part 50, Appendix N, the 2006 primary and secondary 24-hour $PM_{2.5}$ NAAQS are met within a nonattainment area when the 24-hour $PM_{2.5}$ NAAQS design value at each eligible monitoring site is less than or equal to 35 μg/m³. Three years of valid annual $PM_{2.5}$ 98th percentile mass concentrations are required to produce a valid 24-hour $PM_{2.5}$ NAAQS design value.

The EPA's determination of attainment is based upon data that have been collected and quality-assured in accordance with 40 CFR part 58 and recorded in the EPA's AQS database. Ambient air quality monitoring data for the 3-year period must meet data completion criteria or data substitution criteria according to 40 CFR part 50, Appendix N. The ambient air quality monitoring data completeness requirements are met when quarterly data capture rates for all four quarters in a calendar year are at least 75 percent. However, Appendix N states that years shall be considered valid, notwithstanding quarters with less than complete data, if the resulting annual 98th percentile value or resulting 24-hour NAAQS design value is greater than the level of the standard.

IV. The EPA's Proposed Action and Associated Rationale

The EPA is issuing this proposal pursuant to the agency's statutory obligation under CAA section 188(b)(2) to determine whether 11 nonattainment areas have attained the 2006 24-hour $PM_{2.5}$ NAAQS by December 31, 2015. The agency's proposed actions, and the rationale for these proposed actions, are described in the sections that follow.

A. Determinations of Attainment

The EPA evaluated data from air quality monitors in 11 areas classified as Moderate for the 2006 24-hour $PM_{2.5}$ NAAQS in order to determine the areas' attainment status as of the applicable attainment date, December 31, 2015. Seven of the 11 nonattainment areas' monitoring sites with valid data had a design value equal to or less than 35 μg/m³ based on the 2013–2015 monitoring period. Thus, the EPA proposes to determine, in accordance with section 188(b)(2) of the CAA, that these seven areas (listed in Table 1) have attained the standard by the applicable attainment date. The EPA's determination is based upon 3 years' worth of complete, quality-assured and certified data during the applicable 3-year period. The monitoring data for the 3 years (2013 to 2015) used to calculate each monitor's design value are provided in a technical support document (TSD) in the docket for this proposed action.[8] Also, the EPA notes that these determinations of attainment do not constitute a redesignation to attainment. Redesignations require states to meet a number of additional statutory criteria, including the EPA approval of a state plan demonstrating maintenance of the air quality standard for 10 years after redesignation. As for all NAAQS, the EPA is committed to working with states that choose to submit redesignation requests for the 2006 24-hour $PM_{2.5}$ NAAQS. The EPA is soliciting comments on these proposed determinations of attainment by the attainment date.

B. Determinations of Failure To Attain and Reclassification

The EPA is proposing to determine that the remaining four areas (listed in Table 1) failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date. Each of these areas failed to attain because the 2013–2015 design value for at least one monitor in each area exceeded the 2006 24-hour $PM_{2.5}$ NAAQS of 35 μg/m³. The TSD provided in the docket shows all monitoring data for the relevant years for each of these nonattainment areas as well as the 3-year design value calculations for each area.

CAA section 188(b)(2) provides that a Moderate nonattainment area shall be reclassified by operation of law upon a determination by the EPA that such area failed to attain the relevant NAAQS by the applicable attainment date. Based on quality-assured $PM_{2.5}$ monitoring data from 2013–2015, described in the TSD for this proposal, the new classification applicable to each of these four areas would be ''Serious.'' Serious $PM_{2.5}$ nonattainment areas are required to attain the standard as expeditiously as practicable, but no later than the end of the tenth year after designation (which, in the case of these four areas, is December 31, 2019).

Section 188(d) of the CAA states that the Administrator may extend the attainment date for 1 additional year if: ''(1) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan and (2) no more than one exceedance of the 24-hour NAAQS for PM_{10} has occurred in the area in the year preceding the Extension Year, and the annual mean concentration of PM_{10} in the area for such year is less than or equal to the standard level.'' [9] The state of Idaho submitted two letters [10] to the EPA

[7] The three areas not addressed in this action are Klamath Falls, Oregon; Oakridge, Oregon; and, West Central Pinal, Arizona. The EPA issued a determination of attainment by the attainment date of December 31, 2014, for Klamath Falls, Oregon, on June 6, 2016 (*See* 81 FR 36176). The EPA issued a 1-year attainment date extension from December 31, 2015, to December 31, 2016, for Oakridge, Oregon. *See* 81 FR 46612, July 18, 2016. The EPA designation for the West Central Pinal, Arizona area as nonattainment became effective March 7, 2011. *See* 76 FR 6056, February 3, 2011. Therefore, the latest attainment date applicable to this area under subpart 4 is December 31, 2017.

[8] Technical Support Document Regarding $PM_{2.5}$ Monitoring Data—Determinations of Attainment by the Attainment Date, Determinations of Failure to Attain by the Attainment Date and Reclassification For Certain Nonattainment Areas for the 2006 24-Hour Fine Particulate Matter National Ambient Air Quality Standards.

[9] Consistent with the January 2013 *NRDC* v. *EPA* decision, the EPA reads the air quality criterion under CAA 188(d) for PM_{10} to also apply to $PM_{2.5}$. The form of the 2006 24-hour $PM_{2.5}$ NAAQS is a percentile-based form and not a ''one expected exceedance'' form as is the PM_{10} NAAQS. The EPA interprets the statutory language to require a state seeking an attainment date extension for a Moderate nonattainment area for a 24-hour $PM_{2.5}$ NAAQS to demonstrate that the area had clean data for that particular standard in the calendar year prior to the applicable attainment date for the area, rather than demonstrating that the area necessarily had no more than one exceedance of the 24-hour $PM_{2.5}$ NAAQS.

[10] *See* Letters from John H. Tippets, Director, Department of Environmental Quality, state of Idaho, to Dennis J. McLerran, Regional Administrator, U.S. EPA, Region 10, on December

Continued

requesting a 1-year extension of the area's Moderate attainment date for its portion of the Logan, UT-ID multi-state nonattainment area, asserting that the state has complied with all requirements and commitments pertaining to the Logan, Utah-Idaho nonattainment area in the applicable Idaho SIP and that all monitors in the area have a 98th percentile of 35 μg/m^3 or less for the attainment year (2015). These letters are provided in the docket for this proposed action.

CAA section 188(d)(2) air quality criterion requiring the area to meet the applicable NAAQS in the year preceding the extension year applies to ''the area'' which, in the case of the Logan, Utah-Idaho, nonattainment area, includes regulatory monitors in both Franklin, Idaho, and Logan, Utah. In other words, the reference to ''the area'' is to the entire designated nonattainment area, not merely to a portion of it in one state. However, in its request, Idaho acknowledges that, ''. . . the validity of the Logan, Utah, monitor data is in question. Therefore, the Franklin monitor is the only regulatory monitor available for use in the (nonattainment area).'' Idaho's submission attempts to address concerns about the regulatory suitability of the Utah monitor with a statistical comparison of monitors in Utah and Idaho based on historical data.

Because there are data completeness issues for the Utah monitoring sites in question for the first three quarters of 2015, the nonattainment area as a whole lacks the necessary data for the EPA to determine that the air quality criterion has been satisfied for the entire nonattainment area. Moreover, because the historically high monitor is located on the Utah portion of the multi-state nonattainment area, as acknowledged by Idaho, the EPA believes that it is necessary to have complete data from the Utah monitor in order to determine whether the entire nonattainment area has a 98th percentile of 35 μg/m^3 or less for the year prior to the attainment date (*i.e.,* 2015).

Further, with respect to the 2015 monitoring data for the Franklin monitor, the EPA determined in 2015 that temperature and relative humidity data for the FRM filter laboratory were not being archived as required by the Idaho Quality Assurance Plan and EPA regulations. The EPA's audit [11] concluded that, due to this lack of laboratory data, FRM filter weight determinations and the resulting FRM concentration data cannot be confirmed to meet data quality objectives. Idaho concurred with this finding and subsequently changed the status of the affected data for 2011–2014 in AQS to ''non-regulatory.'' The EPA therefore cannot confirm the accuracy of the monitoring data cited in Idaho's request.

The EPA has thus evaluated the information submitted by Idaho for its portion of the nonattainment area and the relevant monitoring data for the entire area for calendar year 2015 and has determined that the area does not meet the air quality criterion for a 1-year extension to the CAA section 188(c)(1) Moderate area attainment date. Given the lack of complete and valid data from Utah, and the lack of valid, historical data from Idaho, the EPA is unable to determine whether the entire nonattainment area has a 98th percentile of 35 μg/m^3 or less for the year preceding the extension year. Therefore, the EPA has determined that Idaho's request for a 1-year extension to the Moderate attainment date for the Idaho portion of the Logan, Utah-Idaho nonattainment area should be denied, and is instead proposing to determine that the Logan, Utah-Idaho nonattainment area failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date.

If the EPA determines that an area has failed to attain by its attainment date, CAA section 188(b)(2) requires that those areas be reclassified to Serious as of the time that the EPA publishes the notice identifying the areas that have failed to attain by their attainment date. Accordingly, the EPA is proposing that the following four Moderate areas failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by December 31, 2015, and will be reclassified to Serious: Fairbanks, Alaska; Logan Utah-Idaho; Provo, Utah and Salt Lake City, Utah. The EPA is taking comment on these proposed determinations of failure to attain and subsequent reclassifications of each of these four nonattainment areas from Moderate to Serious.

V. Summary of Proposed Actions

The actions proposed in this notice affect 11 nonattainment areas for the 2006 24-hour $PM_{2.5}$ NAAQS currently classified as Moderate. The EPA is proposing to determine that the following seven areas attained the NAAQS by the applicable attainment date of December 31, 2015: (1) Chico, CA; (2) Imperial County, CA; (3) Knoxville-Sevierville-La Follette, TN; (4) Liberty-Clairton, PA; (5) Nogales, AZ; (6) San Francisco, CA and (7) Sacramento, CA. The EPA is also proposing to determine that the following four Moderate areas failed to attain the 2006 $PM_{2.5}$ NAAQS by the December 31, 2015, attainment date and thus will be reclassified to Serious: (1) Fairbanks, AK; (2) Logan UT-ID; (3) Provo, UT; and, (4) Salt Lake City, UT. The EPA is taking comment on these proposed determinations of attainment by the attainment date.

VI. Statutory and Executive Order Reviews

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

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This proposed action to find that the Moderate $PM_{2.5}$ nonattainment areas listed in Table 1 have failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by their attainment date and to reclassify those areas as Serious $PM_{2.5}$ nonattainment areas does not establish any new information collection burden.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Determinations of attainment and the resulting reclassification of nonattainment areas by operation of law under section 188(b)(2) of the CAA do not in and of themselves create any new requirements. Instead, this rulemaking only makes a factual determination, and does not directly regulate any entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The EPA believes, as discussed previously in this document, that the finding of nonattainment is a factual determination based upon air quality considerations and that the resulting reclassification of an area and the associated required revisions to state

15, 2015 and February 26, 2016, regarding a 1-year extension of the attainment date for the Logan UT-ID nonattainment area. Copies of these letters are available in the docket for this rulemaking.

[11] *See* ''Final Technical Systems Audit Report for the Idaho Department of Environmental Quality,'' January 16, 2015. This report is within the rulemaking docket.

implementation plans must occur by operation of law. Thus, this action imposes no enforceable duty on any state, local or tribal governments or the private sector.

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. This action merely proposes to determine whether the 2006 24-hour $PM_{2.5}$ nonattainment areas listed in Table 1 attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date and to reclassify as ''Serious'' the 2006 24-hour $PM_{2.5}$ nonattainment areas that did not do so.

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

This action does not have tribal implications as specified in Executive Order 13175. No tribal areas are implicated in the four areas that the EPA is proposing to find failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date. The CAA and the Tribal Authority Rule establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action merely proposes to determine that four 2006 24-hour $PM_{2.5}$ nonattainment areas, identified in Table 1, did not attain the 2006 24-hour $PM_{2.5}$ standard by their applicable attainment date and to reclassify these areas as Serious $PM_{2.5}$ nonattainment areas.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards. This action merely proposes to determine that four 2006 24-hour $PM_{2.5}$ nonattainment areas (identified in Table 1) did not attain the 2006 24-hour $PM_{2.5}$ standard by their applicable attainment date and to reclassify these areas as Serious $PM_{2.5}$ nonattainment areas.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This action merely proposes to determine that four 2006 24-hour $PM_{2.5}$ nonattainment areas identified in Table 1, did not attain by the applicable attainment date and to reclassify these nonattainment areas as Serious $PM_{2.5}$ nonattainment areas.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen oxides, Fine particulate matter, Ammonia, Sulfur dioxides, Volatile organic compounds, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR 81

Environmental protection, Air pollution control, Nitrogen oxides, Fine particulate matter, Ammonia, Sulfur dioxides, Volatile organic compounds, Intergovernmental relations, Reporting and recordkeeping requirements.

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

Dated: December 1, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, Title 40, Chapter I of the Code of Federal Regulations is proposed to be 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 D—Arizona

■ 2. Section 52.131 is amended by adding paragraph (c) to read as follows:

§ 52.131 Control Strategy and regulations: Fine Particle Matter.

* * * * *

(c) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the Nogales, AZ $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188((b)(2) to determine whether the area attained the standard. The EPA also has determined that the Nogales, AZ nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

Subpart F—California

■ 3. Section 52.247 is amended by adding paragraphs (i), (j), (k) and (l) to read as follows:

§ 52.247 Control Strategy and regulations: Fine Particle Matter.

* * * * *

(i) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the Chico, CA $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188((b)(2) to determine whether the area attained the standard. The EPA also has determined that the Chico, CA nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

(j) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the Imperial County, CA $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188(b)(2) to determine whether the area attained the standard. The EPA also has determined that the Imperial County, CA nonattainment area will not

be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

(k) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the Sacramento, CA $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188(b)(2) to determine whether the area attained the standard. The EPA also has determined that the Sacramento, CA nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

(l) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the San Francisco Bay, CA $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188(b)(2) to determine whether the area attained the standard. The EPA also has determined that the San Francisco Bay, CA nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

Subpart NN—Pennsylvania

■ 4. Section 52.2059 is amended by adding paragraph (u) to read as follows:

§ 52.2059 Control strategy: Particulate matter.

* * * * *

(u) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the Liberty-Clairton, PA $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188(b)(2) to determine whether the area attained the standard. The EPA also has determined that the Liberty-Clairton, PA nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

* * * * *

Subpart RR—Tennessee

■ 5. Section 52.2231 is amended by adding paragraph (f) to read as follows:

§ 52.2231 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(f) *Determination of Attainment.* Effective [DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], the EPA has determined that, based on 2013–2015 ambient air quality data, the Knoxville-Sevierville-La Follette, Tennessee $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 31, 2015. Therefore, the EPA has met the requirement pursuant to CAA section 188(b)(2) to determine whether the area attained the standard. The EPA also has determined that the Knoxville-Sevierville-La Follette, Tennessee nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 188(b)(2).

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

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

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

Subpart C—Section 107 Attainment Status Designations

■ 7. Section 81.302 is amended in the table for ''Alaska—2006 24-Hour $PM_{2.5}$ NAAQS (Primary and secondary)'' by revising the entries for ''Fairbanks, AK'' to read as follows:

§ 81.302 Alaska.

* * * * *

ALASKA—2006 24-HOUR $PM_{2.5}$ NAAQS

[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
Fairbanks, AK:				
AQCR 09 Northern Alaska Intrastate:				
Fairbanks North Star Borough (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
The following townships and ranges:—MTRS F001N001—All Sections; —MTRS F001N001E—Sections 2–11, 14–23, 26–34; —MTRS F001N002—Sections 1–5, 8–17, 20–29, 32–36; —MTRS F001S001E—Sections 1, 3–30, 32–36; —MTRS F001S001W—Sections 1–30; —MTRS F001S002E—Sections 6–8, 17–20, 29–36; —MTRS F001S002W—Sections 1–5, 8–17, 20–29, 32–33; —MTRS F001S003E—Sections 31–32; —MTRS F002N001E—Sections 31–35; —MTRS F002N001—Sections 28, 31–36; —MTRS F002N002—Sections 32–33, 36; —MTRS F002S001E—Sections 1–2; —MTRS F002S002E—Sections 1–17, 21–24; —MTRS F002S003E—Sections 5–8, 18				
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 30 days after November 13, 2009, unless otherwise noted.
[2] This date is July 2, 2014, unless otherwise noted.

* * * * *

■ 8. Section 81.313 is amended in the table for ''Idaho—2006 24-Hour $PM_{2.5}$ NAAQS (Primary and secondary)'' by revising the entries for ''Franklin County, ID'' to read as follows:

§ 81.313 Idaho.

* * * * *

IDAHO—2006 24-HOUR $PM_{2.5}$ NAAQS
[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
Logan, UT-ID:				
Franklin County (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
Begin in the bottom left corner (southwest) of the nonattainment area boundary, southwest corner of the PLSS-Boise Meridian, Township 16 South, Range 37 East, Section 25. The boundary then proceeds north to the northwest corner of Township 15 South, Range 37 East, Section 25; then the boundary proceeds east to the southeast corner of Township 15 South, Range 38 East, Section 19; then north to the Franklin County boundary at the northwest corner of Township 13 South, Range 38 East, Section 20. From this point the boundary proceeds east 3.5 sections along the northern border of the county boundary where it then turns south 2 sections, and then proceeds east 5 more sections, and then north 2 sections more. At this point, the boundary leaves the county boundary and proceeds east at the southeast corner of Township 13 South, Range 39 East, Section 14; then the boundary heads north 2 sections to northwest corner of Township 13 South, Range 39 east, Section 12; then the boundary proceeds east 2 sections to the northeast corner of Township 13 South, Range 40 East, Section 7. The boundary then proceeds south 2 sections to the northwest corner of Township 13 South, Range 40 East, Section 20; the boundary then proceeds east 6 sections to the northeast corner of Township 13 South, Range 41 East, Section 19. The boundary then proceeds south 20 sections to the southeast corner of Township 16 South, Range 41 East, Section 30. Finally, the boundary is completed as it proceeds west 20 sections along the southern Idaho state boundary to the southwest corner of the Township 16 South, Range 37 East, Section 25.				
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 30 days after November 13, 2009, unless otherwise noted.
[2] This date is July 2, 2014, unless otherwise noted.

* * * * *

■ 9. Section 81.345 is amended in the table for ''Utah—2006 24-Hour $PM_{2.5}$ NAAQS (Primary and secondary)'' by revising the entries for ''Logan, UT-ID,'' ''Provo, UT'', and ''Salt Lake City, UT'' to read as follows:

§ 81.345 Utah.

* * * * *

UTAH—2006 24-HOUR $PM_{2.5}$ NAAQS
[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
Logan, UT-ID:				
Cache County (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
All portions of Cache County west of and including any portion of the following townships located within Utah: Township 15 North Range 1 East; Township 14 North Range 1 East; Township 13 North Range 1 East; Township 12 North Range 1 East; Township 11 North Range 1 East; Township 10 North Range 1 East; Township 9 North Range 1 East.				
Provo, UT:				
Utah County (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.

UTAH—2006 24-HOUR $PM_{2.5}$ NAAQS—Continued

[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
The area of Utah County that lies west of the Wasatch Mountain Range (and this includes the Cities of Provo and Orem) with an eastern boundary for Utah County to be defined as the following Townships: Township 3 South Range 1 East; Township 4 South Range 2 East; Township 5 South Range 3 East; Township 6 South Range 3 East; Township 7 South Range 3 East; Township 8 South Range 3 East; Township 9 South Range 3 East; Township 10 South Range 2 East.				
Salt Lake City, UT:				
Box Elder County (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
The following Townships or portions thereof as noted (including Brigham City): Township 7 North Range 2 West; Township 8 North Range 2 West; Township 9 North Range 2 West; Township 10 North Range 2 West; Township 11 North Range 2 West; Township 12 North Range 2 West; Township 13 North Range 2 West; Township 9 North Range 3 West; Township 10 North Range 3 West; Township 11 North Range 3 West; Township 12 North Range 3 West; Township 13 North Range 3 West; Township 13 North Range 4 West; Township 12 North Range 4 West; Township 11 North Range 4 West; Township 10 North Range 4 West; Township 9 North Range 4 West; Township 13 North Range 5 West; Township 12 North Range 5 West; Township 11 North Range 5 West; Township 10 North Range 5 West; Township 9 North Range 5 West; Township 13 North Range 6 West; Township 12 North Range 6 West; Township 11 North Range 6 West; Township 10 North Range 6 West; Township 9 North Range 6 West; Township 7 North Range 1 West (portion located in Box Elder County); Township 8 North Range 1 West (portion located in Box Elder County); Township 9 North Range 1 West (portion located in Box Elder County).				
Davis County		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
Salt Lake County		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
Tooele County (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.
The following Townships or portions thereof as noted (including Tooele City: Township 1 South Range 3 West; Township 2 South Range 3 West; Township 3 South Range 3 West; Township 3 South Range 4 West; Township 2 South Range 4 West; Township 2 South Range 5 West; Township 3 South Range 5 West; Township 3 South Range 6 West; Township 2 South Range 6 West; Township 1 South Range 6 West; Township 1 South Range 5 West; Township 1 South Range 4 West; Township 1 South Range 7 West; Township 2 South Range 7 West; Township 3 South Range 7 West; all Sections within Township 4 South Range 7 West except for Sections 29, 30, 31 and 32; Township 4 South Range 6 West; Township 4 South Range 5 West; Township 4 South Range 4 West; Township 4 South Range 3 West.				
Weber County (part)		Nonattainment	[DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].	Serious.

UTAH—2006 24-HOUR $PM_{2.5}$ NAAQS—Continued

[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
The area of Weber County that lies west of the Wasatch Mountain Range with an eastern boundary for Weber County to be defined as the following Townships (or portion thereof) extending to the western boundary of Weber County: Township 5 North Range 1 West; Township 6 North Range 1 West; all Sections within Township 7 North Range 1 West located within Weber County except for Sections 1, 2, 3, 4, 11, 12, 13 and 24; Township 7 North Range 2 West (portion located in Weber County).				
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 30 days after November 13, 2009, unless otherwise noted.
[2] This date is July 2, 2014, unless otherwise noted.

* * * * *

[FR Doc. 2016–30174 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223

[Docket No. 161109999–6999–01]

RIN 0648–BG45

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Proposed rule; request for comments; notice of public hearings.

SUMMARY: We are proposing to withdraw the alternative tow time restriction and require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing—with the exception of vessels participating in the Biscayne Bay wing net fishery prosecuted in Miami-Dade County, Florida—to use turtle excluder devices (TEDs) designed to exclude small turtles in their nets. The intent of this proposed rule is to reduce incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries, and to aid in the protection and recovery of listed sea turtle populations. We also are proposing to amend the definition of tow times to better clarify the intent and purpose of tow times to reduce sea turtle mortality, and to refine additional portions of the TED requirements to avoid potential confusion.

DATES: Written comments (see **ADDRESSES**) will be accepted through February 14, 2017. Public hearings on the proposed rule will be held in January 2017. See **SUPPLEMENTARY INFORMATION** for meeting dates, times, and locations.

ADDRESSES: You may submit comments on this proposed rule, identified by 0648–BG45, by any of the following methods:

- *Federal e-Rulemaking Portal:* Go to *www.regulations.gov/#!docketDetail;D=[NOAA-NMFS-2016-0151*], click the ''Comment Now!' icon, complete the required fields, and enter or attach your comments
- Mail: Michael Barnette, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: 727–824–5309; Attention: Michael Barnette.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will generally post for public viewing on *www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.), 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). You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, 727–551–5794.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). In the Atlantic Ocean and Gulf of Mexico, the Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta;* Northwest Atlantic Ocean distinct population segment) and green (*Chelonia mydas;* North Atlantic and South Atlantic Ocean distinct population segments) turtles are listed as threatened.

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities including fishery-related trawling activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, taking (harassing, injuring or killing) sea turtles is prohibited, except as identified in 50 CFR 223.206 in compliance with the terms and conditions of a biological opinion issued under section 7 of the ESA, or in accordance with an incidental take permit issued under section 10 of the ESA. Incidental takes of threatened sea turtles during shrimp trawling are exempt from the taking prohibition of section 9 of the ESA so long as the conservation measures specified in the sea turtle conservation regulations (50 CFR 223.206) are followed. The same conservation measures also apply to endangered sea turtles (50 CFR 224.104).

The regulations require most shrimp trawlers operating in the southeastern United States to have an approved TED installed in each net that is rigged for fishing, to allow sea turtles to escape. Approved TED types include single-grid

hard TEDs and hooped hard TEDs conforming to a generic description, and the Parker soft TED (see 50 CFR 223.207). However, skimmer trawls, pusher-head trawls, and vessels using wing nets (butterfly trawls) currently may employ alternative tow time restrictions in lieu of installing TEDs, under 50 CFR 223.206(d)(2)(ii)(A). The alternative tow time restrictions currently limit tow times to 55 minutes from April 1 through October 31, and 75 minutes from November 1 through March 31.

TEDs incorporate an escape opening, usually covered by a webbing flap, which allows sea turtles to escape from trawl nets. A TED design must be shown to be 97 percent effective in excluding sea turtles during testing based upon specific testing protocols (50 CFR 223.207(e)(1)) to meet standards for approval. Most approved hard TEDs are described in the regulations (50 CFR 223.207(a)) according to generic criteria based upon certain parameters of TED design, configuration, and installation, including minimum height and width dimensions of the TED opening through which the turtles escape.

We previously examined the incidental bycatch and mortality of sea turtles in the shrimp fisheries in 2011–2012, stemming from concerns related to elevated sea turtle strandings in the northern Gulf of Mexico. On June 24, 2011 (76 FR 37050), we published a notice of intent to prepare an EIS and conduct scoping meetings on potential measures to reduce sea turtle bycatch in the shrimp fisheries. On May 10, 2012 (77 FR 27411), we published a proposed rule that, if implemented, would require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) to use TEDs in their nets. We also prepared a draft environmental impact statement (DEIS), which included a description of the purpose and need for evaluating the proposed action and other potential management alternatives, the scientific methodology and data used in the analyses, background information on the physical, biological, human, and administrative environments, and a description of the effects of the proposed action and other potential management alternatives on the aforementioned environments. A notice of its availability was published on May 18, 2012 (77 FR 29636). At the time the 2012 DEIS was prepared, information on the effects of the skimmer trawl fisheries on sea turtle populations was extremely limited. New information gained after the preparation of the 2012 DEIS indicated that a significant number of sea turtles observed interacting with the skimmer trawl fisheries (*i.e.,* those found in shallow (< 60 feet), state waters) had a body depth that would allow them to pass between the required maximum 4-inch (10.2 centimeter (cm)) bar spacing of a standard, approved TED and proceed into the back of the net (*i.e.,* they would not escape the trawl net). Therefore, the conservation benefit of expanding the TED requirement to skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) was much less than originally anticipated. As a result, we determined that a final rule to withdraw the alternative tow time restriction and require all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) to use TEDs was not warranted (February 7, 2013; 78 FR 9024).

Following the withdrawal of the proposed rule, we initiated additional TED testing, evaluating both small sea turtle exclusion and shrimp retention within the skimmer trawl fisheries. This testing has produced several TED configurations that all use a TED grid with 3-inch (7.6 cm) bar spacing (*i.e.,* less than the current 4-inch bar spacing maximum) and escape-opening flap specifications that would allow small turtles to effectively escape the trawl net, which could be employed by trawl vessels in areas where these small turtles occur.

Additionally, anecdotal information, law enforcement data, and past public comment during scoping for the 2012 DEIS indicate that the alternative tow time requirements are exceeded by the skimmer trawl fleets, though to what extent is unclear. Tow times are inherently difficult to enforce widely due to the time required to monitor a given vessel, as well as the ability to do so covertly to observe unbiased fishing operations. Furthermore, anecdotal information indicates that skimmer trawl vessels have increased the size and amount of gear they use to fish, allowing them to fish in deeper water. In some cases, vessels are rigged with both skimmer trawl frames and outriggers for use with conventional otter trawl nets. As a result of these larger skimmer trawl nets, there is a possibility that a sea turtle could be captured within the mouth of the net and not be visible during a cursory cod end inspection, a scenario that is compounded by the fact that many vessels fish at night. For these reasons, and because of the increased abundance of sea turtles in the northern Gulf of Mexico, particularly juvenile Kemp's ridley sea turtles, we are re-evaluating the efficacy of sea turtle conservation requirements associated with the skimmer trawl fisheries, and analyzing the effectiveness of current TED requirements in the otter trawl fisheries.

On March 15, 2016 (81 FR 13772), we published a notice of intent to prepare an EIS and conducted five scoping meetings in April 2016. Information and public comment gathered during that process was incorporated into this DEIS, and a notice of its availability was published elsewhere in today's issue of the **Federal Register**. The analysis included in this DEIS demonstrates that withdrawing the alternative tow time restriction and requiring all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing—with the exception of vessels participating in the Biscayne Bay wing net fishery prosecuted in Miami-Dade County, Florida—to use TEDs in their nets would reduce incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries and, therefore, may be a necessary and advisable action to conserve threatened and endangered sea turtle species.

The Biscayne Bay wing net fishery is not required to use the new TEDs included in this rulemaking since the fishery operates by sight fishing at the surface close to the vessel using small, light monofilament nets during the winter months. We anticipate the incidental capture of sea turtles would be a rare event based on the time, location, and operational parameters of the fishery. If a sea turtle was incidentally captured, it would be immediately obvious to the operator, and could be quickly released.

Skimmer Trawls, Pusher-Head Trawls, and Wing Nets

Developed in the early 1980s, the skimmer trawl was intended for use in some areas primarily to catch white shrimp, which have the ability to jump over the headrope of standard otter trawls while being towed in shallow water. The skimmer net frame allows the net to be elevated above the water while the net is fishing, thus preventing shrimp from escaping over the top. Owing to increased shrimp catch rates, less debris and/or fish and other bycatch, and lower fuel consumption than otter trawlers, the use of skimmer nets quickly spread throughout Louisiana, Mississippi, and Alabama. The basic components of a skimmer trawl include a frame, the net, heavy weights, skids or ''shoes,'' and tickler chains. The net frame is usually constructed of steel or aluminum pipe or tubing and is either L-shaped (with an additional stiff leg) or a trapezoid design. When net frames are deployed, they are aligned perpendicularly to the vessel and cocked or tilted forward and

slightly upward. This position allows the net to fish better and reduces the chance of the leading edge of the skid digging into the bottom and subsequently damaging the gear. The frames are maintained in this position by two or more stays or cables to the bow. The outer leg of the frame is held in position with a ''stiff leg'' to the horizontal pipe and determines the maximum depth at which each net is capable of working. The skid, or ''shoe,'' is attached to the bottom of the outer leg, which allows the frame to ride along the bottom, rising and falling with the bottom contour. The bottom of the gear includes tickler chains and lead lines. The skimmer trawl is the most popular trawl type after the otter trawl, and is widely used in Louisiana waters.

Vietnamese fishers who moved into Louisiana in the early 1980s introduced the pusher-head trawl, also known as the ''xipe'' or chopstick net. The pusher-head trawl net is attached to a rigid or flexible frame similar to the wing net; however, the frame mounted on the bow of the boat is attached to a pair of skids and fished by pushing the net along the bottom.

Wing nets, also known as butterfly trawls or ''paupiers'', were introduced in the 1950s and used on stationary platforms and on shrimp boats either under power or while anchored. A wing net consists of a square metal frame which forms the mouth of the net. Webbing is attached to the frame and tapers back to a cod end. The net can be fished from a stationary platform or a pair of nets can be attached to either side of a vessel. The vessel is then anchored in tidal current or the nets are ''pushed'' through the water by the vessel. The contents of the wing net, as well as the contents of skimmer and pusher-head trawls, can be picked up and dumped without raising the entire net out of the water, which is necessary with an otter trawl.

Pusher-head trawls and wing nets (butterfly trawls) are both allowable gear types in several Gulf of Mexico coastal states, however, their use is largely overshadowed by skimmer trawls in shallow, coastal waters. In the DEIS, we estimate approximately 93 percent of non-otter trawl effort in the shrimp fisheries is conducted by skimmer trawls.

Sea Turtle Bycatch in Skimmer Trawls, Pusher-Head Trawls, and Wing Nets

We initiated observer effort on Gulf of Mexico skimmer trawl vessels in 2012. A total of 39 sea turtles were captured during observed trips consisting of 2,699.23 tow hours from 2012 through 2015. Additionally, in 2015 the North Carolina Division of Marine Fisheries observed 238 tows over 62 days, which is 6.21 percent of the total annual skimmer trawl fishing effort. They observed four sea turtle captures (Brown 2016). The incidental capture of sea turtles in skimmer trawls has been documented in North Carolina during other studies as well (Coale *et al,* 1994; Price and Gearhart 2011).

In the DEIS, we calculated sea turtle catch per unit effort rates based on observed effort in the skimmer trawl fisheries. The catch rate was multiplied by total average effort (*i.e.,* 539,394 effort hours in the Gulf of Mexico non-otter trawl fisheries and 4,356 effort hours in the North Carolina skimmer trawl fishery) to determine total sea turtle take in these fisheries. The analysis resulted in a total anticipated take of 7,928 captured sea turtles in the combined skimmer trawl, pusher-head trawl, and wing net fisheries.

We then estimated sea turtle mortalities as a result of these fisheries based on observed mortality rates and taking into consideration the effects of post-interaction mortality on captured and released sea turtles. That analysis concluded a TED requirement for all skimmer trawl, pusher-head trawl, and wing net vessels could reduce annual sea turtle mortalities from those currently occurring under the status quo by 789–1,543 in the near term and 1,730–2,500 after TED compliance rises to final anticipated levels. The methodology for this analysis is described in detailed in the DEIS. Therefore, we preliminarily determined that the measures proposed here are necessary and advisable to conserve threatened and endangered sea turtle species. We have further preliminarily determined that the measures proposed here are necessary and appropriate to enforce the requirements of the ESA.

We anticipate a six-month delayed effective date upon publication of a final rule in the **Federal Register**. Due to the number of TEDs required for the affected vessels and the time required to construct these TEDs, our analysis indicates additional effort may be needed to construct the new TEDs. One way to address this concern is a phased-in approach for implementing the new TED requirements that takes these issues into account. Thus, we are specifically soliciting public comment on how to best structure a phased implementation, so as to achieve the desired conservation benefit promptly, while providing adequate time for the devices to be constructed and installed.

Potential scenarios include basing the approach on landings, where vessels with the highest landings would be the first vessels required to install the new TEDs, and vessels with lower landings would be required to install the new TEDs later in time. Vessels could be placed in categories based on their recorded landings, with each category being addressed in multiple phases over time. The intention would be to first implement the requirement where it would achieve the greatest conservation benefit for listed sea turtles. Based on the assumption that higher landings would be associated with higher levels of effort and, therefore, higher numbers of sea turtle interactions, those vessels should be the first required to install the devices. Another approach could be to phase the TED requirement based on vessel size, where the largest vessels would be the first vessels required to install the devices. Similar to the landings based approach, this would view vessel size as a proxy for effort and the associated sea turtle interactions. One of the challenges with any approach will be the ability to definitively identify all vessels subject to the requirement and provide adequate notice to the owners and operators as to precisely when the new devices must be installed.

Additional Revisions to the TED Requirements

We are proposing to amend the TED requirements to clarify that tow times are mandatory for vessels not required to use TEDs, as well as to clarify the tow time definition. The requirements currently define a tow time for trawls that are not attached to an otter door as the time the cod end enters the water until it is removed from the water. Skimmer trawls can still fish while the cod end is raised, and there is concern that turtles could be entangled or otherwise entrained in other portions of the net that would not be visible by raising just the cod end. As such, this definition may not properly address the need to ensure sea turtles are not drowned in trawl nets while fishing without TEDs. Therefore, we are proposing to revise the tow time definition to specify that the entire net (*i.e.,* including the net frame) be removed from the water at the end of a tow when not using TEDs in the net. We also are amending the name of various TED escape openings and webbing flaps to avoid confusion about where these openings and flaps may be used. For example, we propose to amend the ''71-inch offshore opening'' to just the ''71-inch opening'' as this TED escape opening can also be used in inshore waters.

Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

We prepared an initial regulatory flexibility analysis (IRFA), as required by section 603 of the Regulatory Flexibility Act (RFA), for this proposed rule. The IRFA describes the economic effects this proposed rule, if adopted, would have on small entities. A description of this action, why it is being considered, the objectives of, and legal basis for this proposed rule are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from us (see **ADDRESSES**). A summary of the IRFA follows.

The ESA provides the statutory basis for this proposed rule. This proposed rule would not establish any new reporting, record-keeping, or other compliance requirements beyond the requirement to use TEDs when using skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls). TEDs are typically installed by the net manufacturer, so no special skills would be expected to be required of fishers for TED installation. Some training would be necessary for the maintenance and routine use of TEDs by fishers who have not historically had to use these devices. However, TEDs have been required for vessels harvesting shrimp with otter trawls for many years. A majority of the vessels directly regulated by this proposed rule also used otter trawls between 2011 and 2014 and, thus, are expected to know how to properly maintain and use TEDs. Further, the skills required for properly maintaining and using TEDs in skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) is thought to be consistent with the skillset and capabilities of commercial shrimp fishers in general. As a result, special professional skills training would not be expected to be necessary.

This proposed rule is expected to directly regulate vessels that use skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) in the southeastern U.S. shrimp fisheries (North Carolina through Texas), with the exception of vessels that use only wing nets (butterfly trawls) in Biscayne Bay in Miami-Dade County, Florida. An estimated 5,837 vessels have been identified as using this gear (5,660 vessels in the Gulf of Mexico and 177 vessels in the South Atlantic). Although some of the directly regulated shrimp vessels are thought to be owned by businesses with the same or substantively the same individual owners, and thus would be considered affiliated, ownership data for these vessels is incomplete. It is not currently feasible to accurately determine whether businesses that own these vessels are, in fact, affiliated. As a result, although it will result in an overestimate of the actual number of businesses directly regulated by this proposed rule, for the purposes of this analysis, it is assumed that each vessel is independently owned by a single business. We have not identified any other entities that might be directly regulated by this proposed rule. Therefore, this proposed rule would be expected to directly regulate 5,837 businesses.

The average annual gross revenue (2014 dollars) over the period 2011–2014 for vessels that harvested shrimp using skimmer trawls, pusher-head trawls, or wing nets (butterfly trawls) was approximately $31,861 for vessels in the Gulf of Mexico (5,660 vessels) and $37,250 for vessels in the South Atlantic (177 vessels). The largest average annual gross revenues earned by a single business over this period were approximately $1.85 million.

On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts (revenue) for all businesses primarily engaged in the commercial fishing industry (NAICS code 114111) for RFA compliance purposes only (80 FR 81194; December 29, 2015). The $11 million standard became effective on July 1, 2016, and is to be used in place of the prior Small Business Administration standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all our rules subject to the RFA after July 1, 2016. Id. at 81194. In addition to this gross revenue standard, a business primarily involved in commercial fishing is classified as a small business if it is independently owned and operated, and is not dominant in its field of operations (including its affiliates). Based on the information above, all businesses directly regulated by this proposed rule are determined to be small businesses for the purpose of this analysis.

This proposed rule would require all commercial fishing vessels using skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) in the Southeastern U.S. shrimp fishery (North Carolina through Texas), with the exception of vessels that use only wing nets (butterfly trawls) in Biscayne Bay in Miami-Dade County, Florida, to use TEDs designed to exclude small sea turtles when shrimping. Although these TEDs, as designed, successfully result in the reduced bycatch of small sea turtles, they also result in shrimp loss and, thus, reduced shrimp harvest per tow. Although it may be theoretically possible to compensate for this reduction in harvest with additional effort (more tows or trips), increasing effort will also increase operating costs. The difference between shrimp prices and fuel prices is directly related to profitability (*i.e.,* as the difference increases, profits increase). With the exception of 2014, this difference has been very small in the past several years and thus vessels are already operating on small economic margins. Increasing effort is therefore likely to be economically risky, particularly for vessels that only or primarily harvest after the seasonal openings because catch per unit effort steadily declines over time and the additional revenue from each tow or trip steadily declines as well. Further, if additional effort was cost-effective or profitable, this effort would already be occurring and part of baseline fishing behavior. Therefore, vessels are not expected to compensate for lost shrimp and the associated gross revenues by increasing effort.

As a result, vessels affected by this proposed rule would be expected to experience adverse economic effects from two sources: reduced shrimp revenue and increased gear costs associated with the purchase, installation, maintenance, and replacement of newly required TEDs. Revenue loss from reduced shrimp harvest would be expected to be recurrent (yearly), barring changes in fishing practices, and the increased gear costs would recur periodically based on the loss, maintenance, and replacement cycles of TEDs (under normal use and proper maintenance, a TED would be expected to last at least three years).

In this analysis, the average shrimp loss is assumed to be 6.21 percent on average (estimated range of 3.07 percent-10.61 percent), the estimated cost per TED is $325 for small vessels (vessels less than 60 feet) and $550 for large vessels (vessels 60 feet or longer), and vessels are assumed to purchase/carry enough TEDs for the nets towed plus one spare set. Therefore, the actual effects of this proposed rule on individual vessels will vary based on individual performance (*i.e.,* shrimp loss may be higher or lower than the average; because these fishers have not traditionally had to use TEDs, and initial shrimp loss may be higher and persist until greater familiarity with the gear is acquired) and gear purchase

decisions (how many TEDs are purchased/carried).

Additionally, in this analysis, neither the ex-vessel price per pound of domestically harvested shrimp nor the expected cost per TED is modeled to change in response to supply and demand conditions. Specifically, the estimated decrease in the harvest of domestic shrimp (as a result of increased shrimp loss due to this proposed rule) is not modeled to result in an increase in the ex-vessel price of domestic shrimp, nor has the projected increase in the demand for TEDs been modeled to result in an increase in the average price of a TED. The assumed lack of change in shrimp ex-vessel prices is likely more realistic than the assumed constant price of a TED because imported shrimp dominate the U.S. market and available evidence suggests the demand for shrimp is highly elastic. Upward price pressure on TEDs will be affected by the number of available suppliers (there are currently six), their capacity to meet production demand (each can currently produce 20 TEDs per week), the timeframe for compliance, and the total number of TEDs needed (estimated to be 23,266 in order to fully outfit all of the vessels directly regulated by this proposed rule). The total number of TEDs needed will be affected by vessel purchase decisions (*i.e.,* how many spare TEDs vessels choose to carry), and the number of vessels that can successfully remain in operation in the face of the higher operating costs and reduced revenue. Although not expected, if the ex-vessel price of shrimp increases as a result of reduced supply, the effects provided in this analysis will be overstated. Conversely, if the price of a TED increases, then the adverse economic effects associated with the costs of purchasing TEDs will be understated.

Because the increased gear costs associated with purchasing TEDs would be periodic, whereas the shrimp loss would be ongoing and recurrent, the following analysis only presents first-year results (*i.e.,* results that include both TED purchase costs and shrimp revenue reduction). The adverse effects in subsequent years will be less than those in the first year and would be expected to vary with fishing adaptations (fishers may become more skilled in and familiar with the operation and use of TEDs, thereby reducing shrimp loss), and TED replacement schedules (both planned and unplanned).

All of the monetary effects provided in this analysis are in 2014 dollars. Over all of the businesses expected to be affected (5,837 vessels), this proposed rule would be expected to result in a reduction in gross revenue of approximately $6.2 million and TED costs of approximately $7.5 million, thereby resulting in a total adverse effect of approximately $13.7 million in the first year. The average adverse effects per vessel would be $1,062, $1,285, and $2,347 with respect to lost gross revenue, TED costs, and the total adverse effect, respectively. These effects would not be expected to be uniform across Gulf of Mexico and South Atlantic vessels. Gulf of Mexico vessels would be expected to experience average adverse effects of $1,085, $1,298, and $2,383 with respect to lost gross revenue, TED costs, and the total adverse effect, respectively. The comparable values for South Atlantic vessels would be $146, $1,219, and $1,365.

In the Gulf of Mexico, vessels were placed into one of six (6) categories: average Federally-permitted vessel (Federal Gulf of Mexico), Q5, Q4, Q3, Q2, and Q1. The average annual gross revenue ranges for these categories are as follows: greater than or equal to $255,000 (Federal Gulf of Mexico), less than $255,000 but greater than or equal to $119,000 (Q5), less than $119,000 but greater than or equal to $52,000 (Q4), less than $52,000 but greater than or equal to $29,000 (Q3), less than $29,000 but greater than or equal to $17,000 (Q2), and less than $17,000 (Q1). In the South Atlantic, vessels were placed into nine (9) categories: rock shrimp (RSLA), primary penaeid (SPA Primary), secondary penaeid (SPA Secondary), average Federally-permitted South Atlantic penaeid vessel (AS), Q5, Q4, Q3, Q2, and Q1. A vessel was placed in the RSLA category if 50 percent or more of its gross revenue came from shrimp and its average annual gross revenue was greater than or equal to $456,000. A vessel was placed in the AS category if 50 percent or more of its gross revenue came from shrimp and its average annual gross revenue was less than $456,000 but greater than or equal to $216,000. A vessel was placed in the SPA Primary category if 50 percent or more of its gross revenue came from shrimp and its average annual gross revenue was less than $216,000 but greater than or equal to $119,000. Finally, a vessel was placed in the SPA Secondary category if less than 50 percent of its gross revenue came from shrimp and its average annual gross revenue was greater than or equal to $119,000. The ranges are the same as in the Gulf of Mexico for the Q5, Q4, Q3, Q2, and Q1 categories.

It should not be inferred that every vessel in a particular category has a particular permit associated with the category name, as that is not always the case. For the purpose of this analysis, vessels in the Q1, Q2, and Q3 categories are considered part-time vessels (*i.e.,* vessels that are only engaged in commercial fishing part-time) in both the Gulf of Mexico and the South Atlantic, while vessels in each of the other categories are considered full-time vessels.

For Gulf of Mexico vessels, the number of vessels expected to be directly regulated by this proposed rule and their average annual gross fishing revenue from 2011 through 2014 are 3,386 vessels and $4,524 for Q1 vessels, followed by 534 vessels and $22,773 (Q2), 655 vessels and $39,130 (Q3), 781 vessels and $77,698 (Q4), 232 vessels and $160,932 (Q5), and 72 vessels and $405,664 (Federal Gulf of Mexico). The expected average adverse effect (reduced shrimp revenue and TED cost) of the proposed rule in the first year for these vessels is $1,510, $2,200, $2,813, $4,568, $6,467, and $3,303 for vessels in the Q1, Q2, Q3, Q4, Q5, and Federal Gulf of Mexico categories, respectively.

Although the average adverse effects of the proposed rule could be compared to the average gross revenue to generate an estimate of the average relative (percent) effect of the proposed rule by category, this ''average to average'' approach (average adverse effect/average gross revenue for each category) would provide a distorted perspective of the actual expected effects of this proposed rule at the vessel level. For example, using this approach (''average to average'') for category Q1, the average estimated effect of the cost of the proposed rule would be approximately 33.4 percent ($1,510/$4,524; the projected average adverse effect per vessel of this proposed rule would be 33.4 percent of average annual gross revenue). Although this outcome would not likely be considered insignificant, examination of the adverse effect by vessel (adverse effect/average gross revenue for that vessel), then averaged across all vessels, provides a much clearer picture of the expected economic effect of this proposed rule. Using this approach, the relative adverse effect of this proposed rule, as a percentage of average annual gross revenue, increases to 199.4 percent for vessels in the Q1 category. This result demonstrates that most of these vessels generate minimal fishing revenue year-to-year, and the costs of the TEDs alone are likely to be financially unbearable even before factoring in the loss of shrimp revenue.

Applying this approach (analysis at the vessel level, then averaging across all vessels) to all revenue categories for

Gulf of Mexico vessels, the relative adverse effect as a percentage of gross revenue would be expected to be 199.4 percent for Q1 vessels, 9.8 percent (Q2), 7.3 percent (Q3), 6.0 percent (Q4), 4.2 percent (Q5), and 1.0 percent (Federal Gulf of Mexico). These results demonstrate that, although the expected effects in absolute monetary terms are greater for vessels in the Q4, Q5, and Federal Gulf of Mexico categories, (*i.e.,* vessels that generate the highest average annual gross revenues and are considered full-time vessels), the relative effect of this proposed rule would be greater on vessels in the Q1, Q2, and Q3 categories (*i.e.,* part-time vessels that have the lowest average annual gross revenues).

For South Atlantic vessels, the number of vessels expected to be directly affected by this proposed rule and their average gross revenue for 2011–2014 are 123 vessels and $5,350 for Q1 vessels, followed by 19 vessels and $22,797 (Q2), 17 vessels and $39,329 (Q3), 13 vessels and $717,843 (Q4), 3 vessels and $835,270 (RSLA), and 1 vessel for each of the SPA Secondary and AS categories. Because the expected number of entities affected by the proposed rule in the SPA Secondary and AS categories is so small, neither baseline economic information nor expected economic effects can be reported for them due to confidentiality restrictions. The expected average adverse effect (reduced shrimp revenue and TED cost) of this proposed rule in the first year is $1,290, $1,378, $1,667, $1,627, $1,573 for vessels in the Q1, Q2, Q3, Q4 and RSLA categories, respectively. Using the same vessel-level analytical approach discussed in the previous paragraph and applied to Gulf of Mexico vessels, the relative adverse effect as a percentage of gross revenue for South Atlantic vessels would be expected to be 96.5 percent for Q1 vessels, 6.2 percent (Q2), 4.4 percent (Q3), 2.4 percent (Q4), and 0.2 percent (RSLA). The expected effects in absolute monetary terms for the South Atlantic vessels do not follow as markedly the same pattern as do those for Gulf of Mexico vessels. Full-time vessels in the South Atlantic would generally be expected to experience greater average adverse effects than part-time vessels, but range of the difference is only a couple hundred dollars for South Atlantic vessels and not thousands of dollars as expected in the Gulf of Mexico, and the relative effects are not expected to be as great. However, as in the Gulf of Mexico, the relative effects on the part-time vessels in the South Atlantic also exceed that of full-time vessels. In addition, similar to the results for Gulf of Mexico vessels, the effects on the South Atlantic Q1 vessels may be so great as to render continued operation as a commercial fishing vessel economically infeasible.

In spite of the results presented above, this analysis neither assumes nor concludes that any specific individual or total number of vessels would be expected to stop operating as a commercial fishing business due to the expected adverse effects of this proposed rule. The results suggest that a high number of the part-time vessels may not continue operating as a result of this proposed rule. However, based on available data, a general economic assessment utilizing gross revenue and operating cost information suggests that the financial conditions for many vessels are and have been poor, particularly for part-time vessels as the average net revenues for Q1, Q2, and Q3 vessels were negative based on 2012 data for non-permitted vessels in the Gulf of Mexico. Yet, at least some of these vessels continue to commercially harvest shrimp. This suggests either that available data incompletely capture the ''economics'' of these operations, or that the decision to harvest shrimp is based on criteria other than, or in addition to, considerations of profit and loss (*e.g.,* personal consumption of harvested shrimp and the associated value, the value some fishermen place on the commercial fishing lifestyle, etc.).

Despite acknowledgement that reducing revenues and imposing additional costs on businesses that already operate under a tenuous financial situation will, with some unknown degree of certainty, result in some vessels exiting the commercial shrimp industry, this analysis does not forecast how many vessels may do so. Instead, this analysis simply notes that the total reduction in gross revenues and total adverse effects associated with this proposed rule will increase as more vessels cease operation. Conversely, the more vessels that cease commercial fishing, the more likely that demand pressure on TED prices will be reduced (*i.e.,* TED prices will not increase over the assumed prices used in this analysis) and the total costs associated with purchasing TEDs will decrease as fewer vessels will need to buy them. Further, for vessels that continue to operate, they may harvest some portion of the shrimp traditionally harvested by the exiting vessels, thereby mitigating some of the shrimp loss to these vessels as a result of TED use.

Seven alternatives, including no action, were considered for the action in this proposed rule (Alternative 3 is the preferred alternative). The first alternative (Alternative 1, no action) to the action in this proposed rule would not expand the required use of TEDs and, as a result, would not achieve the objective of reducing the incidental bycatch and mortality of sea turtles in the Southeastern U.S. commercial shrimp fisheries.

The second alternative (Alternative 2) to the action in this proposed rule would have expanded the required use of TEDs to only vessels using skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) that were 26 feet and greater in length. This alternative would have been expected to affect fewer vessels (3,103) and reduce the total expected increase in TED costs and shrimp revenue loss compared to this proposed rule. However, this alternative was not selected because it would be expected to result in less protection of sea turtles (1,509–2,179 turtles, or a mid-point estimate of 1,844 turtles) than this proposed rule (1,730–2,500 turtles, or a mid-point estimate of 2,115 turtles).

The third alternative (Alternative 4) to the action in this proposed rule would have expanded the required use of TEDs to only vessels using skimmer trawls that were 26 feet and greater in length. This alternative would have been expected to affect fewer vessels (2,913) and reduce the total expected increase in TED costs and the shrimp revenue loss compared to this proposed rule. However, this alternative was not selected because it would be expected to result in less protection of sea turtles (1,412–2,040 turtles, or a mid-point estimate of 1,726 turtles) than this proposed rule.

The fourth alternative (Alternative 5) to the action in this proposed rule would have expanded the required use of TEDs to all vessels using skimmer trawls regardless of vessel length. This alternative would, similar to Alternative 4, have been expected to affect fewer vessels (5,432) and reduce the total expected increase in TED costs and shrimp revenue loss compared to this proposed rule. However, this alternative was not selected because it would be expected to result in less protection of sea turtles (1,624–2,348 turtles, or a mid-point estimate of 1,986 turtles) than this proposed rule.

The fifth and sixth alternatives (Alternatives 6 and 7) to the action in this proposed rule would have expanded the required use of TEDs to all shrimp vessels regardless of trawl type but varying by fishing location (Alternative 6, state waters only; Alternative 7, all waters). These alternatives were not selected because they would have been expected to affect

more vessels (9,711, both alternatives) and result in greater expected increases in TED costs and shrimp revenue loss compared to this proposed rule.

Locations and Times of Public Hearings

Public hearings will be held at the following locations:

1. Larose—Larose Regional Park and Civic Center, 307 East 5th Street, Larose, LA 70373.
2. Gretna—Coastal Communities Consulting, Inc. Offices, 925 Behrman Highway, Suite 15, Gretna, LA 70056.
3. Belle Chasse—Belle Chasse Auditorium, 8398 Highway 23, Belle Chasse, LA 70037.
4. Biloxi—Biloxi Visitor's Center, 1050 Beach Boulevard, Biloxi, MS 39530.
5. Bayou La Batre—Bayou La Batre Community Center, 12745 Padgett Switch Road, Bayou La Batre, AL 36509.
6. Morehead City—Crystal Coast Civic Center, 3505 Arendell Street, Morehead City, NC 28557.

The public hearing dates are:

1. January 9, 2017, 4 p.m. to 6 p.m., Larose, LA.
2. January 10, 2017, 12 p.m. to 2 p.m., Gretna, LA.
3. January 10, 2017, 4 p.m. to 6 p.m., Belle Chasse, LA.
4. January 11, 2017, 4 p.m. to 6 p.m., Biloxi, MS.
5. January 12, 2017, 10 a.m. to 12 p.m., Bayou La Batre, AL.
6. January 18, 2017, 12 p.m. to 2 p.m., Morehead City, NC.

Vietnamese translation services will be available at the January 10, 2017, meeting in Gretna, LA.

List of Subjects in 50 CFR Part 223

Endangered and threatened species; Exports; Imports; Transportation.

Dated: December 12, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES.

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.206, revise paragraphs (d)(2)(ii)(A)(*3*) and (d)(3)(i) to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(A) * * *

(*3*) Has only a wing net rigged for fishing and is fishing only in Miami-Dade County, Florida;

* * * * *

(3) *Tow-time restrictions*–(i) *Duration of tows.* If tow-time restrictions are used pursuant to paragraph (d)(2)(ii), (d)(3)(ii), or (d)(3)(iii) of this section, a shrimp trawler must limit tow times. The tow time begins at the time that the trawl door enters the water and ends at the time that the trawl door is removed from the water. For a trawl that is not attached to a door, the tow time begins at the time that the entire net enters the water and ends at the time that the entire net is removed from the water. Tow times may not exceed:

* * * * *

■ 3. In § 223.207,

■ a. Revise paragraphs (a)(4), (a)(6), (a)(7)(ii)(B) and (C), and (d)(3)(ii) and (iii); and

■ b. Add paragraph (d)(3)(v) to read as follows:

§ 223.207 Approved TEDs.

* * * * *

(a) * * *

(4) *Space between bars.* The space between deflector bars and the deflector bars and the TED frame must not exceed 4 inches (10.2 cm) except for TEDs installed in skimmer trawls, pusher-head trawls, and wing nets, where the space between deflector bars and the deflector bars and the TED frame must not exceed 3 inches (7.6 cm).

* * * * *

(6*) Position of the escape opening.* The escape opening must be made by removing a rectangular section of webbing from the trawl, except for a TED with an escape opening size described at paragraph (a)(7)(ii)(A) of this section for which the escape opening may alternatively be made by making a horizontal cut along the same plane as the TED. The escape opening must be centered on and immediately forward of the frame at either the top or bottom of the net when the net is in the deployed position. The escape opening must be at the top of the net when the slope of the deflector bars from forward to aft is upward, and must be at the bottom when such slope is downward. The passage from the mouth of the trawl through the escape opening must be completely clear of any obstruction or modification, other than those specified in paragraph (d) of this section. A TED installed in a skimmer trawl, pusher-head trawl, or wing net rigged for fishing must have the escape opening oriented at the top of the net.

(7) * * *

(ii) * * *

(B) *The 71-inch opening.* The two forward cuts of the escape opening must not be less than 26 inches (66 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 71 inches (181 cm) with a resultant circumference of the opening being 142 inches (361 cm) (Figure 12 to this part). A webbing flap, as described in paragraph (d)(3)(ii) or (d)(3)(v) of this section, may be used with this escape hole, so long as this minimum opening size is achieved. Either this opening or the one described in paragraph (a)(7)(ii)(C) of this section must be used in all offshore waters and in all inshore waters in Georgia and South Carolina, but may also be used in other inshore waters.

(C) *Double cover opening.* The two forward cuts of the escape opening must not be less than 20 inches (51 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 56 inches (142 cm)(Figure 16 to this part illustrates the dimensions of these cuts). A webbing flap, as described in paragraph (d)(3)(iii) or (d)(3)(v) of this section, may be used with this escape hole. Either this opening or the one described in paragraph (a)(7)(ii)(B) of this section must be used in all offshore waters and in all inshore waters in Georgia and South Carolina, but may also be used in other inshore waters.

* * * * *

(d) * * *

(3) * * *

(ii) *71-inch TED flap.* The flap must be a 133-inch (338-cm) by 52-inch (132-cm) piece of webbing. The 133-inch (338-cm) edge of the flap is attached to the forward edge of the opening (71-inch (180-cm) edge). The flap may extend no more than 24 inches (61 cm) behind the posterior edge of the grid (Figure 12 to this part illustrates this flap).

(iii) *Double cover TED flap.* This flap must be composed of two equal size rectangular panels of webbing. Each panel must be no less than 58 inches (147.3 cm) wide and may overlap each other no more than 15 inches (38.1 cm). The panels may only be sewn together along the leading edge of the cut. The trailing edge of each panel must not

extend more than 24 inches (61 cm) past the posterior edge of the grid (Figure 16 to this part). Each panel may be sewn down the entire length of the outside edge of each panel. Paragraph (d)(3) of this section notwithstanding, this flap may be installed on either the outside or inside of the TED extension. For interior installation, the flap may be sewn to the interior of the TED extension along the leading edge and sides to a point intersecting the TED frame; however, the flap must be sewn to the exterior of the TED extension from the point at which it intersects the TED frame to the trailing edge of the flap. Chafing webbing described in paragraph (d)(4) of this section may not be used with this type of flap.

* * * * *

(v) *Small turtle TED flap.* If the angle of the deflector bars of a bent bar TED used by a skimmer trawl, pusher-head trawl, or wing net exceeds 45°, or if a double cover opening straight bar TED (at any allowable angle) is used by a skimmer trawl, pusher-head trawl, or wing net, the flap must not consist of twine size greater than number 15 (1.32-mm thick) on webbing flaps described in paragraphs (d)(3)(i), (d)(3)(ii), (d)(3)(iii), or (d)(3)(iv) of this section.

* * * * *

[FR Doc. 2016–30224 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 160906822–6999–01]

RIN 0648–BG33

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Amendment 37

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement management measures described in Amendment 37 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared and submitted by the South Atlantic Fishery Management Council (South Atlantic Council). If implemented, this proposed rule would modify the management unit boundaries for hogfish in the South Atlantic by establishing two hogfish stocks, a Georgia through North Carolina (GA/NC) stock and a Florida Keys/East Florida (FLK/EFL) stock; establish a rebuilding plan for the FLK/EFL hogfish stock; specify fishing levels and accountability measures (AMs), and modify or establish management measures for the GA/NC and FLK/EFL stocks of hogfish. The purpose of this proposed rule is to manage hogfish using the best scientific information available while ending overfishing and rebuilding the FLK/EFL hogfish stock.

DATES: Written comments must be received by January 17, 2017.

ADDRESSES: You may submit comments on the proposed rule, identified by ''NOAA–NMFS–2016–0068'' by either of the following methods:

- *Electronic Submission:* Submit all electronic comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0068,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit all written comments to Nikhil Mehta, NMFS Southeast Regional Office (SERO), 263 13th Avenue South, St. Petersburg, FL 33701.

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 *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), 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).

Electronic copies of Amendment 37 may be obtained from *www.regulations.gov* or the SERO Web site at *http://sero.nmfs.noaa.gov*. Amendment 37 includes a final environmental impact statement, initial regulatory flexibility analysis (IRFA), regulatory impact review, and fishery impact statement.

FOR FURTHER INFORMATION CONTACT: Nikhil Mehta, NMFS SERO, telephone: 727–824–5305, or email: *nikhil.mehta@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery in the South Atlantic includes hogfish and is managed under the FMP. The FMP was prepared by the South Atlantic Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Magnuson-Stevens Act requires that NMFS and regional fishery management councils prevent overfishing and achieve, on a continuing basis, the optimum yield (OY) from federally managed fish stocks. These mandates are intended to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act requires fishery managers to minimize bycatch and bycatch mortality to the extent practicable.

Currently, hogfish is managed under the FMP as a single stock in the South Atlantic from the jurisdictional boundary between the South Atlantic Council and Gulf of Mexico Fishery Management Council (Gulf Council) (approximately the Florida Keys) to a line extending seaward from the North Carolina and Virginia state border. The current stock status determination criteria, such as maximum sustainable yield (MSY) and minimum stock size threshold (MSST), annual catch limits (ACLs), recreational annual catch targets (ACTs), AMs, and management measures in the FMP, are established for a single stock of hogfish for the South Atlantic region. The most recent stock assessment for hogfish was completed in 2014 through the Southeast Data, Assessment, and Review process (SEDAR 37). SEDAR 37 identified two separate stocks of hogfish in the South Atlantic region under the jurisdiction of the South Atlantic Council, and one stock of hogfish in the Gulf of Mexico (Gulf) under the jurisdiction of the Gulf Council. In the South Atlantic region, one stock of hogfish was identified to exist off North Carolina, South Carolina, and Georgia; and a separate stock of hogfish was identified to exist off the Florida Keys and east Florida. The South Atlantic Council's Scientific and Statistical Committee (SSC) did not consider the SEDAR 37 results for the GA/NC stock as sufficient to determine stock status and inform South Atlantic Council management decisions, and the South Atlantic Council concurred. NMFS agreed and determined that the overfishing and overfished status determination of the GA/NC stock is unknown. The SSC did consider the SEDAR 37 results as sufficient to

determine the stock status and inform management decisions for the FLK/EFL stock, and the South Atlantic Council concurred. NMFS agreed and determined that the FLK/EFL stock is currently undergoing overfishing and is overfished. Based on SEDAR 37, NMFS also determined that the West Florida hogfish stock in the Gulf, which occurs off the west coast of Florida to Texas, is neither overfished, nor undergoing overfishing. NMFS notified the South Atlantic Council of these stock status determinations via letter on February 17, 2015.

Management Measures Contained in This Proposed Rule

This proposed rule would revise the hogfish fishery management unit in the FMP by establishing two hogfish stocks, one in Federal waters off Georgia through North Carolina and one in Federal waters off the Florida Keys and east Florida; specify ACLs and AMs; and modify or establish management measures for the GA/NC and FLK/EFL stocks of hogfish. All weights of hogfish are described in round weight.

Fishery Management Unit for Hogfish

Currently, hogfish is managed as a single stock in Federal waters in the South Atlantic region from the jurisdictional boundary between the South Atlantic and Gulf Councils to the North Carolina and Virginia state border. This proposed rule would establish new stock boundaries and create two stocks of hogfish in Federal waters under the jurisdiction of the South Atlantic Council. The first stock would be the GA/NC stock, with a southern boundary extending from the Florida and Georgia state border extending northward to the North Carolina and Virginia state border. The second stock would be the FLK/EFL hogfish stock, with a southern boundary extending from 25°09′ N. lat. near Cape Sable on the west coast of Florida. The management area would extend south and east around the Florida Keys and have a northern border extending from the Florida and Georgia state border.

The Gulf Council has approved Amendment 43 to the FMP for the Reef Fish Resources of the Gulf, and has selected the same boundary near Cape Sable on the west coast of Florida to separate the FLK/EFL hogfish stock from the West Florida hogfish stock. In accordance with section 304(f) of the Magnuson-Stevens Act, the Gulf Council requested that the Secretary of Commerce designate the South Atlantic Council as the responsible Council for management of the FLK/EFL hogfish stock in Gulf Federal waters south of 25°09′ N. lat. near Cape Sable on the west coast of Florida. On November 23, 2016, NMFS published a proposed rule in the **Federal Register** to implement Amendment 43 (81 FR 84538, November 23, 2016). If NMFS implements Amendment 43, the Gulf Council would continue to manage hogfish in Federal waters in the Gulf (the West Florida hogfish stock), except in Federal waters south of this boundary. Therefore, the South Atlantic Council, and not the Gulf Council, would establish the management measures for the entire range of the FLK/EFL hogfish stock, including in Federal waters south of 25°09′ N. lat. near Cape Sable in the Gulf. Vessels fishing for hogfish in Gulf Federal waters, *i.e.,* north and west of the jurisdictional boundary between the Gulf and South Atlantic Councils (approximately at the Florida Keys), as defined at 50 CFR 600.105(c), would still be required to have the appropriate Federal Gulf reef fish permits, and vessels fishing for hogfish in South Atlantic Federal waters, *i.e.,* south and east of the jurisdictional boundary, would still be required to have the appropriate Federal South Atlantic snapper-grouper permits. Federal permit holders would still be required to follow the sale and reporting requirements associated with the respective permits.

As described in Amendment 37, the proposed stock boundary near Cape Sable, Florida, would aid law enforcement personnel, because it coincides with an existing State of Florida management boundary for certain state-managed species, and it would simplify regulations across adjacent state and Federal management jurisdictions. NMFS specifically seeks public comment regarding the revised stock boundaries and the manner in which the Councils would have jurisdiction over these stocks if both Amendment 37 for the South Atlantic Council and Amendment 43 for the Gulf Council are approved and implemented. NMFS published notices of availability in the **Federal Register**, seeking comments on Amendment 37 and Amendment 43, on October 7, 2016, and November 4, 2016, respectively (81 FR 69774 and 81 FR 76908). On November 23, 2016, NMFS published a proposed rule to implement Amendment 43 in the **Federal Register** that also solicited public comment (81 FR 84538, November 23, 2016).

ACLs and OY for the GA/NC and FLK/EFL Hogfish Stocks

Currently, the total acceptable biological catch (ABC) for the single hogfish stock (equal to ACL and OY) in the FMP is 134,824 lb (61,155 kg), with a commercial ACL sector allocation (36.69 percent) of 49,469 lb (22,439 kg), and recreational ACL sector allocation (63.31 percent) of 85,355 lb (38,716 kg). Because SEDAR 37 was not deemed sufficient to specify an ABC recommendation for the GA/NC stock of hogfish, the SSC applied Level 4 of the South Atlantic Council's ABC control rule to arrive at their ABC recommendation for this stock. Level 4 is appropriate for unassessed stocks with only reliable catch data, and involves selection of a ''catch statistic,'' a scalar to describe the risk of overexploitation for the stock, and a scalar to describe the management risk level. Amendment 29 updated the South Atlantic Council's ABC control rule, including Level 4 for unassessed stocks (80 FR 30947, June 1, 2015). The SSC provides the first two criteria for each stock, and the South Atlantic Council specifies their management risk level for each stock. For the GA/NC hogfish stock, this proposed rule and Amendment 37 would specify an ABC of 35,716 lb (16,201 kg), a total ACL and OY (equal to 95 percent of the ABC) of 33,930 lb (15,390 kg), and commercial and recreational ACLs based on re-calculated sector allocations of 69.13 percent to the commercial sector and 30.87 percent to the recreational sector. It was necessary to re-calculate the sector allocations based on the existing formula from the South Atlantic Council's Comprehensive ACL Amendment (77 FR 15916, March 16, 2012), to reflect the appropriate landings for each sector from the relevant geographic region of the new stock. Through this proposed rule, the commercial ACL would be 23,456 lb (10,639 kg) and the recreational ACL would be 988 fish. For the GA/NC stock of hogfish, the South Atlantic Council decided to specify the ABC, total ACL, and commercial ACL in pounds and the recreational ACL in numbers of fish. Commercial landings are already tracked in pounds while recreational landings are tracked in numbers of fish. Additionally, because Amendment 37 also considers changing the minimum size limit for this stock of hogfish, specifying the recreational ACL in pounds could potentially increase the risk of exceeding the ABC in pounds because larger fish are heavier. Therefore, the South Atlantic Council determined that there would be a lower risk of exceeding the recreational ACL due to an increase in the minimum size limit if the recreational ACL were to be specified in numbers of fish.

The SSC considered the SEDAR 37 results sufficient to provide an ABC recommendation for the FLK/EFL stock of hogfish, and the South Atlantic Council concurred with their recommendation. The ABC for the FLK/EFL stock is derived from projections in SEDAR 37, and the projections were provided in both pounds and numbers of fish. The South Atlantic Council determined that for this stock of hogfish, it was more appropriate to specify the ABC, total ACL, and recreational ACL in numbers of fish, and the commercial ACL in pounds (since recreational landings are tracked in numbers of fish and commercial landings are tracked in pounds). Therefore, Amendment 37 would specify an ABC of 17,930 fish for this stock, which would increase annually through 2027 when the ABC would be 63,295 fish. The total ACL and OY would be equal to 95 percent of the ABC, and the commercial and recreational ACLs would be based on re-calculated sector allocations of 9.63 percent to the commercial sector and 90.37 percent to the recreational sector. As discussed above, the re-calculated sector allocations are based on the South Atlantic Council's existing allocation formula and are necessary to reflect the appropriate landings for each sector from the relevant geographic region of the new stock. In 2017, the total ACL (and OY) would be 17,034 fish, the commercial ACL would be 3,510 lb (1,592 kg), and the recreational ACL would be 15,689 fish and would increase annually through 2027 as the stock rebuilds. In 2027, the total ACL (and OY) for the FLK/EFL hogfish stock would be 60,130 fish, the commercial ACL would be 17,018 lb (7,719 kg), and recreational ACL would be 53,610 fish.

AMs for the Commercial and Recreational Sectors for Both the GA/NC and FLK/EFL Hogfish Stocks

The current South Atlantic commercial AMs for the single hogfish stock consist of an in-season closure of the commercial sector if the commercial ACL is met or projected to be met. If the commercial ACL is exceeded, a post-season AM would reduce the commercial ACL by the amount of the commercial ACL overage during the following fishing year if the total ACL (commercial ACL plus recreational ACL) is also exceeded and hogfish are overfished. This proposed rule would retain the current South Atlantic in-season and post-season AMs for the commercial sector, as specified in 50 CFR 622.193(u)(1), and apply them to both the GA/NC and FLK/EFL hogfish stocks.

The current South Atlantic recreational AMs for the single hogfish stock consist of an in-season closure of the recreational sector if the recreational ACL is met or is projected to be met. If the recreational ACL is exceeded, then during the following fishing year, NMFS will monitor for a persistence in increased landings. The post-season AM would reduce the length of the recreational season and the recreational ACL by the amount of the recreational ACL overage if the total ACL is also exceeded and hogfish are overfished. This proposed rule would retain the current South Atlantic recreational AMs, as specified in 50 CFR 622.193(u)(2), and apply them to both the GA/NC and FLK/EFL hogfish stocks.

Minimum Size Limits for the GA/NC and FLK/EFL Hogfish Stocks

The current minimum size limit for the single hogfish stock in the South Atlantic is 12 inches (30.5 cm), fork length (FL), for both the commercial and recreational sectors. For both the commercial and recreational sectors, this proposed rule would increase the minimum size limit to 17 inches (43.2 cm), FL, for the GA/NC hogfish stock, and 16 inches (40.6 cm), FL, for the FLK/EFL hogfish stock. Hogfish are protogynous: Fish mature as females first and are expected to eventually become male if they live long enough; they are pair spawners; and they form harems. The number and gender of hogfish in a local group influences the size and age range at which sexual transition occurs. Considering these life history characteristics, the South Atlantic Council determined these proposed minimum size limits could serve as a precautionary approach to address population stability for hogfish off Georgia through North Carolina, and reduce disruption to spawning, avoid recruitment overfishing, and benefit the spawning populations off the Florida Keys and east Florida.

Commercial Trip Limit for the GA/NC and FLK/EFL Hogfish Stocks

Currently, there is no commercial trip limit for hogfish in the South Atlantic. This proposed rule would establish a commercial trip limit of 500 lb (227 kg) for the GA/NC stock, and 25 lb (11 kg) for the FLK/EFL stock. As described in Amendment 37, few commercial fishermen catch more than 500 lb (227 kg) of hogfish per trip off Georgia through North Carolina, and the proposed commercial ACL is not expected to be met. However, the South Atlantic Council is concerned that commercial fishermen may shift effort from the FLK/EFL stock to the GA/NC stock because of the proposed restrictions to the FLK/EFL stock. Therefore, the South Atlantic Council proposed a 500-lb (227-kg) commercial trip limit for the GA/NC stock to enable commercial harvest in that geographic area to take place year-round. Furthermore, as described in Amendment 37, the majority of commercial fishermen landed 25 lb (11 kg) or less of hogfish per trip off the Florida Keys and east Florida area. The South Atlantic Council determined that implementing a commercial trip limit of 25 lb (11 kg) for the FLK/EFL hogfish stock would restrict harvest and help to prevent a commercial in-season closure.

Recreational Bag Limits for the GA/NC and FLK/EFL Hogfish Stocks

The current recreational bag limit for hogfish in the South Atlantic is five fish per person per day in Federal waters off Florida, with no recreational bag limit in Federal waters off Georgia, South Carolina, and North Carolina. This proposed rule would set a recreational bag limit of one fish per person per day in Federal waters off the Florida Keys and east coast of Florida, and a recreational bag limit of two fish per person per day in Federal waters off Georgia through North Carolina. The South Atlantic Council determined that these bag limits would reduce harvest and help to prevent a recreational in-season closure.

Recreational Fishing Season for the FLK/EFL Hogfish Stock

Currently, hogfish is available for the recreational sector to harvest year-round, as long as the recreational ACL has not been met. This proposed rule would establish a recreational fishing season from May through October for the FLK/EFL hogfish stock, with recreational harvest prohibited from January through April and from November through December each year. As described in Amendment 37, hogfish spawning activity occurs predominantly during the months of December through April, and begins (and ends) slightly earlier in the Florida Keys than on the West Florida shelf (*e.g.,* from the Florida panhandle south along the west coast of Florida to Naples, Florida). Analysis in Amendment 37 showed that based on the proposed recreational ACLs, minimum size limits, and recreational bag limits, a recreational fishing season that is open for 6 months would help constrain recreational landings below the recreational ACL for the FLK/EFL hogfish stock. The South Atlantic Council determined that specifying a May through October fishing season would protect the overfished FLK/EFL

hogfish stock during the peak spawning season, and the proposed ACLs and AMs would help ensure overfishing does not occur. The South Atlantic Council decided not to establish a recreational fishing season for the GA/NC hogfish stock because that stock does not seem to be experiencing heavy fishing pressure, and the average recreational landings in recent years have been well below the proposed recreational ACL.

Management Measures Contained in Amendment 37 But Not Codified Through This Proposed Rule

In addition to the management measures that this proposed rule would implement, Amendment 37 includes actions to specify fishing levels and recreational ACTs for the GA/NC and FLK/EFL hogfish stocks, and establish a rebuilding plan for the FLK/EFL hogfish stock.

MSY and MSST for the GA/NC and FLK/EFL Hogfish Stocks

Currently, MSY for the single hogfish stock in the South Atlantic is the yield produced by the fishing mortality rate at MSY (F_{MSY}) or the F_{MSY} proxy, and MSST is equal to the spawning stock biomass at MSY (SSB_{MSY}) * (1–M) or 0.5, whichever is greater (where M equals natural mortality). However, MSY and MSST values for the single hogfish stock are unknown because hogfish were unassessed until recently. Amendment 37 would specify the MSY for the GA/NC and FLK/EFL stocks of hogfish as equal to the yield produced by F_{MSY} or the F_{MSY} proxy, with the MSY and F_{MSY} proxy recommended by the most recent stock assessment. Based on SEDAR 37, the resulting MSY for the FLK/EFL hogfish stock is 346,095 lb (156,986 kg), and is unknown for the GA/NC hogfish stock. Amendment 37 would specify the MSST for these two stocks of hogfish at 75 percent of SSB_{MSY}, which results in an unknown MSST value for the GA/NC hogfish stock, and an MSST for the FLK/EFL hogfish stock of 1,725,293 lb (782,580 kg). The proposed MSST for hogfish is consistent with how the South Atlantic Council has defined MSST for other snapper-grouper stocks with low natural mortality estimates, and SEDAR 37 estimated the natural mortality for hogfish at 0.179.

Recreational ACTs for the GA/NC and FLK/EFL Hogfish Stocks

The recreational ACT for the current hogfish stock is 59,390 lb (26,939 kg). Amendment 37 specifies a recreational ACT (equal to 85 percent of the recreational ACL) of 840 fish for the GA/NC stock and 13,335 fish for the FLK/EFL stock in 2017. The recreational ACT for the FLK/EFL stock would increase annually from 2017 through 2027 as the stock rebuilds. NMFS notes that the current and proposed recreational ACTs are used only for monitoring and do not trigger an AM.

Rebuilding Plan for the FLK/EFL Hogfish Stock

Because the FLK/EFL hogfish stock is overfished, Amendment 37 would establish a rebuilding plan that would set the ABC equal to the yield at a constant fishing mortality rate and rebuild the stock in 10 years with a 72.5 percent probability of success. Year 1 of the rebuilding plan would be 2017, and 2027 would be the last year. The South Atlantic Council's SSC indicated that harvest levels proposed in the Amendment 37 rebuilding plan are sustainable and would achieve the goal of rebuilding the FLK/EFL hogfish stock. The ABC for the FLK/EFL hogfish stock would be 17,930 fish in 2017 and would increase annually through 2027 when the ABC would be 63,295 fish.

Additional Proposed Change to Codified Text Not in Amendment 37

In addition to the measures described for Amendment 37, this final rule would correct an error in Table 1 to § 622.1—FMPs Implemented Under Part 622. In 2013, the final rule for Amendment 27 to the FMP inadvertently removed two footnotes from the entry for the FMP in Table 1 of § 622.1 (78 FR 78770, December 27, 2013). This final rule corrects that error and inserts those footnotes back into the entry for the FMP in Table 1 of § 622.1.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this proposed rule is consistent with Amendment 37, the FMP, the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an IRFA for this proposed rule, as required by section 603 of the RFA, 5 U.S.C. 603. The IRFA describes the economic impact that this proposed rule, if implemented, would have on small entities. A description of the proposed rule, why it is being considered, and the objectives of and legal basis for this proposed rule are contained at the beginning of this CLASSIFICATION section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this proposed rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed rule. Accordingly, this proposed rule does not implicate the Paperwork Reduction Act.

This proposed rule, if implemented, would apply to all federally-permitted commercial vessels and recreational anglers that fish for or harvest hogfish in Federal waters of the South Atlantic. It would not directly apply to or regulate charter vessels and headboats (for-hire vessels), since for-hire vessels sell fishing services to recreational anglers and the proposed changes to the hogfish management measures would not directly alter the services sold by these vessels. However, the proposed changes would affect when recreational anglers on for-hire trips are allowed to fish for or retain hogfish, as well as the quantity and size of hogfish that are harvested. Any change in demand for for-hire fishing services, and associated economic effects, as a result of this proposed rule would be a consequence of behavioral change by anglers, secondary to any direct effect on anglers and, therefore, an indirect effect of the proposed rule. Because the effects on for-hire vessels would be indirect, they fall outside the scope of the RFA. For-hire captains and crew are permitted to retain hogfish under the recreational bag limit; however, they are not permitted to sell these fish. As such, for-hire captains and crew are only affected as recreational anglers. The RFA does not consider recreational anglers to be small entities, so they are outside the scope of this analysis, and only the impacts on commercial vessels will be discussed.

As of May 25, 2016, there were 552 valid or renewable Federal South Atlantic snapper-grouper unlimited permits and 116 valid or renewable 225-lb (102-kg) trip-limited permits. Each of these commercial permits is associated with an individual vessel. Data from the years of 2010 through 2014, the most recent data available at the time the analysis was conducted, were used in Amendment 37 and these data provided the basis for the South Atlantic Council's decisions. Although this proposed rule would apply to all commercial snapper-grouper permit holders, it is expected that the vessels that harvest hogfish would most likely be affected. On average from 2010

through 2014, there were 135 federally-permitted commercial fishing vessels with reported landings of hogfish. Their average annual vessel-level revenue from all species for 2010 through 2014 was approximately $59,000 (2014 dollars). During this period, there were an average of 62 vessels that harvested hogfish in the GA/NC stock area and 77 vessels that harvested hogfish in the FLK/EFL stock area. Their average annual revenue from all species (2010 through 2014) was approximately $83,000 and $44,000 (2014 dollars) in the two stock areas, respectively. Some of these vessels reported hogfish landings from both stock areas and are, therefore, included in the vessel counts for both stock areas. The maximum annual revenue for all species reported by a single one of the 135 vessels identified above, in 2014, was approximately $1 million (2014 dollars).

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. All of the commercial vessels directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard.

No other small entities that would be directly affected by this proposed rule have been identified.

There are currently 668 federally-permitted commercial vessels eligible to fish for the snapper-grouper species managed under the FMP. Based on the analysis included in Amendment 37, NMFS expects 135 of these vessels would be affected by this proposed rule (approximately 20 percent). Because all entities expected to be affected by this proposed rule are small entities, NMFS has determined that this proposed rule would affect a substantial number of small entities. Moreover, the issue of disproportionate effects on small versus large entities does not arise in the present case.

This proposed rule would modify the snapper-grouper Fishery Management Unit for hogfish, specifying two stocks of hogfish: (1) A GA/NC stock from the Georgia/Florida state boundary to the North Carolina/Virginia state boundary, and (2) a FLK/EFL stock from the Florida/Georgia state boundary south to a line extending due west from 25°09′ N. lat. just south of Cape Sable on the west coast of Florida. Amendment 37 would also specify MSY and MSST values for each of these stocks. For both the GA/NC and FLK/EFL stocks, MSY would be set equal to the yield produced by F_{MSY} or the F_{MSY} proxy ($F_{30\%SPR}$) and MSST would be set equal to 75 percent of SSB_{MSY}. Specifying separate hogfish stocks, as well as management reference points (MSY and MSST) for those stocks, would not directly alter the current harvest of the hogfish resource. Therefore, these changes would not be expected to have any direct economic effects on any small entities. They would, however, influence other components of this proposed rule that would be expected to have direct economic effects.

This proposed rule would also establish a total ACL of 33,930 lb (15,390 kg), round weight, for the GA/NC stock of hogfish, which is equal to 95 percent of the ABC recommended by the Council's SSC. Using the existing allocation formula specified in the Comprehensive ACL Amendment and landings data specific to the GA/NC stock area, the commercial ACL for the GA/NC stock of hogfish would be set constant at 23,456 lb (10,639 kg). Based on average annual landings for 2012 through 2014 off Georgia through North Carolina, the commercial sector would be expected to land only 20,534 lb (9,314 kg) under the status quo in 2017, with an estimated ex-vessel value of $76,797 (2014 dollars). Because the proposed commercial ACL is higher than the estimated status quo commercial landings for 2017, it would not be expected to have any short-term direct negative economic effects on commercial vessels. Due to increasing uncertainty as projections extend further into the future, status quo commercial landings estimates for years subsequent to 2017 were not calculated. The proposed commercial ACL would provide the potential for landings to increase by 2,922 lb (1,325 kg) relative to average historical commercial landings (2012 through 2014). Using the average annual hogfish price per pound from 2012 through 2014, this would represent a potential increase in ex-vessel revenue of $10,928 (2014 dollars) overall. Divided by the average number of commercial vessels that harvested hogfish in the GA/NC stock area from 2010 through 2014, this would be an increase of approximately $176 per vessel.

In addition, Amendment 37 would establish a rebuilding plan, beginning in 2017, for the FLK/EFL stock, where the rebuilding strategy sets ABC equal to the yield at a constant fishing mortality rate and rebuilds the stock in 10 years with a 72.5 percent probability of rebuilding success. This proposed rebuilding plan would provide the basis for setting ACLs but would not directly alter the current harvest of the hogfish resource. Therefore, it would not be expected to have direct economic effects on any small entities.

The proposed rule would also establish a total ACL, in numbers of fish, for the FLK/EFL stock of hogfish for 2017 through 2027. The total ACL each year would be set equal to 95 percent of the ABC values specified in the proposed rebuilding plan. In 2017, the total ACL would be 17,034 fish and would increase each year until reaching 60,130 fish in 2027. Using the existing allocation formula specified in the Comprehensive ACL Amendment and landings data specific to the FLK/EFL stock area, the commercial ACL for the FLK/EFL stock of hogfish would be set at 3,510 lb (1,592 kg) in 2017 and would increase each year until reaching 17,018 lb (7,719 kg) in 2027. In Amendment 37, a time series model was fit to historical landings data (1997 through 2014) for the FLK/EFL stock area in order to project commercial landings under the status quo in 2017. The commercial sector would be expected to land an estimated 20,380 lb (9,244 kg) of hogfish under the status quo in 2017, worth $76,213 (2014 dollars). Due to increasing uncertainty as projections extend further into the future, status quo commercial landings estimates for years subsequent to 2017 were not calculated. Assuming the proposed commercial ACL for FLK/EFL hogfish is harvested in full, it would represent a reduction in ex-vessel revenue of $63,086 (2014 dollars), or 83 percent, relative to estimated 2017 status quo revenue. This assumes that ex-vessel revenue from other commercially harvested species would not be substituted for the loss in hogfish revenue. Divided by the average number of commercial vessels that harvested hogfish in the FLK/EFL stock area from 2010 through 2014, this would be a decrease of approximately $819 (2014 dollars) per vessel. It is assumed that ex-vessel revenue from FLK/EFL hogfish will increase relative to the proposed annual increases in the commercial ACL from 2017 through 2027. This would lessen the negative economic effects of this proposed rule on commercial vessels each year.

This proposed rule would increase the commercial minimum size limit for both stocks of hogfish as well. The minimum size limit for the GA/NC stock would be increased from 12 inches (30.5 cm), FL, to 17 inches (43.2 cm), FL, and the minimum size limit for the FLK/EFL

stock would be increased from 12 inches (30.5 cm), FL, to 16 inches (38.1 cm), FL.

The proposed minimum size limit increase for the GA/NC stock was estimated to reduce commercial landings by only 406 lb (184 kg) in 2017. This would translate into a $1,478 (2014 dollars) reduction in ex-vessel revenue overall, or $24 per vessel. This assumes that ex-vessel revenue from other species would not be substituted for the loss in hogfish revenue. Under the proposed commercial ACL for GA/NC hogfish, the season would be expected to be open year-round and would not change as a result of the proposed minimum size limit. Assuming effort, harvest rates, and hogfish prices remain constant, then the expected economic effects of the proposed minimum size limit in future years would be equivalent to those of 2017.

For the FLK/EFL stock, the proposed minimum size limit increase would not be expected to reduce aggregate commercial landings or ex-vessel revenue in 2017. This assumes that ex-vessel hogfish prices would be unresponsive to temporal changes in landings. In subsequent years, as the FLK/EFL stock ACL increases, the proposed minimum size limit would be more likely than the status quo minimum size limit to prevent the full harvest of the commercial ACL and result in a reduction in aggregate ex-vessel revenue. Under the proposed minimum size limit of 16 inches (38.1 cm), FL, the 2017 fishing season is expected to be open 35 days longer than under the current minimum size limit of 12 inches (30.5 cm), FL. Because fewer legal-sized fish would be available for harvest, this proposed rule may increase harvest costs, and in turn, reduce profitability for some vessels. Conversely, a longer season for FLK/EFL hogfish may have positive economic effects for other vessels by expanding the number of species available for harvest later in the fishing year. Individual vessels would be expected to experience varying levels of economic effects, depending on their fishing practices, profit maximization strategies, and ability to substitute revenue from other species for hogfish revenue. These economic effects cannot be estimated with available data.

This proposed rule would also establish commercial trip limits for each stock of hogfish. The trip limit would be set at 500 lb (227 kg) per trip for the GA/NC stock and 25 lb (11 kg) per trip for the FLK/EFL stock. Currently, there is no commercial trip limit for hogfish in the South Atlantic.

For the GA/NC stock, the proposed commercial trip limit was estimated to result in a $4,470 (2014 dollars) decrease in ex-vessel revenue relative to the status quo. This assumes that ex-vessel revenue from other commercially harvested species would not be substituted for the loss in hogfish revenue. Based on historical harvest rates for 2012 through 2014, it is expected that the proposed commercial trip limit of 500 lb (227 kg), round weight, would only affect spearfishing trips. On average (2010 through 2014), there were 11 vessels with Federal commercial snapper-grouper permits that reported taking at least 1 hogfish trip in the GA/NC stock area, where the majority of revenue from that trip was attributed to spearfishing. Their average annual revenue from all species from 2010 through 2014 was $61,479 (2014 dollars). If the estimated reduction in ex-vessel revenue was borne entirely by these vessels, it would result in a loss of $406 per vessel, or less than 1 percent of their average annual revenue from all species from 2010 through 2014. When the proposed commercial trip limit and proposed minimum size limit for the GA/NC stock are analyzed together, the combined effect on all vessels that fish for hogfish in the corresponding stock area would be an estimated reduction in aggregate ex-vessel revenue of $5,741 (2014 dollars).

For the FLK/EFL stock, the proposed commercial trip limit would not be expected to reduce aggregate commercial landings or ex-vessel revenue in 2017. This assumes that prices would not change as a result of a change in the timing of landings. In subsequent years, as the commercial ACL for the FLK/EFL stock increases, the proposed commercial trip limit of 25 lb (11 kg) would be more likely to prevent full harvest of the commercial ACL and result in a reduction in ex-vessel revenue relative to no trip limit. Under the proposed commercial trip limit, the 2017 fishing season is expected to be open 33 days longer than what would be expected under the proposed commercial ACL of 3,510 lb (1,592 kg) and with no commercial trip limit implemented. Because more trips would be required to harvest the same amount of fish, the proposed commercial trip limit could reduce profitability for some vessels. Conversely, a longer commercial fishing season in the FLK/EFL stock area may have positive economic effects for other vessels by expanding the number of species available for harvest later in the fishing year. On average (2010 through 2014), 37 vessels with Federal commercial snapper-grouper permits took at least 1 trip with hogfish landings in excess of 25 lb (11 kg). Trips with hogfish landings in excess of 25 lb (11 kg) accounted for approximately 28 percent of all hogfish trips reported for the FLK/EFL stock area, on average, from 2010 through 2014. Approximately 66 percent of these were spearfishing trips, 25 percent were trips that used hook-and-line gear, and the remaining 11 percent were trips that used other fishing gear types. Historically (2012 through 2014), 10.1 percent of hogfish landings on hook-and-line trips and approximately 29.4 percent of hogfish landings on spearfishing trips were harvested on trips in excess of the proposed 25 lb (11 kg) commercial trip limit. These statistics suggest that spearfishing trips may be more adversely affected, on average, by the proposed commercial trip limit than hook-and-line trips. However, specific economic effects estimates categorized by fishing gear are not currently available due to the high degree of model uncertainty at the gear level. Individual vessels would be expected to experience varying levels of economic effects, depending on their fishing practices, profit maximization strategies, and ability to substitute other species revenue for hogfish revenue. These economic effects cannot be estimated with available data.

Finally, the proposed rule would establish commercial AMs for the GA/NC and the FLK/EFL stocks of hogfish. These AMs would close the commercial sector for the applicable hogfish stock for the remainder of the fishing year if commercial landings of the applicable stock reach, or are projected to reach, the respective commercial ACL. Additionally, if the commercial ACL is exceeded, NMFS would reduce the stock-specific commercial ACL in the following fishing year by the amount of the commercial ACL overage, only if hogfish is overfished and the total ACL (commercial ACL and recreational ACL) for the respective stock is exceeded. These proposed AMs are the same as the current commercial AMs in place for hogfish in the South Atlantic. It is assumed that the proposed AMs would constrain landings to the proposed commercial ACL for each stock, so no direct economic effects, aside from those already discussed under the proposed ACLs, would be expected to occur. If the proposed AMs do not constrain commercial landings at or below the proposed commercial ACL, then there would be an increase in ex-vessel revenue in the fishing year the AMs are triggered and the commercial

sector closes. Additionally, if the conditions are met for a reduction in the following year's commercial ACL by the amount of the commercial ACL overage, a reduction in ex-vessel revenue in the following fishing year would be expected. The status of the GA/NC stock is currently unknown, so both conditions necessary for a reduction in the following year's commercial ACL would not be met and this provision would only affect the FLK/EFL stock. Because of the timeliness of commercial landings data for federally-permitted vessels, overages and corresponding economic effects would likely be small, should they occur.

In summary, when all of the hogfish management changes in this proposed rule are analyzed together, in 2017 they would result in an estimated reduction in ex-vessel revenue of $5,741 (2014 dollars) for the vessels that harvest hogfish from the GA/NC stock and $63,086 for the vessels that harvest hogfish from the FLK/EFL stock. The proposed changes to the minimum size limit and commercial trip limit would also have the potential to reduce profitability by increasing harvest costs, although these economic effects cannot be estimated with available data. In subsequent years, if hogfish landings from the GA/NC stock increase to reach the proposed commercial ACL, the increase in landings would offset the loss in revenue from the proposed minimum size limit and commercial trip limit, and would generate an increase in ex-vessel revenue of $5,187 (2014 dollars). For the vessels that harvest hogfish from the FLK/EFL stock, it is assumed that ex-vessel revenue from hogfish would increase relative to the proposed annual increases in the commercial ACL from 2017 through 2027. This would lessen the negative economic effects of this proposed rule on commercial vessels each year.

The following discussion describes the alternatives that were not selected as preferred by the South Atlantic Council.

The actions to designate two separate stocks of hogfish in the South Atlantic, set management reference points (MSY and MSST) for those stocks, and establish a rebuilding plan for the FLK/EFL stock of hogfish would not be expected to have any direct economic effects on any small entities, and therefore, the issue of significant alternatives is not relevant.

Two alternatives were considered for the action to specify a stock ACL and OY for the GA/NC stock of hogfish. The first alternative, the no action alternative, would retain the current South Atlantic hogfish stock ACL and would not be expected to alter current harvest or use of the resource. This alternative was not selected by the South Atlantic Council because it would not adhere to the best scientific information available from the most recent hogfish stock assessment. The second alternative is the preferred alternative, which would establish a stock ACL specific to the GA/NC stock of hogfish. This alternative includes three sub-alternatives. The first sub-alternative would set the ACL equal to optimum yield (OY), where OY equals acceptable biological catch (ABC). This sub-alternative would result in a commercial ACL for the GA/NC hogfish stock of 24,690 lb (11,199 kg), round weight, which is approximately 5 percent greater than the proposed commercial ACL. Because status quo landings are not expected to exceed any of the sub-alternative commercial ACL values in the short term, the first sub-alternative would not be expected to have any direct economic effects. However, it would allow for greater potential landings and ex-vessel revenue in the future compared to the preferred alternative in this proposed rule. The first sub-alternative was not selected as preferred by the South Atlantic Council, because the Council determined it was prudent to include a buffer in the stock ACL to account for management uncertainty. The second sub-alternative is the preferred sub-alternative in this proposed rule and would set the stock ACL equal to OY, where OY equals 95 percent of ABC. The third sub-alternative would set the stock ACL equal to OY, where OY equals 90 percent of ABC. This sub-alternative would result in a stock ACL that is approximately 5 percent less than the proposed stock ACL. Based on projected landings for 2017, this would not be expected to have direct economic effects on small entities; however, the potential for future increases in ex-vessel revenue would be less than under this proposed rule. Because allowable harvest and potential ex-vessel revenue would be lower than that under the preferred alternative, this alternative was not selected by the South Atlantic Council.

Two alternatives were considered for the action to specify commercial and recreational ACLs and OY for the FLK/EFL stock of hogfish. The first alternative, the no action alternative, would retain the current South Atlantic hogfish stock ACL and would not be expected to alter current harvest or use of the resource. This alternative was not selected by the South Atlantic Council, because it would not adhere to the best scientific information available from the most recent hogfish stock assessment. The second alternative is the preferred alternative, which would establish commercial and recreational ACLs specific to the FLK/EFL stock of hogfish. This alternative includes three sub-alternatives. The first sub-alternative would set the ACL equal to OY, where OY equals ABC. The commercial hogfish ACL for the FLK/EFL stock would be 3,695 lb (1,676 kg) in 2017 and would increase annually up to 17,914 lb (8,126 kg) in 2027. Under the first sub-alternative, the commercial ACL would be approximately 5 percent greater each year than under the preferred sub-alternative. Assuming the entire commercial ACL is harvested annually, hogfish landings and ex-vessel revenue would also be 5 percent greater under the first sub-alternative than under the preferred sub-alternative. As such, the first sub-alternative would be expected to have less negative economic effects on small entities than this proposed rule. However, it was not selected as preferred by the South Atlantic Council, because they determined it was prudent to include a buffer in the stock ACL to account for management uncertainty. The second sub-alternative is the preferred sub-alternative, which would set the stock ACL equal to OY, where OY equals 95 percent of ABC. The third sub-alternative would set the stock ACL equal to OY, where OY equals 90 percent of ABC. This sub-alternative would result in commercial and recreational ACLs that are approximately 5 percent less each year than under the second (preferred) sub-alternative in this proposed rule and, therefore, would be expected to have more direct negative economic effects on small entities than this proposed rule. Because allowable harvest and expected ex-vessel revenue would be lower than that under the preferred alternative, this alternative was not selected by the South Atlantic Council.

Three alternatives were considered for the action to increase the commercial and recreational minimum size limits for the GA/NC and FLK/EFL stocks of hogfish. The first alternative, the no action alternative, would retain the current South Atlantic hogfish minimum size limit of 12 inches (30.5 cm), FL, for both sectors. This would not be expected to alter commercial harvest rates relative to the status quo, so no direct economic effects to small entities would be expected to occur. This alternative was not selected by the South Atlantic Council, because it would fail to acknowledge important biological differences between the two

stocks of hogfish, as well as stock-specific management needs.

The second alternative, which was selected as preferred, would increase the commercial and recreational minimum size limit for the GA/NC stock. The second alternative contains six sub-alternatives. The first sub-alternative would increase the minimum size limit from 12 inches (30.5 cm), FL, to 16 inches (38.1 cm), FL. This would be expected to result in an annual reduction in commercial ex-vessel revenue of only $479 (2014 dollars), which is $1,041 less than the reduction expected under the proposed minimum size limit. This sub-alternative was not selected as preferred because it would be expected to result in fewer hogfish reaching sexual maturity, fewer hogfish transitioning to males, and more negative biological effects than the proposed minimum size limit. The second sub-alternative is the preferred sub-alternative, which would set the commercial and recreational minimum size limit for the GA/NC stock at 17 inches (43.2 cm), FL. The third through the fifth sub-alternatives would set the commercial and recreational minimum size limit at 18, 19, and 20 inches (45.7, 48.3, and 50.8 cm), FL, respectively. These sub-alternatives were not selected because they would be expected to result in a greater decrease in commercial ex-vessel revenue than the proposed minimum size limit. The sixth sub-alternative would set the commercial and recreational minimum size limit at 15 inches (38.1 cm), FL, in the first year of implementation, 18 inches (45.8 cm), FL, in the second year, and 20 inches (50.8 cm), FL, in the third year. This sub-alternative would be expected to have a smaller direct negative economic effect on small entities than the proposed minimum size limit in the first year of implementation only, and a larger direct negative economic effect thereafter. The sixth sub-alternative was not selected by the South Atlantic Council, because there was little public support for step-up size limit increases, and it would not aid in simplifying regulations.

The third alternative, also selected as preferred, would increase the commercial and recreational minimum size limit for the FLK/EFL stock. The third alternative contains five sub-alternatives. The first and second sub-alternatives would increase the commercial and recreational minimum size limit to 14 and 15 inches (35.6 and 38.1 cm), FL, respectively. These sub-alternatives would not be expected to affect aggregate ex-vessel revenue in the short-term; however, by allowing for potentially higher catch rates, they would be less likely to negatively affect profitability than the proposed minimum size limit. The specific effects on profitability cannot be estimated with available data. These sub-alternatives were not selected by the South Atlantic Council, because they would be expected to result in fewer hogfish reaching sexual maturity, fewer hogfish transitioning to males, and more negative biological effects than the proposed minimum size limit. The third sub-alternative is the preferred sub-alternative, which would increase the commercial and recreational minimum size limit to 16 inches (38.1 cm), FL. The fourth sub-alternative would increase the minimum size limit to 17 inches (43.2 cm), FL, which would be more likely to negatively affect profitability than the proposed minimum size limit and, therefore, was not selected as preferred. The fifth sub-alternative would set the commercial and recreational minimum size limit at 14 inches (35.6 cm), FL, in the first year of implementation and 16 inches (38.1 cm), FL, in the third year. This sub-alternative would provide for a more gradual increase in the minimum size limit up to 16 inches (38.1 cm), FL, which would be expected to have less negative economic effects than the proposed minimum size limit in the first year of implementation and equivalent effects in the third year and beyond. The fifth sub-alternative was not selected by the Council, because it would have less immediate biological benefits to the FLK/EFL hogfish stock, which is currently overfished.

Three alternatives were considered for the action to establish commercial trip limits for the GA/NC and FLK/EFL stocks of hogfish. Under the first alternative, the no action alternative, there would be no commercial trip limit specified for either stock. This would not be expected to alter commercial harvest rates relative to the status quo, so no direct economic effects to small entities would be expected to occur. This alternative was not selected by the South Atlantic Council, because they decided it was necessary to implement stock-specific commercial trip limits in order to successfully constrain commercial hogfish landings and to end overfishing of the FLK/EFL stock.

The second alternative, which was selected as preferred, would establish a commercial trip limit for the GA/NC stock. The second alternative contains five sub-alternatives. The first and second sub-alternatives would set the commercial trip limit at 100 lb (45 kg) and 250 lb (113 kg), respectively, which would be expected to reduce aggregate annual landings and ex-vessel revenue by 43 percent and 19 percent, respectively. These reductions in ex-vessel revenue would be larger than what would be expected under the proposed commercial trip limit and, thus, the first and second sub-alternatives were not selected. The third sub-alternative was selected as preferred and would set the commercial trip limit at 500 lb (227 kg), which was estimated to reduce ex-vessel revenue by 6 percent. The fourth sub-alternative would set the commercial trip limit at 700 lb (318 kg). This sub-alternative would be expected to reduce ex-vessel revenue by only 3 percent, which would translate into $2,287 (2014 dollars) more in aggregate ex-vessel revenue than under the proposed trip limit. The fifth sub-alternative would not specify a commercial trip limit, which would be expected to have no effect on status quo hogfish landings or ex-vessel revenue. Under the fifth sub-alternative, ex-vessel revenue would be $4,470 (2014 dollars) greater than what would be expected under the proposed trip limit. The fourth and fifth sub-alternatives were not selected as preferred because the South Atlantic Council chose to take a precautionary approach to setting the commercial trip limit for the GA/NC stock in order to prevent effort shifts as a result of stricter commercial regulations needed to end overfishing of the FLK/EFL stock. Additionally, the vast majority of commercial trips in Georgia and the Carolinas do not land more than 500 lb (227 kg) of hogfish per trip.

The third alternative, also selected as preferred, would establish a commercial trip limit for the FLK/EFL stock. The third alternative contains six sub-alternatives. The first sub-alternative was selected as preferred and would set the commercial trip limit at 25 lb (11 kg). Sub-alternatives 2 through 5 would set the commercial trip limit at 50 lb (23 kg), 100 lb (45 kg), 150 lb (68 kg), and 200 lb (91 kg), respectively. The sixth sub-alternative would not specify a commercial trip limit. These sub-alternatives for commercial trip limits would not be expected to affect aggregate ex-vessel revenue in the short term, given the low proposed commercial ACL. However, for each incremental increase in the commercial trip limit, the likelihood of direct negative effects on profitability would be reduced. Because of the proposed increasing commercial ACL schedule, sub-alternatives 2 through 5 may provide for greater aggregate annual ex-vessel hogfish revenue and increased profitability on hogfish trips in the

medium to long term, relative to the proposed commercial trip limit. These economic effects cannot be estimated with available data. However, sub-alternatives 2 through 6 were not selected by the South Atlantic Council because, given the overfished status of the stock, the South Atlantic Council wanted to be conservative in setting the commercial trip limit in order to end overfishing and prevent commercial ACL overages.

Four alternatives were considered for the action to establish commercial and recreational AMs for the GA/NC and the FLK/EFL stocks of hogfish. The first alternative, the no action alternative, would retain the current South Atlantic hogfish AMs for both sectors. This alternative was not selected by the South Atlantic Council because stock-specific AMs would be required to ensure landings are constrained to the commercial ACL for each stock. The second alternative was selected as preferred and would specify commercial AMs for each stock that are equivalent to the existing AMs for the single South Atlantic stock. The third and fourth alternatives pertain exclusively to recreational anglers and therefore no direct economic effects on any small entities would be expected.

List of Subjects in 50 CFR Part 622

Commercial, Fisheries, Fishing, Gulf of Mexico, Hogfish, Recreational, South Atlantic.

Dated: December 12, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.1, revise the Table 1 entry for ''FMP for the Snapper-Grouper Fishery of the South Atlantic Region'', and add footnote 8 to Table 1 to read as follows:

§ 622.1 Purpose and scope.

* * * * *

TABLE 1 TO § 622.1—FMPS IMPLEMENTED UNDER PART 622

FMP title	Responsible fishery management council(s)	Geographic area
*	*	*
FMP for the Snapper-Grouper Fishery of the South Atlantic Region	SAFMC	South Atlantic.[1 2 6 8]
*	*	*

[1] Regulated area includes adjoining state waters for purposes of data collection and quota monitoring.

[2] Black sea bass and scup are not managed by the FMP or regulated by this part north of 35°15.9′ N. lat., the latitude of Cape Hatteras Light, NC.

* * * * * * *

[6] Nassau grouper in the South Atlantic EEZ and the Gulf EEZ are managed under the FMP.

* * * * * * *

[8] Hogfish in the Gulf EEZ are managed under the FMP from the South Atlantic and Gulf of Mexico intercouncil boundary specified in § 600.105(c) and south of 25°09′ N. lat. off the west coast of Florida. Hogfish in the remainder of the Gulf EEZ are managed under the FMP for the Reef Fish Resources of the Gulf of Mexico.

■ 3. In § 622.183, add paragraph (b)(4) to read as follows:

§ 622.183 Area and seasonal closures.

* * * * *

(b) * * *

(4) Hogfish recreational sector off the Florida Keys and east coast of Florida. From January through April and from November through December each year, the recreational harvest or possession of hogfish in or from the South Atlantic EEZ off the Florida Keys and east coast of Florida, and in the Gulf EEZ south of 25°09′ N. lat. off the west coast of Florida is prohibited, and the bag and possession limits are zero.

* * * * *

■ 4. In § 622.185, revise paragraph (c)(3) to read as follows:

§ 622.185 Size limits.

* * * * *

(c) * * *

(3) *Hogfish.* (i) In the South Atlantic EEZ off Georgia, South Carolina, and North Carolina—17 inches (43.2 cm), fork length.

(ii) In the South Atlantic EEZ off the Florida Keys and east coast of Florida, and in the Gulf EEZ south of 25°09′ N. lat. off the west coast of Florida—16 inches (38.1 cm), fork length.

* * * * *

■ 5. In § 622.187, revise paragraph (b)(3) to read as follows:

§ 622.187 Bag and possession limits.

* * * * *

(b) * * *

(3) *Hogfish.* (i) In the South Atlantic EEZ off Georgia, South Carolina, and North Carolina—2.

(ii) In the South Atlantic EEZ off the Florida Keys and east coast of Florida, and in the Gulf EEZ south of 25°09′ N. lat. off the west coast of Florida—1.

* * * * *

■ 6. In § 622.191, add paragraph (a)(12) to read as follows:

§ 622.191 Commercial trip limits.

* * * * *

(a) * * *

(12) *Hogfish.* (i) Until the commercial ACL specified in § 622.193(u)(1)(iii)(A) is reached or is projected to be reached off Georgia, South Carolina, and North Carolina, 500 lb (227 kg), round weight.

(ii) Until the commercial ACL specified in § 622.193(u)(2)(iii)(A) is reached or is projected to be reached off the Florida Keys and east coast of Florida, and south of 25°09′ N. lat. off the west coast of Florida, 25 lb (11 kg), round weight.

(iii) See § 622.193(u)(1)(i) or (2)(i) for the limitations regarding hogfish after a commercial ACL is reached.

* * * * *

■ 7. In § 622.193, revise paragraph (u) to read as follows:

§ 622.193 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(u) *Hogfish*—(1) *Hogfish off Georgia, South Carolina, and North Carolina (Georgia-North Carolina)*—(i) *Commercial sector.* (A) If commercial landings for the Georgia-North Carolina hogfish stock, as estimated by the SRD, reach or are projected to reach the commercial ACL specified in paragraph (u)(1)(iii)(A) of this section, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. On and after the effective date of such a notification, all sale or purchase of hogfish in or from the South Atlantic EEZ off Georgia, South Carolina, and North Carolina is prohibited, and harvest or possession of this species is limited to the bag and possession limits. These bag and possession limits apply to the Georgia-North Carolina hogfish stock on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

(B) If commercial landings for the Georgia-North Carolina hogfish stock, as estimated by the SRD, exceed the commercial ACL specified in paragraph (u)(1)(iii)(A) of this section, and the combined commercial and recreational ACL specified in paragraph (u)(1)(iii)(C) of this section is exceeded during the same fishing year, and the Georgia-North Carolina hogfish stock is overfished based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for the stock in the following fishing year by the amount of the commercial ACL overage in the prior fishing year.

(ii) *Recreational sector.* (A) If recreational landings for the Georgia-North Carolina hogfish stock, as estimated by the SRD, reach or are projected to reach the recreational ACL specified in paragraph (u)(1)(iii)(B) of this section, the AA will file a notification with the Office of the Federal Register to close the recreational sector for the remainder of the fishing year regardless if the stock is overfished, unless NMFS determines that no closure is necessary based on the best scientific information available. On and after the effective date of such a notification, the bag and possession limits for hogfish in or from the South Atlantic EEZ off Georgia, South Carolina, and North Carolina are zero.

(B) If recreational landings for the Georgia-North Carolina hogfish stock, as estimated by the SRD, exceed the recreational ACL specified in paragraph (u)(1)(iii)(B) of this section, then during the following fishing year recreational landings will be monitored for a persistence in increased landings. If necessary, the AA will file a notification with the Office of the Federal Register to reduce the length of the following recreational fishing season and recreational ACL in the following fishing year by the amount of the recreational ACL overage if the Georgia-North Carolina hogfish stock is overfished, based on the most recent Status of U.S. Fisheries Report to Congress, and the combined commercial and recreational ACL is exceeded during the same fishing year to ensure recreational landings do not exceed the recreational ACL in the following fishing year. NMFS will use the best scientific information available to determine if reducing the length of the recreational fishing season and recreational ACL is necessary. When a recreational sector is closed as a result of NMFS reducing the length of the following recreational fishing season and ACL, the bag and possession limits for hogfish in or from the South Atlantic EEZ off Georgia, South Carolina, and North Carolina are zero.

(iii) *ACLs for the Georgia-North Carolina stock.* This stock includes hogfish off Georgia, South Carolina, and North Carolina. All weights are given in round weight.

(A) *Commercial ACL*—23,456 lb (10,639 kg).

(B) *Recreational ACL*—988 fish.

(C) The combined commercial and recreational ACL for the Georgia-North Carolina hogfish stock is 33,930 lb (15,390 kg).

(2) *Hogfish off the Florida Keys and east coast of Florida, and south of 25°09′ N. lat. off the west coast of Florida (Florida Keys-East Florida)*—(i) *Commercial sector.* (A) If commercial landings for the Florida Keys-East Florida hogfish stock, as estimated by the SRD, reach or are projected to reach the applicable commercial ACL specified in paragraph (u)(2)(iii)(A) of this section, the AA will file a notification with the Office of the Federal Register to close the applicable commercial sector for the remainder of the fishing year. On and after the effective date of such a notification, all sale or purchase of hogfish in or from the EEZ off the Florida Keys and east coast of Florida, and south of 25°09′ N. lat. off the west coast of Florida is prohibited, and harvest or possession of this species is limited to the bag and possession limits. These bag and possession limits apply for this hogfish stock on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters.

(B) If commercial landings for the Florida Keys-East Florida hogfish stock, as estimated by the SRD, exceed the applicable commercial ACL specified in paragraph (u)(2)(iii)(A) of this section, and the applicable combined commercial and recreational ACL specified in paragraph (u)(2)(iii)(C) of this section is exceeded during the same fishing year, and the stock is overfished based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for the stock in the following fishing year by the amount of the applicable commercial ACL overage in the prior fishing year.

(ii) *Recreational sector.* (A) If recreational landings for the Florida Keys-East Florida hogfish stock, as estimated by the SRD, reach or are projected to reach the applicable recreational ACL specified in paragraph (u)(2)(iii)(B) of this section, the AA will file a notification with the Office of the Federal Register to close the recreational sector for the remainder of the fishing year regardless if the stock is overfished, unless NMFS determines that no closure is necessary based on the best scientific information available. On and after the effective date of such a notification, the bag and possession limits for hogfish in or from the EEZ off the Florida Keys and east coast of Florida, and south of 25°09′ N. lat. off the west coast of Florida are zero.

(B) If recreational landings for the Florida Keys-East Florida hogfish stock, as estimated by the SRD, exceed the applicable recreational ACL specified in paragraph (u)(2)(iii)(B) of this section, then during the following fishing year recreational landings will be monitored for a persistence in increased landings. If necessary, the AA will file a notification with the Office of the Federal Register to reduce the length of the following applicable recreational fishing season and recreational ACL in the following fishing year by the amount of the recreational ACL overage if the Florida Keys-East Florida hogfish stock is overfished, based on the most recent Status of U.S. Fisheries Report to Congress, and the applicable combined commercial and recreational ACL is exceeded during the same fishing year to ensure recreational landings do not exceed the recreational ACL in the following fishing year. NMFS will use the best scientific information available to determine if reducing the length of

the recreational fishing season and recreational ACL is necessary. When a recreational sector is closed as a result of NMFS reducing the length of the following recreational fishing season and ACL, the bag and possession limits for hogfish in or from the EEZ off the Florida Keys and east coast of Florida, and south of 25°09′ N. lat. off the west coast of Florida are zero.

(iii) *ACLs for the Florida Keys-East Florida stock.* This stock includes hogfish off the Florida Keys and east coast of Florida, and south of 25°09′ N. lat. off the west coast of Florida.

(A) *Commercial ACL.* See the following table. All weights are given in round weight.

Year	Commercial ACL
2017	3,510 lb (1,592 kg).
2018	4,524 lb (2,052 kg).
2019	5,670 lb (2,572 kg).
2020	6,926 lb (3,142 kg).
2021	8,277 lb (3,754 kg).
2022	9,703 lb (4,401 kg).
2023	11,179 lb (5,071 kg).
2024	12,677 lb (5,750 kg).
2025	14,167 lb (6,426 kg).
2026	15,621 lb (7,086 kg).
2027	17,018 lb (7,719 kg).

(B) *Recreational ACL.* See the following table. The recreational ACL is in numbers of fish.

Year	Recreational ACL
2017	15,689
2018	18,617
2019	21,574
2020	25,086
2021	29,096
2022	33,358
2023	37,671
2024	41,934
2025	46,046
2026	49,949
2027	53,610

(C) *Combined commercial and recreational ACL.* See the following table. The combined commercial and recreational ACL is in numbers of fish.

Year	Combined commercial and recreational ACL
2017	17,034
2018	20,350
2019	23,746
2020	27,740
2021	32,267
2022	37,076
2023	41,954
2024	46,791
2025	51,474
2026	55,934
2027	60,130

* * * * *

[FR Doc. 2016–30223 Filed 12–15–16; 8:45 am]

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Notices

Federal Register

Vol. 81, No. 242

Friday, December 16, 2016

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 COMMERCE

Foreign-Trade Zones Board

[B–84–2016]

Foreign-Trade Zone (FTZ) 21—Dorchester County, South Carolina, Notification of Proposed Production Activity, AGRU America Charleston, LLC (Industrial Pipes), North Charleston, South Carolina

The South Carolina State Ports Authority, grantee of FTZ 21, submitted a notification of proposed production activity to the FTZ Board on behalf of AGRU America Charleston, LLC (AGRU), located in North Charleston, South Carolina. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 9, 2016.

The AGRU facility is located within Site 5 of FTZ 21. The facility is used for the production of large volume industrial pipes for high volume flow applications. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt AGRU from customs duty payments on the foreign-status component used in export production. On its domestic sales, AGRU would be able to choose the duty rate during customs entry procedures that applies to high density polyethylene (HDPE) pipes (duty rate 3.1%) for the foreign-status input noted below. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include high density polyethylene (HDPE) pellets having relative viscosity of 1.44 or more (duty rate 6.5%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is January 25, 2017.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: December 12, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–30341 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–920]

Lightweight Thermal Paper From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 12, 2016, the Department of Commerce (''Department'') published the preliminary results of the administrative review of the antidumping duty order on lightweight thermal paper (''LWTP'') from the People's Republic of China (''PRC''). The period of review (''POR'') is November 1, 2014, through October 31, 2015. The review covers two exporters of subject merchandise: Jaan Huey Co. Ltd. (''Jaan Huey'') and Shanghai Hanhong Paper Co., Ltd. and Hanhong Paper Co. Ltd (together, ''Hanhong''). We invited interested parties to comment on our preliminary results. No party provided comment. Accordingly, for the final results of review, we continue to find that because neither respondent participated in this review, Jaan Huey and Hanhong have not demonstrated eligibility for a separate rate in this segment of the proceeding, and therefore, we are treating both as part of the PRC-wide entity.

DATES: Effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Keith Haynes, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5139.

SUPPLEMENTARY INFORMATION:

Background

On August 12, 2016, the Department of Commerce (''Department'') published the *Preliminary Results* [1] of the instant review, preliminarily finding that because neither respondent participated in this review, Jaan Huey and Hanhong did not demonstrate eligibility for a separate rate in this segment of the proceeding and are, thus, both a part of the PRC-wide entity. We invited interested parties to submit comments on the *Preliminary Results.* We received no comments from interested parties.

The Department has conducted this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (''the Act'').

Scope of the Order

The merchandise covered by this review includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of ± 4.0 g/m^2) or less; irrespective of dimensions; [2] with or without a base coat [3] on one or both sides; with thermal active coating(s) [4] on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without

[1] *See Lightweight Thermal Paper from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015,* 81 FR 53431 (August 12, 2016) (''*Preliminary Results*'').

[2] LWTP is typically produced in jumbo rolls that are slit to the specifications of the converting equipment and then converted into finished slit rolls. Both jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of these orders.

[3] A base coat, when applied, is typically made of clay and/or latex and like materials and is intended to cover the rough surface of the paper substrate and to provide insulating value.

[4] A thermal active coating is typically made of sensitizer, dye, and co-reactant.

a top coat;[5] and without an adhesive backing. Certain lightweight thermal paper is typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts. The merchandise subject to this review may be classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under subheadings 3703.10.60, 4811.59.20, 4811.90.8040, 4811.90.9090, 4820.10.20, 4823.40.00, 4811.90.8030, 4811.90.8050, 4811.90.9030, and 4811.90.9050.[6] [7] Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.

Final Results of Review

The Department continues to find that Jaan Huey and Hanhong are not eligible for a separate rate and are part of the PRC-wide entity for the period November 1, 2014, through October 31, 2015. Because no party requested a review of the PRC-wide entity, and the Department no longer considers the PRC-wide entity as an exporter conditionally subject to administrative reviews, we did not conduct a review of the PRC-wide entity and the PRC-wide entity's rate is not subject to change in this administrative review.[8]

Assessment Rates

We will instruct U.S. Customs and Border Protection (''CBP'') to apply an *ad valorem* assessment rate of 115.29 percent (the rate applicable to the PRC-wide entity) to all entries of subject merchandise during the POR which were exported by Jaan Huey and Hanhong. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Jaan Huey and Hanhong, as part of the PRC-wide entity, will be the PRC-wide rate of 115.29 percent; (2) for previously investigated or reviewed PRC and non-PRC exporters who are not under review in this segment of the proceeding but who have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 115.29 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–30308 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–DS–P

[5] A top coat, when applied, is typically made of polyvinyl acetone, polyvinyl alcohol, and/or like materials and is intended to provide environmental protection, an improved surface for press printing, and/or wear protection for the thermal print head.

[6] HTSUS subheading 4811.90.8000 was a classification used for LWTP until January 1, 2007. Effective that date, subheading 4811.90.8000 was replaced with 4811.90.8020 (for gift wrap, a non-subject product) and 4811.90.8040 (for ''other'' including LWTP). HTSUS subheading 4811.90.9000 was a classification for LWTP until July 1, 2005. Effective that date, subheading 4811.90.9000 was replaced with 4811.90.9010 (for tissue paper, a non-subject product) and 4811.90.9090 (for ''other,'' including LWTP).

[7] As of January 1, 2009, the International Trade Commission deleted HTSUS subheadings 4811.90.8040 and 4811.90.9090 and added HTSUS subheadings 4811.90.8030, 4811.90.8050, 4811.90.9030, and 4811.90.9050 to the *Harmonized Tariff Schedule of the United States (2009). See Harmonized Tariff Schedule of the United States (2009),* available at <*ww.usitc.gov*>. These HTSUS subheadings were added to the scope of the order in LWTP's LTFV investigation.

[8] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–869]

Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan: Final Results of Antidumping Duty Administrative Review; 2013–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On June 17, 2016, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on diffusion-annealed, nickel-plated flat rolled steel products from Japan.[1] The review covers one company, Toyo Kohan Co., Ltd. (Toyo Kohan). The period of review (POR) is November 19, 2013 through April 30, 2015. As a result of our analysis of the comments and information received, these final results do not differ from the *Preliminary Results.*

DATES: Effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Dena Crossland or Brian Davis, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3362 or (202) 482–7924, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 17, 2016, the Department published the *Preliminary Results.* In accordance with 19 CFR 351.309(c)(1)(ii), we invited parties to comment on our *Preliminary Results.*[2] We received a case brief from Thomas Steel Strip Corporation (Petitioner) on

[1] *See Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Preliminary Results of Antidumping Duty Administrative Review; 2013–2015,* 81 FR 39627 (June 17, 2016) (*Preliminary Results*).

[2] *See Preliminary Results,* 81 FR at 39628.

August 1, 2016,[3] and a rebuttal brief from Toyo Kohan on August 12, 2016.[4]

On October 13, 2016, the Department issued a memorandum extending the time period for issuing the final results of this administrative review from October 15, 2016, to December 9, 2016.[5]

Scope of the Order

The diffusion-annealed, nickel-plated flat-rolled steel products included in this order are flat-rolled, cold-reduced steel products, regardless of chemistry; whether or not in coils; either plated or coated with nickel or nickel-based alloys and subsequently annealed (*i.e.,* ''diffusion-annealed''); whether or not painted, varnished or coated with plastics or other metallic or nonmetallic substances; and less than or equal to 2.0 mm in nominal thickness. For purposes of this order, ''nickel-based alloys'' include all nickel alloys with other metals in which nickel accounts for at least 80 percent of the alloy by volume.

Imports of merchandise included in the scope of this order are classified primarily under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7212.50.0000 and 7210.90.6000, but may also be classified under HTSUS subheadings 7210.70.6090, 7212.40.1000, 7212.40.5000, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.90.0010, 7220.90.0015, 7225.99.0090, or 7226.99.0180. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice.[6] A list of the issues that parties raised and to which we responded is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on-file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed Issues and Decision Memorandum and the electronic version of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we have not recalculated Toyo Kohan's weighted-average dumping margin for these final results.

Final Results of Review

The Department determines that, for the period November 19, 2013, through April 30, 2015, the weighted-average dumping margin for Toyo Kohan Co., Ltd. is zero.

Duty Assessment

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries.[7] Because Toyo Kohan's weighted-average dumping margin is zero for these final results of review, we will instruct CBP not to assess duties on any of its entries in accordance with 19 CFR 351.212 and the *Final Modification for Reviews, i.e.,* ''{w}here the weighted-average margin of dumping for the exporter is determined to be zero or *de minimis,* no antidumping duties will be assessed.''[8] The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

For entries of subject merchandise during the POR produced by Toyo Kohan for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for intermediate company(ies) involved in the transaction. The all-others rate is 45.42 percent.[9] We intend to issue assessment instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of this notice for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of these final results, as provided by section 751(a)(2) of the Tariff Act of 1930, as amended (Act): (1) No cash deposit will be required for Toyo Kohan since the rate for Toyo Kohan in the final results of this administrative review is zero; (2) for merchandise exported by manufacturers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 45.42 percent, the all-others rate established in the antidumping investigation.[10] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant

[3] *See* Case Brief of Thomas Steel Strip Corporation, dated August 1, 2016 (Petitioner's Case Brief).

[4] *See* Letter from Toyo Kohan to the Department of Commerce regarding ''Toyo Kohan's Rebuttal Brief: Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan,'' dated August 12, 2016 (Toyo Kohan's Rebuttal Brief).

[5] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Dena Crossland, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations, Office VI, through Scot Fullerton, Antidumping and Countervailing Duty Operations, Office VI, on the subject of ''Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Extension of Deadline for Final Results of Antidumping; 2013/2015,'' dated October 13, 2016.

[6] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance entitled ''Issues and Decision Memorandum for the Final Results of Administrative Review, 2013–2015: Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan,'' dated concurrently with this notice (Issues and Decision Memorandum).

[7] In these final results, the Department applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[8] *Id.* at 8102.

[9] *See Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Antidumping Duty Order,* 79 FR 30816, 30817 (May 29, 2014) (*Order*).

[10] *Id.*

entries during the POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h).

Dated: December 9, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Final Issues and Decision Memorandum

I. Summary
II. List of Issues
III. Background
IV. Scope of the Order
V. Discussion of Interested Party Comments
Comment 1: Whether Certain of Toyo Kohan's Home Market Transactions Were Made Outside the Ordinary Course of Trade and Should Be Excluded From Analysis
Comment 2: U.S. Date of Sale
Comment 3: Whether the Costs for a Certain Control Number Should Be Disregarded
VI. Recommendation

[FR Doc. 2016–30306 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–810]

Stainless Steel Bar From India: Initiation of Antidumping Duty Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is initiating a changed circumstances review of the antidumping duty order on stainless steel bar (SSB) from India to determine whether to reinstate the order with respect to Viraj Profiles Ltd. (Viraj) and Venus Wire Industries Pvt. Ltd. and its affiliates Hindustan Inox, Precision Metals and Sieves Manufacturers (India) Pvt. Ltd. (collectively, Venus).

DATES: Effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Thomas Schauer, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–0410.

SUPPLEMENTARY INFORMATION:

Background

On February 21, 1995, the Department published the antidumping duty (AD) order on SSB from India.[1] On September 14, 2004, the Department conditionally revoked the *Order* with respect to merchandise produced and exported by Viraj Alloys, Ltd., Viraj Forgings, Ltd., and Viraj Impoexpo, Ltd. (collectively, Viraj, and now known as Viraj Profiles Limited [2]), based on a finding of three years of no dumping.[3] On September 13, 2011, the Department conditionally revoked the *Order* with respect to merchandise produced and exported by Venus, based on a finding of three years of no dumping.[4]

On September 29, 2016, the petitioners [5] alleged that, since their conditional revocation from the *Order,* there is evidence that Viraj and Venus have both resumed sales to the United States at prices below normal value (NV). The petitioners note that Viraj and Venus agreed in writing to reinstatement into the AD order if either company were found to have resumed dumping, and alleges that, because Viraj and Venus violated this agreement, the Department should initiate a changed circumstances review (CCR) to determine whether to reinstate Viraj and Venus into the *Order.*[6]

In November 2016, Viraj and Venus objected to the petitioners' request for a CCR.[7] On November 28, 2016, the petitioners submitted a rebuttal to Venus' objection to the request for a CCR.[8] Also in November 2016, the Department extended the time period for determining whether to initiate the CCR by 45 days to December 28, 2016.[9]

In accordance with section 751(b) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b), and as discussed in further detail below, the Department finds the information submitted by the petitioners sufficient to warrant initiation of a CCR of the AD order on SSB from India with respect to Viraj and Venus. The period of review (POR) is July 1, 2015, through June 30, 2016.

In this CCR, we intend to determine whether Viraj or Venus sold SSB from India at less than NV subsequent to their revocations from the *Order.* If we make an affirmative preliminarily finding, we will direct U.S. Customs and Border Protection to suspend liquidation of all entries of SSB manufactured in India and exported by the company(ies) for which we made an affirmative finding.

Scope of the Order

The merchandise subject to the order is stainless steel bar. Stainless steel bar

[1] *See Antidumping Duty Orders: Stainless Steel Bar from Brazil, India, and Japan,* 60 FR 9661 (February 21, 1995) (*Order*).

[2] In July 2006, Viraj Forgings Ltd. merged with Viraj Alloys Ltd.; in April 2007, Viraj Alloys and Viraj Impoexpo Ltd. merged into Viraj Profiles Ltd. *See* Letter from the petitioners, ''Stainless Steel Bar From India—Petitioners' Request for Changed Circumstances Reviews,'' dated September 29, 2016 (CCR Request) at Exhibit GEN–1.

[3] *See Stainless Steel Bar From India; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part,* 69 FR 55409 (September 14, 2004) (*Viraj Revocation*). The regulatory provision governing partial revocation at the time of Viraj's (and Venus's) revocation was 19 CFR 353.25 (1997). The relevant language remained substantively unchanged when 19 CFR 353.25 was superseded by 19 CFR 351.222 in 1997. *See Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments,* 61 FR 7308 (February 27, 1996) (*1996 Notice of Proposed Rulemaking*); *see also Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27325–26, 27399–402 (May 19, 1997) (*Preamble*). The portion of 19 CFR 351.222 related to partial revocations of orders as to specific companies has been revoked for all reviews initiated on or after June 20, 2012. *See Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders: Final Rule,* 77 FR 29875 (May 21, 2012) (*Revocation Final Rule*).

[4] *See Stainless Steel Bar from India: Final Results of the Antidumping Duty Administrative Review, and Revocation of the Order, in Part,* 76 FR 56401 (September 13, 2011) (*Venus Revocation*).

[5] Carpenter Technology Corporation, Crucible Industries LLC, Electralloy, a Division of G.O. Carlson, Inc., North American Stainless, Outokumpu Stainless Bar, LLC, Universal Stainless & Alloy Products, Inc., and Valbruna Slater Stainless, Inc. (collectively, the petitioners)

[6] *See* CCR Request.

[7] *See* Letter from Viraj, ''Stainless Steel Bar from India,'' dated November 14, 2016 (Viraj Rebuttal) and Letter from Venus, ''Stainless Steel Bars (''SSB'') from India—Response to Request for Changed Circumstances Review,'' dated November 4, 2016 (Venus Rebuttal).

[8] *See* Letter from the petitioners, ''Stainless Bar from India—Petitioners' Comments Concerning Venus' Rebuttal Comments to Petitioners' Changed Circumstances Review Request,'' dated November 29, 2016.

[9] *See* Memorandum, ''Extension of Deadline to Initiate Changed Circumstances Review,'' dated November 10, 2016.

means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons. Stainless steel bar includes cold-finished stainless steel bars that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut-to-length flat-rolled products (*i.e.,* cut-to-length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.,* cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes, and sections.

Imports of these products are currently classifiable under subheadings 7222.10.00, 7222.11.00, 7222.19.00, 7222.20.00, 7222.30.00 of the Harmonized Tariff Schedule (HTS). Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Allegation of Resumed Dumping

The allegation of resumed dumping upon which the Department has based its decision to initiate a CCR is detailed below. The sources of data for the adjustments that the petitioners calculated relating to NV and U.S. price are discussed in greater detail in the Changed Circumstances Review Initiation Checklist dated concurrently with this notice.

1. Constructed Export Price

The petitioners based U.S. price upon offers for sale from the respondents' U.S. affiliates to unaffiliated customers in the United States, which they obtained from a proprietary source.[10] The offers for sale identify prices and terms of sale for a number of SSB models sold by the respondents' U.S. affiliates.[11] The petitioners made adjustments for movement expenses consistent with the terms of sale, for the U.S. affiliates' profit and selling expenses, and for imputed credit expenses.[12] We recalculated the imputed expenses to be consistent with Policy Bulletin 98.1.[13]

2. Normal Value

The petitioners based NV on home market prices obtained from a proprietary source.[14] The petitioners made an adjustment for imputed credit expenses.[15]

3. Cost of Production

The petitioners based COP on the costs of an integrated U.S. producer of the subject merchandise, as the best information reasonably available, and made adjustments for known differences in cost between the domestic industry and the respondents.[16] Based on a comparison of home market sales and the COP, the petitioners assert that there is reason to believe or suspect that certain home market sales made by Viraj and Venus were priced below COP.[17] Accordingly, the petitioners consider those home market sales to be outside the ordinary course of trade, and relied on the remaining home market sales above COP to establish normal value.[18]

2. Alleged Margins of Dumping

The petitioners allege that there is evidence that Viraj and Venus have both resumed dumping SSB in the United States that is sufficient to warrant initiation of a CCR to determine whether the respondents should be reinstated into the AD order. The petitioners' estimated dumping margins, as revised to recalculate imputed credit expenses for U.S. sales, range from 9.27 to 45.98 percent for Viraj and from 26.59 to 43.55 percent for Venus.[19]

Comments by Interested Parties

As noted above, in November 2016, Viraj and Venus submitted comments on the petitioners' request that the Department initiate a CCR.[20] These comments are detailed in the Changed Circumstances Review Initiation Checklist.

Initiation of Changed Circumstances Review

Pursuant to section 751(b) of the Act, the Department will conduct a CCR upon receipt of a request ''from an interested party for review of an Aantidumping duty order which shows changed circumstances sufficient to warrant a review of the order.'' After examining the petitioners' allegation and supporting documentation, we find that the petitioners have provided evidence of changed circumstances sufficient to initiate a review to determine whether Viraj or Venus have resumed dumping and should be reinstated in the *Order.*[21]

The Department's authority to reinstate a revoked company into an AD order by means of a CCR derives from sections 751(b) and (d) of the Act.[22] The Department's authority to revoke an order is expressed in section 751(d) of the Act. The statute, however, provides no detailed description of the criteria, procedures, or conditions relating to the Department's exercise of this authority. Accordingly, the Department issued regulations that set forth in detail how the Department will exercise the authority granted to it under the statute. At the time of the respondents' revocations from the *Order,* a Department regulation authorized the partial and conditional revocation of orders as to companies that were determined not to have made sales at less than NV for the equivalent of three consecutive years and that certified to the immediate reinstatement into an order if they resumed dumping.[23] Although the regulatory provision for partial and conditional revocation of companies from orders has since been revoked, we have clarified that all conditionally revoked companies remain subject to their certified agreements to be reinstated into the

[10] *See* CCR Request at 11–12 and Exhibits AD–IN–2.B.1 and AD–IN–2.B.2.

[11] *Id.*

[12] *Id.* at 11–12 and Exhibits AD–IN–2.A.1 and AD–IN–2.A.2.

[13] *See* Changed Circumstances Review Initiation Checklist at ''Constructed Export Price'' section.

[14] *Id.* at 15 and Exhibits AD–IN–3.A.1 and AD–IN–3.A.2.

[15] *Id.*

[16] *Id.* at 15–17 and Exhibits AD–IN–4.F.1 and AD–IN–4.F.2.

[17] *Id.* at 17 and Exhibits AD–IN–5.A.1 and AD–IN–5.A.2.

[18] *Id.* at 17 and Exhibits AD–IN–6.A and AD–IN–6.B.

[19] *See* Changed Circumstances Review Initiation Checklist at ''Estimated Margins'' section.

[20] *See* Viraj Rebuttal and Venus Rebuttal.

[21] *See* Changed Circumstances Review Initiation Checklist.

[22] *See Sahaviriya Steel Indus. Pub. Co., Ltd.* v. *United States,* 649 F.3d 1371, 1378 (Fed. Cir. 2011) (*Sahaviriya*) (''{T}his court holds, applying Chevron deference, that Commerce reasonably interpreted its revocation authority under {section 751(d) of the Act} to permit conditional revocation . . . .''); *id.* at 1378–80 (finding that Commerce properly conducted a changed circumstances review for purposes of reconsidering revocation).

[23] *See* 19 CFR 353.25 (1997). As noted above, the relevant language regarding reinstatement remained substantively unchanged when 19 CFR 353.25 was superseded by 19 CFR 351.222 (1997), and the portion of 19 CFR 351.222 related to partial revocations of orders as to specific companies has been revoked for all reviews initiated on or after June 20, 2012. *See 1996 Notice of Proposed Rulemaking; Preamble; Revocation Final Rule.*

order from which they were revoked if the Department finds that the company has resumed dumping.[24] For these reasons, conducting a CCR pursuant to section 751(b) of the Act to determine whether to reinstate Viraj or Venus into the *Order* is consistent with the statute and with the certification that the respondents signed as a precondition to their conditional revocation.[25]

Period of Changed Circumstances Review

The Department intends to request data from Viraj and Venus for the July 1, 2015, through June 30, 2016, period to determine whether it should reinstate the *Order* with respect to these companies because they resumed dumping.

Public Comment

The Department intends to publish in the **Federal Register** a notice of preliminary results of CCR in accordance with 19 CFR 351.221(b)(4) and 351.221(c)(3)(i), which will set forth the Department's preliminary factual and legal conclusions. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results. Unless otherwise extended, the Department intends to issue its final results of review in accordance with the time limits set forth in 19 CFR 351.216(e).

This notice is published in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b) of the Department's regulations.

Dated: December 12, 2016.

Christian Marsh,

Deputy Assistant Secretary, for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–30323 Filed 12–15–16; 8:45 am]

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[24] *See Revocation Final Rule,* 77 FR at 29882.

[25] *See, e.g., Sahaviriya,* 649 F.3d at 1380; *Initiation of Antidumping Duty Changed Circumstances Review: Certain Hot-Rolled Carbon Steel Flat Products from Thailand,* 73 FR 18766, 18769 (April 7, 2008); *see also Viraj Revocation*, 69 FR at 55411 (''Viraj provided each of the certifications required under 19 CFR 351.222(e) . . . {including} an agreement to immediate reinstatement of the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV.''); *see also Venus Revocation,* 76 at 56402–3 (''the company has agreed to immediate reinstatement of the order if we find that it has resumed making sales at less than fair value''). *See also* Changed Circumstances Review Initiation Checklist at Exhibit 6 for copies of the respondents' agreements.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 12, 2016, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of certain pasta (pasta) from Italy. The period of review (POR) is July 1, 2014, through June 30, 2015. As a result of our analysis of the comments and information received, these final results differ from the *Preliminary Results* with respect to Industria Alimentare Colavita S.p.A. (Indalco) and Liguori Pastificio Dal 1820 (Liguori). For the final weighted-average dumping margins, *see* the ''Final Results of Review'' section below.

DATES: Effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Joy Zhang (Liguori) or George McMahon (Indalco), AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1168 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 12, 2016, the Department of Commerce (the Department) published the *Preliminary Results.*[1] In accordance with 19 CFR 351.309(c)(1)(ii), we invited parties to comment on our *Preliminary Results.* On September 7, 2016, Liguori submitted a request for a hearing, which was withdrawn on October 6, 2016.[2] On August 31, 2016, the Department revised the briefing schedule.[3] On September 19, 2016, Petitioners,[4] Indalco, and Liguori submitted their case briefs. On September 26, 2016, Petitioners, Indalco, and Liguori submitted their rebuttal briefs.

Scope of the Order

Imports covered by the order are shipments of certain non-egg dry pasta. The merchandise subject to review is currently classifiable under items 1901.90.90.95 and 1902.19.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised and to which we responded is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on-file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and in the Central Records Unit (CRU), room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we have recalculated Indalco and Liguori's weighted-average dumping margins.[6] As a result of the

[1] *See Certain Pasta From Italy: Preliminary Results of Antidumping Duty Administrative Review;* 2014–2015, 81 FR 53404 (August 12, 2016) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Liguori's letter titled, ''Hearing Request of Liguori Pastificio dal 1820 S.p.A.,'' dated September 7, 2016. *See also* Liguori's letter titled, ''Certain Pasta from Italy: Withdrawal of Hearing Request of Liguori Pastificio dal 1820 S.p.A.,'' dated October 6, 2016.

[3] *See* the Department's Memorandum to All Interested Parties titled, ''Postponement of Briefing Schedule,'' dated August 31, 2016.

[4] Petitioners consist of New World Pasta Company, American Italian Pasta Company and Dakota Growers Pasta Company.

[5] For a full description of the scope of the order, *see* the ''Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and Partial Rescission: Certain Pasta from Italy; 2014–2015'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with this notice (Issues and Decision Memorandum) and incorporated herein by reference.

[6] *See* Issues and Decision Memorandum; *see also* Memorandum to the File, Through Eric B. Greynolds, Program Manager, Office III, from Joy

recalculation of the rates for Indalco and Liguori, the weighted-average dumping margin for the non-selected companies has changed.

Final Results of the Review

As a result of this review, the Department calculated a weighted-average dumping margin of 1.20 percent for Indalco and 10.79 percent for Liguori for the period July 1, 2014, through June 30, 2015. Therefore, in accordance with section 735(c)(5)(A) of the Act, the Department assigned the weighted-average of these two calculated weighted-average dumping margins, 4.00 percent, to the 19 non-selected companies in these final results, as referenced below.[7]

Producer and/or exporter	Weighted-average dumping margin (percent)
Industria Alimentare Colavita S.p.A. (Indalco)	1.20
Liguori Pastificio Dal 1820 (Liguori)	10.79
Agritalia S.r.L. (Agritalia)	4.00
Atar S.r.L. (Atar)	4.00
Corticella Molini e Pastifici S.p.A. (Corticella)	4.00
Delverde Industrie Alimentari S.p.A. (Delverde)	4.00
Domenico Paone fu Erasmo S.p.A. (Domenico)	4.00
F. Divella S.p.A. (F. Divella)	4.00
La Fabbrica della Pasta di Gragnano S.a.s. di Antonio Moccia (La Fabbrica)	4.00
Molino e Pastificio Tomasello S.r.L. (Tomasello)	4.00
P.A.P SNC DI Pazienza G.B. & C. (P.A.P)	4.00
Pasta Zara S.p.A. (Pasta Zara)	4.00
Pastificio Carmine Russo S.p.A. (Carmine)	4.00
Pastificio DiMartino Gaetano & F. Ili S.r.L. (DiMartino)	4.00
Pastificio Fabianelli S.p.A. (Fabianelli)	4.00
Pastificio Felicetti S.r.L. (Felicetti)	4.00
Pastificio Labor S.r.L. (Labor)	4.00
Pastificio Riscossa F. Ili Mastromauro S.p.A. (AKA Pastificio Riscossa F. Ili. Mastromauro S.r.L.) (Riscossa)	4.00
Poiatti S.p.A. (Poiatti)	4.00
Premiato Pastificio Afreltra S.r.L. (Premiato)	4.00
Rustichella d'Abruzzo S.p.A. (Rustichella)	4.00

Duty Assessment

The Department shall determine and Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries.[8] For any individually examined respondents whose weighted-average dumping margin is above *de minimis,* we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.,* at or above 0.5 percent), the Department will issue instructions directly to CBP to assess antidumping duties on appropriate entries.

We intend to issue assessment instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for respondents noted above will be the rate established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 15.45 percent, the all-others rate established in the antidumping investigation as modified by the section 129 determination. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to

Zhang, Case Analyst, Office III, titled ''Certain Pasta from Italy: Calculation Memorandum—Liguori,'' dated concurrently with this notice, and Memorandum to the File, Through Eric B. Greynolds, Program Manager, Office III, from George McMahon, Case Analyst, Office III, titled ''Certain Pasta from Italy: Calculation Memorandum—Indalco,'' dated concurrently with this notice.

[7] The rate applied to the non-selected companies is a weighted-average percentage margin calculated based on the publicly-ranged U.S. volumes of the two reviewed companies with an affirmative dumping margin, for the period July 1, 2014, through June 30, 2015. *See* Memorandum to the File titled, ''Certain Pasta from Italy: Margin for Respondents Not Selected for Individual Examination,'' dated concurrently with this notice.

[8] In these final results, the Department applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h).

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—*List of Topics Discussed in the Final Issues and Decision Memorandum*

I. Summary
II. Background
III. Scope of the Order
IV. List of Comments
V. Analysis of Comments
Indalco
Comment 1: General and Administrative (G&A) Expense Ratio
Comment 2: Interest Expense Ratio
Comment 3: Cost of Goods Sold for G&A and Interest Expense Ratios
Comment 4: Adjustment to the Cost of Manufacturing
Comment 5: Correct Assessment Rate
Comment 6: Level of Trade
Liguori
Comment 7: Depreciation of Idled Asset
Comment 8: Semolina Costs
Comment 9: Home Market Inland Freight
Comment 10: Shape Classification
VI. Recommendation

[FR Doc. 2016–30324 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with October anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

DATES: Effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with October anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (''POR''), it must notify the Department within 30 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *http://access.trade.gov* in accordance with 19 CFR 351.303.[1] Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (''the Act''). Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy must be served on every party on the Department's service list.

[1] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of review. We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 30 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments five days after the deadline for the initial comments.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department has found that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (''Q&V'') Questionnaire for purposes of respondent selection, in general each

company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where the Department considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

Separate Rates

In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994). In accordance with the separate rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://enforcement.trade.gov/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Status Application will be available on the Department's Web site at *http://enforcement.trade.gov/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 30 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate rate status *unless* they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than October 31, 2017.

	Period to be reviewed
Antidumping Duty Proceedings	
Mexico: Carbon and Certain Alloy Steel Wire Rod, A–201–830	10/1/15–9/30/16
ArcelorMittal Las Truchas, S.A. de C.V.	
Deacero S.A.P.I. de C.V.	
Ternium Mexico S.A. de C.V.	
The People's Republic of China: Steel Wire Garment Hangers, A–570–918	10/1/15–9/30/16

[2] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[3] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

	Period to be reviewed
Da Sheng Hanger Ind. Co., Ltd.	
Feirongda Weaving Material Co. Ltd.	
Hangzhou Qingqing Mechanical Co. Ltd.	
Hangzhou Yingqing Material Co. Ltd.	
Hangzhou Yinte.	
Hong Kong Wells Ltd.	
Hongye (HK) Group Development Co. Ltd.	
Liaoning Metals & Mineral Imp/Exp Corp.	
Nantong Eason Foreign Trade Co., Ltd.	
Ningbo Bingcheng Import & Export Co. Ltd.	
Ningbo Dasheng Daily Products Co., Ltd.	
Ningbo Dasheng Hanger Ind. Co. Ltd.	
Ningbo Peacebird Import & Export Co. Ltd.	
Shang Zhou Leather Shoes Plant.	
Shanghai Bao Heng Relay Making Co., Ltd.	
Shanghai Ding Ying Printing & Dyeing Co. Ltd.	
Shanghai Ganghun Beddiry Clothing Factory.	
Shanghai Guangwei Shoes Co., Ltd.	
Shanghai Guoxing Metal Products Co. Ltd.	
Shanghai Jianhai International Trade Co. Ltd.	
Shanghai Lian Development Co. Ltd.	
Shanghai Shuang Qiang Embroidery Factory Co. Ltd.	
Shanghai Tonghui.	
Shanghai Wells Hanger Co., Ltd.	
Shangyu Baoli Electro Chemical Aluminum Products Co., Ltd.	
Shangyu Baoxiang Metal Manufactured Co. Ltd.	
Shangyu Tongfang Labour Protective Articles Co., Ltd.	
Shaoxing Andrew Metal Manufactured Co. Ltd.	
Shaoxing Dingli Metal Clotheshorse Co. Ltd.	
Shaoxing Gangyuan Metal Manufactured Co. Ltd.	
Shaoxing Guochao Metallic Products Co., Ltd.	
Shaoxing Liangbao Metal Manufactured Co. Ltd.	
Shaoxing Meideli Hanger Co. Ltd.	
Shaoxing Shunji Metal Clotheshorse Co., Ltd.	
Shaoxing Shuren Tie Co. Ltd.	
Shaoxing Tongzhou Metal Manufactured Co. Ltd.	
Shaoxing Zhongbao Metal Manufactured Co. Ltd.	
Shaoxing Zhongdi Foreign Trade Co. Ltd.	
Tianjin Innovation International.	
Tianjin Tailai Import and Export Co. Ltd.	
Wahfay Industrial (Group) Co., Ltd.	
Wesken International (Kunshan) Co. Ltd.	
Xia Fang Hanger (Cambodia) Co., Ltd.	
Zhejiang Hongfei Plastic Industry Co. Ltd.	
Zhejiang Jaguar Import & Export Co. Ltd.	
Zhejiang Lucky Cloud Hanger Co. Ltd.	
Countervailing Duty Proceedings	
The People's Republic of China: Multilayered Wood Flooring, C–570–971	1/1/14–12/31/14
Jiangsu Yuhui International Trade Co., Ltd.	

Suspension Agreements

None.

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period, of the order, if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this

notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Revised Factual Information Requirements

On April 10, 2013, the Department published *Definition of Factual Information and Time Limits for Submission of Factual Information: Final Rule,* 78 FR 21246 (April 10, 2013), which modified two regulations related to antidumping and countervailing duty proceedings: The definition of factual information (19 CFR 351.102(b)(21)), and the time limits for the submission of factual information (19 CFR 351.301). The final rule identifies five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i)–(iv). The final rule requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The final rule also modified 19 CFR 351.301 so that, rather than providing general time limits, there are specific time limits based on the type of factual information being submitted. These modifications are effective for all segments initiated on or after May 10, 2013. Please review the final rule, available at *http://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in this segment.

Any party submitting factual information in an antidumping duty or countervailing duty proceeding must certify to the accuracy and completeness of that information.[4] Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives. All segments of any antidumping duty or countervailing duty proceedings initiated on or after August 16, 2013, should use the formats for the revised certifications provided at the end of the *Final Rule*.[5] The Department intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable revised certification requirements.

Revised Extension of Time Limits Regulation

On September 20, 2013, the Department modified its regulation concerning the extension of time limits for submissions in antidumping and countervailing duty proceedings: *Final Rule,* 78 FR 57790 (September 20, 2013). The modification clarifies that parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) Case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning U.S. Customs and Border Protection data; and (5) quantity and value questionnaires. Under certain circumstances, the Department may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, the Department will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This modification also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which the Department will grant untimely-filed requests for the extension of time limits. These modifications are effective for all segments initiated on or after October 21, 2013. Please review the final rule, available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm*, prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: December 7, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–30310 Filed 12–15–16; 8:45 am]

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[4] *See* section 782(b) of the Act.

[5] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (''*Final Rule*''); *see also* the frequently asked questions regarding the *Final Rule,* available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–051]

Certain Hardwood Plywood Products From the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Effective December 8, 2016.

FOR FURTHER INFORMATION CONTACT: Kabir Archuletta at (202) 482–2593 or Amanda Brings at (202) 482–3927, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petition

On November 18, 2016, the Department of Commerce (the Department) received an antidumping duty (AD) petition concerning imports of certain hardwood plywood products (hardwood plywood) from the People's Republic of China (PRC), filed in proper form on behalf of the Coalition for Fair Trade in Hardwood Plywood and its individual members (Petitioners).[1]

On November 22, 2016, the Department requested additional

[1] *See* the Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended, dated November 18, 2016 (the Petition), at Volumes I and II. The members of the Coalition for Fair Trade in Hardwood Plywood are: Columbia Forest Products; Commonwealth Plywood Co., Ltd.; Murphy Plywood; Roseburg Forest Products Co.; States Industries LLC; and Timber Products Company.

information and clarification of certain areas of the Petition.[2] Petitioners filed responses to these requests on November 29, 2016.[3] On December 5, 2016, Far East America, Inc. (FEA), a U.S. importer of hardwood plywood, provided comments on domestic industry support for the Petitions and requested that the Department poll the domestic industry to determine industry support.[4] We also received comments on industry support and a request to poll the domestic industry from Ashley Furniture Industries, Inc.; Heritage Home Group, Inc.; and Standard Furniture Manufacturing Company, U.S. producers of wooden and upholstered furniture and wooden furniture parts, on December 5, 2016.[5] On December 6, 2016, Petitioners provided a response to FEA's comments on industry support and provided further clarification regarding the scope.[6] On December 7, 2016, Petitioners provided a response to the Furniture Producers' Letter.[7] On December 7, 2016, the Government of the PRC (GOC) provided comments on industry support and requested the Department poll the industry to determine industry support.[8]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), Petitioners allege that imports of hardwood plywood from the PRC are being, or are likely to be, sold in the United States at less-than-fair value within the meaning of section 731 of the Act, and that imports of hardwood plywood from the PRC are materially injuring, or threaten material injury to, the domestic industry producing hardwood plywood in the United States. Also, consistent with section 732(b)(1) of the Act, the Petition is accompanied by information reasonably available to Petitioners supporting their allegations.

The Department finds that Petitioners filed this Petition on behalf of the domestic industry because Petitioners are an interested party as defined in section 771(9)(C) and (F) of the Act. The Department also finds that Petitioners demonstrated sufficient industry support with respect to the initiation of the AD investigation that Petitioners are requesting.[9]

Period of Investigation

Because the Petition was filed on November 18, 2016, pursuant to 19 CFR 351.204(b)(1), the period of investigation (POI) is April 1, 2016 through September 30, 2016.

Scope of the Investigation

The product covered by this investigation is hardwood plywood from the PRC. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in Appendix I of this notice.

Comments on Scope of the Investigation

During our review of the Petition, we issued questions to, and received responses from, Petitioners pertaining to the proposed scope to ensure that the scope language in the Petition would be an accurate reflection of the products for which the domestic industry is seeking relief.[10]

As discussed in the preamble to the Department's regulations,[11] we are setting aside a period for interested parties to raise issues regarding product coverage (scope). The Department will consider all comments received from parties and, if necessary, will consult with parties prior to the issuance of the preliminary determination. If scope comments include factual information (*see* 19 CFR 351.102(b)(21)), all such factual information should be limited to public information. In order to facilitate preparation of its questionnaires, the Department requests all interested parties to submit such comments by 5:00 p.m. Eastern Time (ET) on Wednesday, December 28, 2016. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on Monday, January 9, 2017.

The Department requests that any factual information the parties consider relevant to the scope of the investigation be submitted during this time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigation may be relevant, the party may contact the Department and request permission to submit the additional information. All such comments must also be filed on the record of the concurrent CVD investigation.

Filing Requirements

All submissions to the Department must be filed electronically using Enforcement & Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).[12] An electronically filed document must be received successfully in its entirety by the time and date when it is due. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with Enforcement & Compliance's APO/Dockets Unit, Room 18022, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the applicable deadlines.

[2] *See* Letters from the Department to Petitioners entitled, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Hardwood Plywood Products from the People's Republic of China: Supplemental Questions,'' dated November 22, 2016 (General Issues Supplemental Questionnaire) and ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Hardwood Plywood Products from the People's Republic of China: Supplemental Questions,'' dated November 22, 2016 (AD Supplemental Questionnaire).

[3] *See* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China: Response to the Department's November 22, 2016 Supplemental Questions Regarding Volume I of the Petition for the Imposition of Antidumping and Countervailing Duties,'' dated November 29, 2016 (General Issues Supplement); *see also* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China: Response to the Department's November 22, 2016 Supplemental Questions Regarding Volume II of the Petition for the Imposition of Antidumping Duties,'' dated November 29, 2016 (AD Supplemental Response).

[4] *See* Letter from FEA to the Department entitled, ''Hardwood Plywood Products from the People's Republic of China: Request for Polling,'' dated December 5, 2016 (FEA Letter).

[5] *See* Letter from Ashley Furniture Industries, Inc.; Heritage Home Group, Inc.; and Standard Furniture Manufacturing Company, Inc. to the Department entitled, ''Hardwood Plywood Products from the People's Republic of China: Challenge to Petition's Industry Support,'' dated December 5, 2016 (Furniture Producers' Letter).

[6] *See* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China,'' dated December 6, 2016, (Petitioners' Revised Scope and Response to FEA Letter).

[7] *See* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China: Petitioners' Response to Domestic Furniture Producers' December 5, 2016 Letter,'' dated December 7, 2016 (Petitioners' Response to Furniture Producers' Letter).

[8] *See* Memo to the File, dated December 7, 2016, which contains the GOC's industry support comments (GOC Comments).

[9] *See* the ''Determination of Industry Support for the Petition'' section below.

[10] *See* General Issues Supplemental Questionnaire; *see also* General Issues Supplement at 1–5; *see also* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China,'' dated December 6, 2016, at Exhibit I.

[11] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997).

[12] *See* 19 CFR 351.303 (describing general filing requirements); *see also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011) and *Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of the Department's electronic filing requirements, which went into effect on August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook%20on%20Electronic%20Filling%20Procedures.pdf.*

Comments on Product Characteristics for AD Questionnaires

The Department requests comments from interested parties regarding the appropriate physical characteristics of hardwood plywood to be reported in response to the Department's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors and costs of production accurately as well as to develop appropriate product-comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) General product characteristics and (2) product-comparison criteria. We note that it is not always appropriate to use all product characteristics as product-comparison criteria. We base product-comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe hardwood plywood, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaire, all comments must be filed by 5:00 p.m. ET on Wednesday, December 22, 2016. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on Monday, December 28, 2016. All comments and submissions to the Department must be filed electronically using ACCESS, as explained above, on the record of this less-than-fair-value investigation.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product,[13] they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[14]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the Petition).

With regard to the domestic like product, Petitioners do not offer a definition of the domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that hardwood plywood, as defined in the scope, constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[15]

In determining whether Petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation,'' in Appendix I of this notice. Petitioners provided their own production data of the domestic like product in 2015. Petitioners also provided estimated 2015 production of the domestic like product by the entire U.S. domestic industry.[16] To establish industry support, Petitioners compared their production to the total 2015 production of the domestic like product for the entire domestic industry.[17] We relied on data Petitioners provided for purposes of measuring industry support.[18]

On December 5, 2016, we received comments on industry support from FEA, a U.S. importer of the subject merchandise, and Ashley Furniture Industries, Inc.; Heritage Home Group, Inc.; and Standard Furniture Manufacturing Company, Inc., domestic producers of wooden and upholstered furniture and wooden furniture parts.[19] Petitioners responded to these comments on December 6 and 7, 2016.[20] The GOC also provided comments on industry support on December 7, 2016.[21] For further discussion of these comments, *see* the PRC AD Initiation Checklist, at Attachment II.

Our review of the data provided in the Petition, General Issues Supplement, letters from FEA, the Furniture

[13] *See* section 771(10) of the Act.

[14] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[15] For a discussion of the domestic like product analysis in this case, *see* Antidumping Duty Investigation Initiation Checklist: Certain Hardwood Plywood Products from the People's Republic of China (PRC AD Initiation Checklist), at Attachment II, ''Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Certain Hardwood Plywood Products from the People's Republic of China,'' (Attachment II). This checklist is dated concurrently with, and hereby adopted by, this notice and on file electronically via ACCESS. Access to documents filed via ACCESS is also available in the Central Records Unit, Room B8024 of the main Department of Commerce building.

[16] *See* Volume I of the Petition, at Exhibit I–3; *see also* Petitioners' Response to Furniture Producers' Letter, at 6–8 and Exhibits 1–3.

[17] *See* Volume I of the Petition, at 3 and Exhibits I–3 and I–8; *see also* General Issues Supplement, at 6–8 and Exhibit I–Supp–3.

[18] *Id.* For further discussion, *see* PRC AD Initiation Checklist, at Attachment II.

[19] *See* FEA Letter and Furniture Producers' Letter.

[20] *See* Petitioners' Revised Scope and Response to FEA Letter and Petitioners' Response to Furniture Producers' Letter.

[21] *See* GOC Comments.

Producers, the GOC, and Petitioners, and other information readily available to the Department indicates that Petitioners have established industry support.[22] First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling).[23] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[24] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition.[25] Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) and (F) of the Act and they have demonstrated sufficient industry support with respect to the AD investigation that they are requesting that the Department initiate.[26]

Allegations and Evidence of Material Injury and Causation

Petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (NV). In addition, Petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[27]

Petitioners contend that the industry's injured condition is illustrated by reduced market share; underselling and price suppression or depression; lost sales and revenues; and negative impact on the domestic industry's key indicators, including financial performance, production, shipments, and capacity utilization.[28] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.[29]

Allegations of Sales at Less-Than-Fair Value

The following is a description of the allegation of sales at less-than-fair value upon which the Department based its decision to initiate an investigation of imports of hardwood plywood from the PRC. The sources of data for the deductions and adjustments relating to U.S. price and NV are discussed in greater detail in the initiation checklist.

Export Price

Petitioners based U.S. price on two offers for sale for hardwood plywood produced in the PRC from a Chinese exporter.[30] Petitioners made deductions from U.S. price for foreign inland freight and foreign brokerage and handling charges consistent with the delivery terms.[31]

Normal Value

Petitioners stated that the Department has found the PRC to be a non-market economy (NME) country in every administrative proceeding in which the PRC has been involved.[32] In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of the initiation of this investigation. Accordingly, the NV of the product is appropriately based on factors of production (FOPs) valued in a surrogate market economy country, in accordance with section 773(c) of the Act. In the course of this investigation, all parties, and the public, will have the opportunity to provide relevant information related to the issues of the PRC's NME status and the granting of separate rates to individual exporters.

Petitioners claim that Thailand is an appropriate surrogate country because it is a market economy that is at a level of economic development comparable to that of the PRC and it is a significant producer of comparable merchandise.[33]

Based on the information provided by Petitioners, we determine that it is appropriate to use Thailand as a surrogate country for initiation purposes. Interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value FOPs within 30 days before the scheduled date of the preliminary determination.

Factors of Production

Petitioners based the FOPs for materials, labor, and energy on the consumption rates of a producer of hardwood plywood in the United States.[34] Petitioners assert that the production process for hardwood plywood is similar regardless of whether the product is produced in the United States or in the PRC.[35] Petitioners valued the estimated factors of production using surrogate values from Thailand.[36]

Valuation of Raw Materials

Petitioners valued the FOPs for raw materials using public import data for Thailand obtained from the Global Trade Atlas (GTA) for the POI.[37] Petitioners excluded all import values from countries previously determined by the Department to maintain broadly available, non-industry-specific export subsidies and from countries previously determined by the Department to be NME countries.[38] In addition, in accordance with the Department's practice, the average import value excludes imports that were labeled as originating from an unidentified country.[39] The Department determines

[22] *See* PRC AD Initiation Checklist, at Attachment II.

[23] *See* section 732(c)(4)(D) of the Act; *see also* PRC AD Initiation Checklist, at Attachment II.

[24] *See* PRC AD Initiation Checklist, at Attachment II.

[25] *Id.*

[26] *Id.*

[27] *See* General Issues Supplement, at 8–9 and Exhibit I–Supp–5.

[28] *See* Volume I of the Petitions, at 14–40 and Exhibits I–6 through I–17; *see also* General Issues Supplement, at 1, 8–11 and Exhibits I–Supp–2, I–Supp–5, and I–Supp–6.

[29] *See* PRC AD Initiation Checklist, at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Certain Hardwood Plywood Products from the People's Republic of China (Attachment III).

[30] *See* Volume II of the Petition, at 3 and Exhibit II–2; *see also* AD Supplemental Response, at 1 and Exhibit II–Supp–1.

[31] *See* Volume II of the Petition, at 5–8 and Exhibit II–4, Exhibit II–5, Exhibit II–7; *see also* AD Supplemental Response, at 4 and Exhibit II–Supp–4, Exhibit II–Supp–7, Exhibit II–Supp–10.

[32] *See* Volume II of the Petition, at 8–9.

[33] *Id.* at 9–10 and Exhibit II–8, Exhibit II–9.

[34] *Id.* at 1, 10–11 and Exhibit II–10, Exhibit II–11, Exhibit II–14; *see also* AD Supplemental Response, at 2.

[35] *See* Volume II of the Petition, at 14.

[36] *Id.* at 15.

[37] *Id.* at 17 and Exhibit II–15, Exhibit II–16; *see also* AD Supplemental Response, at Exhibit II–Supp–6.

[38] *See* Volume II of the Petition, at 17.

[39] *Id.*

that the surrogate values used by Petitioners are reasonably available and, thus, are acceptable for purposes of initiation.

Valuation of Energy

Petitioners valued electricity using electricity rates reported by the Thai Board of Investment.[40] This information was reported in U.S. dollars (USD) per kilowatt hour and multiplied by the U.S. producer's usage rates.[41] Petitioners valued water using water rates reported by the Thai Board of Investment.[42] Petitioners converted the water rates reported from USD/cubic meter to USD/gallon and multiplied by the U.S. producer's usage rates.[43]

Valuation of Labor

Petitioners valued labor using the most-recently-available labor data published by Thailand's National Statistics Office.[44] Specifically, Petitioners relied on data pertaining to wages and benefits earned by Thai workers engaged in the ''manufacturing'' sector of the Thai economy.[45] Petitioners converted Thai Baht to USD using the average exchange rate during the POI.[46]

Valuation of Packing Materials

Petitioners valued the packing materials using import data obtained from GTA for the POI.[47]

Valuation of Factory Overhead, Selling, General and Administrative Expenses, and Profit

Petitioners calculated ratios for factory overhead, selling, general and administrative expenses and profit based on the most recent audited financial statements for Vanachai Group Public Company Limited, a Thai manufacturer of comparable merchandise (*i.e.,* particle board, MDF products, laminated particleboard, and finished door frames, and panels).[48]

Fair Value Comparisons

Based on the data provided by Petitioners, there is reason to believe that imports of hardwood plywood from the PRC are being, or are likely to be, sold in the United States at less-than-fair value. Based on comparisons of EP to NV, in accordance with section 773(c) of the Act, the estimated dumping margins for hardwood from the PRC range from 104.06 to 114.72 percent.[49]

Initiation of Less-Than-Fair-Value Investigation

Based upon the examination of the AD Petition on hardwood plywood from the PRC, we find that the Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an AD investigation to determine whether imports of hardwood plywood from the PRC are being, or are likely to be, sold in the United States at less-than-fair value. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we intend to make our preliminary determination no later than 140 days after the date of this initiation.

On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015, which made numerous amendments to the AD and CVD law.[50] The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained in section 771(7) of the Act, which relate to determinations of material injury by the ITC.[51] The amendments to sections 771(15), 773, 776, and 782 of the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this AD investigation.[52]

Respondent Selection

In accordance with our standard practice for respondent selection in AD cases involving NME countries, we intend to issue quantity and value (Q&V) questionnaires to producers/exporters of merchandise subject to the investigation and base respondent selection on the responses received. For this investigation, the Department will request Q&V information from known exporters and producers identified, with complete contact information, in the Petition. In addition, the Department will post the Q&V questionnaire along with filing instructions on the Enforcement and Compliance Web site at *http://www.trade.gov/enforcement/news.asp.*

Producers/exporters of hardwood plywood from the PRC that do not receive Q&V questionnaires by mail may still submit a response to the Q&V questionnaire and can obtain a copy from the Enforcement & Compliance Web site. The Q&V response must be submitted by the relevant PRC exporters/producers no later than December 22, 2016. All Q&V responses must be filed electronically via ACCESS.

Separate Rates

In order to obtain separate-rate status in an NME investigation, exporters and producers must submit a separate-rate application.[53] The specific requirements for submitting a separate-rate application in the PRC investigation are outlined in detail in the application itself, which is available on the Department's Web site at *http://enforcement.trade.gov/nme/nme-sep-rate.html.* The separate-rate application will be due 30 days after publication of this initiation notice.[54] Exporters and producers who submit a separate-rate application and have been selected as mandatory respondents will be eligible for consideration for separate-rate status only if they respond to all parts of the Department's AD questionnaire as mandatory respondents. The Department requires that companies from the PRC submit a response to both the Q&V questionnaire and the separate-rate application by the respective deadlines in order to receive consideration for separate-rate status. Companies not filing a timely Q&V response will not receive separate rate consideration.

Use of Combination Rates

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in an NME investigation. The Separate Rates and Combination Rates Bulletin states:

[40] *Id.* at 18 and Exhibit II–18; *see also* AD Supplemental Response, at 2.

[41] *Id.*

[42] *See* Volume II of the Petition, at 18 and Exhibit II–19.

[43] *Id.; see also* AD Supplemental Response, at 3 and Exhibit II–Supp–3.

[44] *See* Volume II of the Petition at 18 and Exhibit II–20.

[45] *Id.*

[46] *See* Volume II of the Petition at 15–16 and Exhibit II–13.

[47] *Id.* at 19–20 and Exhibit II–14; *see also* AD Supplemental Response, at Exhibit II–Supp–5.

[48] *See* Volume II of the Petition, at 19–20 and Exhibit II–21 and Exhibit II–22; *see also* AD Supplemental Response, at Exhibit II–Supp–9.

[49] *See* AD Supplemental Response, at Exhibit II–Supp–11; *see also* PRC AD Initiation Checklist.

[50] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[51] *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015,* 80 FR 46793 (August 6, 2015) (*Applicability Notice*).

[52] *Id.* at 46794–95. The 2015 amendments may be found at *https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl.*

[53] *See* Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation involving Non-Market Economy Countries (April 5, 2005), available at *http://enforcement.trade.gov/policy/bull05-1.pdf* (Policy Bulletin 05.1).

[54] Although in past investigations this deadline was 60 days, consistent with 19 CFR 351.301(a), which states that ''the Secretary may request any person to submit factual information at any time during a proceeding,'' this deadline is now 30 days.

{w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME Investigation will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.[55]

Distribution of Copies of the Petition

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the government of the PRC via ACCESS. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by delivery of the public version to the government of the PRC, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We will notify the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of hardwood plywood from the PRC are materially injuring or threatening material injury to a U.S. industry.[56] A negative ITC determination will result in the investigation being terminated;[57] otherwise, this investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i)–(iv). Any party, when submitting factual information, must specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted[58] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[59] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Please review the regulations prior to submitting factual information in this investigation.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351 expires. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, we may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances we will grant untimely-filed requests for the extension of time limits. Review *Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013), available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in this investigation.

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[60] Parties are hereby reminded that revised certification requirements are in effect for company/government officials, as well as their representatives. Investigations initiated on the basis of petition filed on or after August 16, 2013, and other segments of any AD or CVD proceedings initiated on or after August 16, 2013, should use the formats for the revised certifications provided at the end of the *Final Rule.*[61] The Department intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order (APO) in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008).

Parties wishing to participate in this investigation should ensure that they meet the requirements of these procedures (*e.g.,* the filing of letters of appearance as discussed in 19 CFR 351.103(d)).

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: December 8, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix I—Scope of the Investigation

The merchandise subject to this investigation is hardwood and decorative plywood, and certain veneered panels as described below. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo. The veneers, along with the core may be glued or otherwise bonded together. Hardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP–1–2016 (including any revisions to that standard).

For purposes of this investigation a ''veneer'' is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and back veneers are the outermost veneer of wood on

[55] *See* Policy Bulletin 05.1 at 6 (emphasis added).

[56] *See* section 733(a) of the Act.

[57] *Id.*

[58] *See* 19 CFR 351.301(b).

[59] *See* 19 CFR 351.301(b)(2).

[60] *See* section 782(b) of the Act.

[61] *See Certification of Factual Information to Import Administration during Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

either side of the core irrespective of additional surface coatings or covers as described below.

The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (MDF).

All hardwood plywood is included within the scope of this investigation regardless of whether or not the face and/or back veneers are surface coated or covered and whether or not such surface coating(s) or covers obscures the grain, textures, or markings of the wood. Examples of surface coatings and covers include, but are not limited to: Ultra-violet light cured polyurethanes; oil or oil-modified or water based polyurethanes; wax; epoxy-ester finishes; moisture-cured urethanes; paints; stains; paper; aluminum; high pressure laminate; MDF; medium density overlay (''MDO''); and phenolic film. Additionally, the face veneer of hardwood plywood may be sanded; smoothed or given a ''distressed'' appearance through such methods as hand-scraping or wire brushing. All hardwood plywood is included within the scope even if it is trimmed; cut-to-size; notched; punched; drilled; or has underwent other forms of minor processing.

All hardwood and decorative plywood is included within the scope of this investigation, without regard to dimension (overall thickness, thickness of face veneer, thickness of back veneer, thickness of core, thickness of inner veneers, width, or length). However, the most common panel sizes of hardwood and decorative plywood are 1219 x 1829 mm (48 x 72 inches), 1219 x 2438 mm (48 x 96 inches), and 1219 x 3048 mm (48 x 120 inches).

Subject merchandise also includes hardwood and decorative plywood that has been further processed in a third country, including but not limited to trimming, cutting, notching, punching, drilling, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

The scope of the investigation excludes the following items: (1) Structural plywood (also known as ''industrial plywood'' or ''industrial panels'') that is manufactured to meet U.S. Products Standard PS 1–09, PS 2–09, or PS 2–10 for Structural Plywood (including any revisions to that standard or any substantially equivalent international standard intended for structural plywood), and which has both a face and a back veneer of coniferous wood; (2) products which have a face and back veneer of cork; (3) multilayered wood flooring, as described in the antidumping duty and countervailing duty orders on Multilayered Wood Flooring from the People's Republic of China, Import Administration, International Trade Administration. *See Multilayered Wood Flooring from the People's Republic of China,* 76 FR 76690 (December 8, 2011) (*amended final determination of sales at less than fair value and antidumping duty order*), and *Multilayered Wood Flooring from the People's Republic of China,* 76 FR 76693 (December 8, 2011) (*countervailing duty order*), *as amended* by *Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 FR 5484 (February 3, 2012); (4) multilayered wood flooring with a face veneer of bamboo or composed entirely of bamboo; (5) plywood which has a shape or design other than a flat panel, with the exception of any minor processing described above; and (6) products made entirely from bamboo and adhesives (also known as ''solid bamboo'').

Imports of hardwood plywood are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4412.10.0500; 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.2510; 4412.31.2520; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4075; 4412.31.4080; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.5175; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0565; 4412.32.0570; 4412.32.2510; 4412.32.2525; 4412.32.2530; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.5600; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3161; 4412.94.3171; 4412.94.3175; 4412.94.4100; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5115; and 4412.99.5710.

Imports of hardwood plywood may also enter under HTSUS subheadings 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.10.9000; 4412.94.5100; 4412.94.9500; and 4412.99.9500. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

[FR Doc. 2016–30305 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–052]

Certain Hardwood Plywood Products From the People's Republic of China: Initiation of Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Effective December 8, 2016.

FOR FURTHER INFORMATION CONTACT: Justin Neuman at (202) 482–0486, or Matthew Renkey at (202) 482–2312, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petition

On November 18, 2016, the Department of Commerce (Department) received a countervailing duty (CVD) petition concerning imports of certain hardwood plywood products (hardwood plywood) from the People's Republic of China (PRC), filed in proper form on behalf of the Coalition for Fair Trade in Hardwood Plywood and its individual members (Petitioners).[1]

On November 22, 2016, the Department requested additional information and clarification of certain areas of the Petition.[2] Petitioners filed responses to these requests on November 29, 2016.[3] On December 5, 2016, Far East America, Inc. (FEA), a U.S. importer of hardwood plywood, provided comments on domestic industry support for the Petitions and requested that the Department poll the domestic industry to determine industry support.[4] We also received comments on industry support and a request to poll the domestic industry from Ashley Furniture Industries, Inc.; Heritage

[1] *See* the Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as Amended, dated November 18, 2016 (Petition), at Volumes I and III. The members of the Coalition for Fair Trade in Hardwood Plywood are: Columbia Forest Products; Commonwealth Plywood Co., Ltd.; Murphy Plywood; Roseburg Forest Products Co.; States Industries LLC; and Timber Products Company.

[2] *See* Letters from the Department to Petitioners entitled, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Hardwood Plywood Products from the People's Republic of China: Supplemental Questions,'' dated November 22, 2016 (General Issues Supplemental Questionnaire) and ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Hardwood Plywood Products from the People's Republic of China: Supplemental Questions,'' dated November 23, 2016 (CVD Supplemental Questionnaire).

[3] *See* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China: Response to the Department's November 22, 2016 Supplemental Questions Regarding Volume I of the Petition for the Imposition of Antidumping and Countervailing Duties,'' dated November 29, 2016 (General Issues Supplement); *see also* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China: Response to the Department's November 23, 2016 Supplemental Questions Regarding Volume III of the Petition for the Imposition of Countervailing Duties,'' dated November 29, 2016 (CVD Supplemental Response).

[4] *See* Letter from FEA to the Department entitled, ''Hardwood Plywood Products from the People's Republic of China: Request for Polling,'' dated December 5, 2016 (FEA Letter).

Home Group, Inc.; and Standard Furniture Manufacturing Company, U.S. producers of wooden and upholstered furniture and wooden furniture parts, on December 5, 2016.[5] On December 6, 2016, Petitioners provided a response to FEA's comments on industry support and provided further clarification regarding the scope.[6] On December 7, 2016, Petitioners provided a response to the Furniture Producers' Letter.[7] On December 7, 2016, the Government of the PRC provided comments on industry support and requested the Department poll the industry to determine industry support.[8] In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), Petitioners allege that the Government of the PRC (GOC) is providing countervailable subsidies (within the meaning of sections 701 and 771(5) of the Act) with respect to imports of hardwood plywood from the PRC, and that imports of hardwood plywood from the PRC are materially injuring, or threaten material injury to, the domestic industry producing hardwood plywood in the United States. Also, consistent with section 702(b)(1) of the Act, for those alleged programs on which we are initiating a CVD investigation, the Petition is accompanied by information reasonably available to Petitioners supporting their allegations.

The Department finds that Petitioners filed this Petition on behalf of the domestic industry because Petitioners are interested parties as defined in section 771(9)(C) and (F) of the Act. The Department also finds that Petitioners demonstrated sufficient industry support with respect to the initiation of the CVD investigation that Petitioners are requesting.[9]

Period of Investigation

Because the Petition was filed on November 18, 2016, pursuant to 19 CFR 351.204(b)(2), the period of investigation is January 1, through December 31, 2015.

Scope of the Investigation

The product covered by this investigation is hardwood plywood from the PRC. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in Appendix I of this notice.

Comments on Scope of the Investigation

During our review of the Petition, we issued questions to, and received responses from, Petitioners pertaining to the proposed scope to ensure that the scope language in the Petition would be an accurate reflection of the products for which the domestic industry is seeking relief.[10]

As discussed in the preamble to the Department's regulations,[11] we are setting aside a period for interested parties to raise issues regarding product coverage (scope). The Department will consider all comments received from parties and, if necessary, will consult with parties prior to the issuance of the preliminary determination. If scope comments include factual information (*see* 19 CFR 351.102(b)(21)), all such factual information should be limited to public information. In order to facilitate preparation of its questionnaires, the Department requests all interested parties to submit such comments by 5:00 p.m. Eastern Time (ET) on Wednesday, December 28, 2016. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on Monday, January 9, 2017.

The Department requests that any factual information the parties consider relevant to the scope of the investigation be submitted during this time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigation may be relevant, the party may contact the Department and request permission to submit the additional information. All such comments must also be filed on the record of the concurrent AD investigation.

Filing Requirements

All submissions to the Department must be filed electronically using Enforcement & Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).[12] An electronically filed document must be received successfully in its entirety by the time and date when it is due. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with Enforcement & Compliance's APO/Dockets Unit, Room 18022, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the applicable deadlines.

Consultations

Pursuant to section 702(b)(4)(A)(i) of the Act, the Department notified representatives of the GOC of the receipt of the Petition. Also, in accordance with section 702(b)(4)(A)(ii) of the Act, the Department provided representatives of the GOC the opportunity for consultations with respect to the CVD petition.[13] In response to the Department's letter, the GOC requested that consultations be held on December 16, 2016, which we note is after the initiation date.[14]

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition

[5] *See* Letter from Ashley Furniture Industries, Inc.; Heritage Home Group, Inc.; and Standard Furniture Manufacturing Company, Inc. to the Department entitled, ''Hardwood Plywood Products from the People's Republic of China: Challenge to Petition's Industry Support,'' dated December 5, 2016 (Furniture Producers' Letter).

[6] *See* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China,'' dated December 6, 2016, (Petitioners' Revised Scope and Response to FEA Letter).

[7] *See* Letter from Petitioners to the Department entitled, ''Certain Hardwood Plywood Products from the People's Republic of China: Petitioners' Response to Domestic Furniture Producers' December 5, 2016 Letter,'' dated December 7, 2016 (Petitioners' Response to Furniture Producers' Letter).

[8] *See* Memo to the File, dated December 7, 2016, which contains the GOC's industry support comments (GOC Comments).

[9] *See* the ''Determination of Industry Support for the Petition'' section below.

[10] *See* General Issues Supplemental Questionnaire; *see also* General Issues Supplement at 1–5; *see also* Petitioners' Revised Scope and Response to FEA Letter.

[11] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997).

[12] *See* 19 CFR 351.303 (describing general filing requirements); *see also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011) and *Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of the Department's electronic filing requirements, which went into effect on August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook%20on%20Electronic%20 Filling%20Procedures.pdf.*

[13] *See* Letter of invitation from the Department regarding, ''Countervailing Duty Petition Certain Hardwood Plywood Products from the People's Republic of China,'' dated December 2, 2016.

[14] *See* Department Memorandum, ''Countervailing Duty Petition on Certain Hardwood Plywood Products from the People's Republic of China: GOC Consultations,'' dated December 7, 2016.

does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product,[15] they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[16]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the Petition).

With regard to the domestic like product, Petitioners do not offer a definition of the domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that hardwood plywood, as defined in the scope, constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[17]

In determining whether Petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation,'' in Appendix I of this notice. Petitioners provided their own production of the domestic like product in 2015. Petitioners also provided data from the Hardwood Plywood & Veneer Association (HPVA) to determine total 2015 production of the domestic like product by the entire domestic industry. To establish industry support, Petitioners compared their production to the total 2015 production of the domestic like product for the entire domestic industry.[18] We relied on data Petitioners provided for purposes of measuring industry support.[19]

On December 5, 2016, we received comments on industry support from FEA, a U.S. importer of the subject merchandise, and Ashley Furniture Industries, Inc.; Heritage Home Group, Inc.; and Standard Furniture Manufacturing Company, Inc., domestic producers of wooden and upholstered furniture and wooden furniture parts.[20] Petitioners responded to these comments on December 6, 2016.[21]

Our review of the data provided in the Petition, General Issues Supplement, and other information readily available to the Department indicates that Petitioners have established industry support.[22] First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling).[23] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[24] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition.[25] Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) and (F) of the Act and they have demonstrated sufficient industry support with respect to the CVD investigation that they are requesting the Department initiate.[26]

Injury Test

Because the PRC is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

Petitioners allege that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, Petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[27]

Petitioners contend that the industry's injured condition is illustrated by reduced market share; underselling and price suppression or depression; lost sales and revenues; and negative impact on the domestic industry's key indicators, including financial performance, production, shipments,

[15] *See* section 771(10) of the Act.

[16] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[17] For a discussion of the domestic like product analysis in this case, *see* Countervailing Duty Investigation Initiation Checklist: Certain Hardwood Plywood Products from the People's Republic of China (PRC CVD Initiation Checklist), at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Certain Hardwood Plywood Products from the People's Republic of China (Attachment II). This checklist is dated concurrently with this notice and on file electronically via ACCESS. Access to documents filed via ACCESS is also available in the Central Records Unit, Room B8024 of the main Department of Commerce building.

[18] *See* Volume I of the Petition, at 3 and Exhibits I–3 and I–8; *see also* General Issues Supplement, at 6–8 and Exhibit I–Supp–3.

[19] *Id.* For further discussion, *see* PRC CVD Initiation Checklist, at Attachment II.

[20] *See* FEA Letter and Furniture Producers' Letter.

[21] *See* Petitioners' Revised Scope and Response to FEA Letter; *see also* Petitioners' Response to Furniture Producers' Letter.

[22] *See* PRC CVD Initiation Checklist, at Attachment II.

[23] *See* section 702(c)(4)(D) of the Act; *see also* PRC CVD Initiation Checklist, at Attachment II.

[24] *See* PRC CVD Initiation Checklist, at Attachment II.

[25] *Id.*

[26] *See* PRC CVD Initiation Checklist, at Attachment II.

[27] *See* General Issues Supplement, at 8–9 and Exhibit I–Supp–5.

and capacity utilization.[28] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[29]

Initiation of Countervailing Duty Investigation

Section 702(b)(1) of the Act requires the Department to initiate a CVD investigation whenever an interested party files a CVD petition on behalf of an industry that: (1) Alleges elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to Petitioners supporting the allegations.

Petitioners allege that producers/exporters of hardwood plywood in the PRC benefit from countervailable subsidies bestowed by the GOC. The Department examined the Petition and finds that it complies with the requirements of section 702(b)(1) of the Act. Therefore, in accordance with section 702(b)(1) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, or exporters of hardwood plywood from the PRC receive countervailable subsidies from the GOC and various authorities thereof.

On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015, which made numerous amendments to the AD and CVD law.[30] The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained in section 771(7) of the Act, which relate to determinations of material injury by the ITC.[31] The amendments to sections 776 and 782 of the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this CVD investigation.[32]

Based on our review of the petition, we find that there is sufficient information to initiate a CVD investigation on 31 of the 33 alleged programs in the PRC. For a full discussion of the basis for our decision to initiate on each program, *see* the PRC CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determination no later than 65 days after the date of this initiation.

Respondent Selection

The Department normally selects respondents in a CVD investigation using CBP entry data. However, for this investigation, the HTSUS numbers the subject merchandise would enter under are basket categories containing many products unrelated to hardwood plywood, and the reported entry data contain differing units of quantity. Therefore, we cannot rely on CBP entry data in selecting respondents. Instead, for this investigation, the Department will request quantity and value (Q&V) information from known exporters and producers identified, with complete contact information, in the Petition. In addition, the Department will post the Q&V questionnaire along with filing instructions on the Enforcement and Compliance Web site at *http://www.trade.gov/enforcement/news.asp.*

Producers/exporters of hardwood plywood from the PRC that do not receive Q&V questionnaires by mail may still submit a response to the Q&V questionnaire and can obtain a copy from the Enforcement & Compliance Web site. The Q&V response must be submitted by the relevant PRC exporters/producers no later than December 22, 2016. All Q&V responses must be filed electronically via ACCESS.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the GOC via ACCESS. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by delivery of the public version to the government of the PRC, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We will notify the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of hardwood plywood from the PRC are materially injuring, or threatening material injury to, a U.S. industry.[33] A negative ITC determination will result in the investigation being terminated;[34] otherwise, this investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i)–(iv). The regulation requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Parties should review the regulations prior to submitting factual information in this investigation.

Extension of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301 expires. For submissions that are due from multiple parties simultaneously,

[28] *See* Volume I of the Petition, at 14–40 and Exhibits I–6 through I–17; *see also* General Issues Supplement, at 1, 8–11 and Exhibits I–Supp–2, I–Supp–5, and I–Supp–6.

[29] *See* PRC CVD Initiation Checklist, at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Certain Hardwood Plywood Products from the People's Republic of China.

[30] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[31] *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015,* 80 FR 46793 (August 6, 2015) (*Applicability Notice*). The 2015 amendments may be found at *https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl.*

[32] *Id.,* at 46794–95.

[33] *See* section 703(a)(2) of the Act.

[34] *See* section 703(a)(1) of the Act.

an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Under certain circumstances, we may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances we will grant untimely-filed requests for the extension of time limits. Review *Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013), available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in this investigation.

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[35] Parties are hereby reminded that revised certification requirements are in effect for company/government officials, as well as their representatives. Investigations initiated on the basis of petitions filed on or after August 16, 2013, and other segments of any AD or CVD proceedings initiated on or after August 16, 2013, should use the formats for the revised certifications provided at the end of the *Final Rule.*[36] The Department intends to reject factual submissions if the submitting party does not comply with the applicable revised certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Parties wishing to participate in this investigation should ensure that they meet the requirements of these procedures (*e.g.,* the filing of letters of appearance as discussed at 19 CFR 351.103(d)).

This notice is issued and published pursuant to sections 702 and 777(i) of the Act.

Dated: December 8, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix I—Scope of the Investigation

The merchandise subject to this investigation is hardwood and decorative plywood, and certain veneered panels as described below. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo. The veneers, along with the core may be glued or otherwise bonded together. Hardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP–1–2016 (including any revisions to that standard).

For purposes of this investigation a ''veneer'' is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and back veneers are the outermost veneer of wood on either side of the core irrespective of additional surface coatings or covers as described below.

The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (''MDF'').

All hardwood plywood is included within the scope of this investigation regardless of whether or not the face and/or back veneers are surface coated or covered and whether or not such surface coating(s) or covers obscures the grain, textures, or markings of the wood. Examples of surface coatings and covers include, but are not limited to: Ultra-violet light cured polyurethanes; oil or oil-modified or water based polyurethanes; wax; epoxy-ester finishes; moisture-cured urethanes; paints; stains; paper; aluminum; high pressure laminate; MDF; medium density overlay (''MDO''); and phenolic film. Additionally, the face veneer of hardwood plywood may be sanded; smoothed or given a ''distressed'' appearance through such methods as hand-scraping or wire brushing. All hardwood plywood is included within the scope even if it is trimmed; cut-to-size; notched; punched; drilled; or has underwent other forms of minor processing.

All hardwood and decorative plywood is included within the scope of this investigation, without regard to dimension (overall thickness, thickness of face veneer, thickness of back veneer, thickness of core, thickness of inner veneers, width, or length). However, the most common panel sizes of hardwood and decorative plywood are 1219 x 1829 mm (48 x 72 inches), 1219 x 2438 mm (48 x 96 inches), and 1219 x 3048 mm (48 x 120 inches).

Subject merchandise also includes hardwood and decorative plywood that has been further processed in a third country, including but not limited to trimming, cutting, notching, punching, drilling, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

The scope of the investigation excludes the following items: (1) Structural plywood (also known as ''industrial plywood'' or ''industrial panels'') that is manufactured to meet U.S. Products Standard PS 1–09, PS 2–09, or PS 2–10 for Structural Plywood (including any revisions to that standard or any substantially equivalent international standard intended for structural plywood), and which has both a face and a back veneer of coniferous wood; (2) products which have a face and back veneer of cork; (3) multilayered wood flooring, as described in the antidumping duty and countervailing duty orders on Multilayered Wood Flooring from the People's Republic of China, Import Administration, International Trade Administration. *See Multilayered Wood Flooring from the People's Republic of China,* 76 FR 76,690 (Dec. 8, 2011) (*amended final determination of sales at less than fair value and antidumping duty order),* and *Multilayered Wood Flooring from the People's Republic of China,* 76 FR 76.693 (Dec. 8, 2011) (*countervailing duty order), as amended* by *Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders, 77 FR 5,484 (Feb. 3, 2012);* (4) multilayered wood flooring with a face veneer of bamboo or composed entirely of bamboo; (5) plywood which has a shape or design other than a flat panel, with the exception of any minor processing described above; and (6) products made entirely from bamboo and adhesives (also known as ''solid bamboo'').

Imports of hardwood plywood are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4412.10.0500; 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.2510; 4412.31.2520; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4075; 4412.31.4080; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.5175; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0565; 4412.32.0570; 4412.32.2510; 4412.32.2525; 4412.32.2530; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.5600; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3161; 4412.94.3171; 4412.94.3175; 4412.94.4100; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130;9 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5115; and 4412.99.5710.

Imports of hardwood plywood may also enter under HTSUS subheadings 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031;

[35] *See* section 782(b) of the Act.

[36] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (''*Final Rule*''); *see also* frequently asked questions regarding the *Final Rule,* available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.10.9000; 4412.94.5100; 4412.94.9500; and 4412.99.9500. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

[FR Doc. 2016–30304 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–036]

Certain Biaxial Integral Geogrid Products From the People's Republic of China: Extension of Final Determination of Antidumping Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') is extending the time limits for the final determination of the investigation of certain biaxial integral geogrid products (''geogrids'') from the People's Republic of China (''PRC''). The period of investigation (''POI'') is July 1, 2015, through December 31, 2015.

DATES: Effective December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Susan Pulongbarit or Julia Hancock, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4031 or (202) 482–1394, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published the notice of initiation of this investigation on February 16, 2016.[1] On June 24, 2016, the companion countervailing duty (''CVD'') investigation of geogrids from the PRC published a notice aligning the final CVD determination with the final determination of the antidumping duty (''AD'') investigation in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.210(b)(4).[2] On August 22, 2016, the Department published the preliminary results of the AD investigation of geogrids from the PRC.[3] In that notice, the Department partially extended the final determination, stating that the final determination would be issued no later than 120 days after the date of publication of the preliminary determination, pursuant to section 735(a)(2) of the Act. The final results are currently due no later than December 20, 2016.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by Petitioners. 19 CFR 351.210(e)(2) requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On July 11, 2016, pursuant to 19 CFR 351.210(b) and (e), Taian Modern Plastic Co., Ltd. requested that, contingent upon an affirmative preliminary determination of sales at LTFV, the Department postpone the final determination and that provisional measures be extended to a period not to exceed six months.[4]

Because the final determination is not fully extended, and in accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) our preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, we are fully postponing the final determination and extending the provisional measures. Accordingly, we will make our final determination no later than 135 days after the date of publication of the preliminary determination, pursuant to section 735(a)(2) of the Act.[5] Therefore, the final results are now due no later than January 4, 2017.

We are issuing and publishing this notice in accordance with sections 733(f) of the Act.

Dated: December 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–30311 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Certain Biaxial Integral Geogrid Products From the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation,* 81 FR 7755 (February 16, 2016).

[2] *See Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products From the People's Republic of China: Preliminary Determination and Alignment of Final Determination With Final Antidumping Duty Determination,* 81 FR 41292 (June 24, 2016).

[3] *See Certain Biaxial Integral Geogrid Products From the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination,* 81 FR 56584 (August 22, 2016).

[4] *See* Letter to the Secretary of Commerce from Taian Modern Plastic Co., Ltd., ''Certain Biaxial Integral Geogrid Products from the People's Republic of China: Request to Extend Final Determination'' (July 11, 2016).

[5] *See also* 19 CFR 351.210(e).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Reporting Requirements for Sea Otter Interactions with the Pacific Sardine Fishery; Coastal Pelagic Species Fishery Management Plan.

OMB Control Number: 0648–0566.

Form Number(s): None.

Type of Request: Regular (extension of a currently approved information collection).

Number of Respondents: 2.

Average Hours per Response: 15 minutes.

Burden Hours: 1.

Needs and Uses: This request is for extension of a currently approved information collection.

On May 30, 2007, the National Marine Fisheries Service (NMFS) published a Final Rule (72 FR 29891) implementing a requirement under the Coastal Pelagic Species Fishery Management Plan (CPS FMP) to report any interactions that may occur between a CPS vessel and/or fishing gear and sea otters.

Specifically, these reporting requirements are:

1. If a southern sea otter is entangled in a net, regardless of whether the animal is injured or killed, such an occurrence must be reported within 24 hours to the Regional Administrator, NMFS West Coast Region.

2. While fishing for CPS, vessel operators must record all observations of otter interactions (defined as otters within encircled nets or coming into contact with nets or vessels, including but not limited to entanglement) with their purse seine net(s) or vessel(s). With the exception of an entanglement, which will be initially reported as described in #2 above, all other observations must be reported within 20 days to the Regional Administrator.

When contacting NMFS after an interaction, fishermen are required to provide information regarding the location, specifically latitude and longitude, of the interaction and a description of the interaction itself. Descriptive information of the interaction should include: Whether or not the otters were seen inside or outside the net; if inside the net, had the net been completely encircled; did contact occur with net or vessel; the number of otters present; duration of interaction; otter's behavior during interaction; and, measures taken to avoid interaction.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

This information collection request may be viewed at *reginfo.gov*. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 12, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–30215 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Atlantic Highly Migratory Species Release Reports

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 14, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Peter Cooper at (301) 427–8503 or *Peter.Cooper@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

Under the Magnuson-Stevens Fishery Conservation and Management Act (MSFMCA, 16 U.S.C. 1801 *et seq.*) the National Marine Fisheries Service (NMFS) is to ensure that conservation and management measures promote, to the extent practicable, implementation of scientific research programs that include the tagging and releasing of Atlantic highly migratory species (HMS). The currently approved information collection allows the public to submit volunteered geographic and biological information relating to HMS releases in order to populate an interactive Web site mapping tool. This Web page attracts visitors who are interested in Atlantic HMS and contains information and links to promote HMS tagging programs that the general public can support or become involved with. All submissions are voluntary. Information is used to raise awareness for releasing Atlantic HMS and HMS tagging programs, and is not used as representative results.

II. Method of Collection

Respondents may submit information via electronic form, email, fax, or mail.

III. Data

OMB Control Number: 0648–0628.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; businesses or other for-profit organizations; not-for-profit institutions; Federal government; and State, Local, or Tribal government.

Estimated Number of Respondents: 13.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 1.05 (1).

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 12, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–30216 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice of Approval for the He'eia National Estuarine Research Reserve Management Plan

AGENCY: Stewardship Division, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Public notice.

SUMMARY: Notice is hereby given that the Stewardship Division, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce approves the Management Plan for the He'eia National Estuarine Research Reserve (NERR) located in Hawai'i.

The National Estuarine Research Reserve System (NERRS) is a federal-state partnership administered by

NOAA. The system protects more than 1.3 million acres of estuarine habitat for long-term research, monitoring, education and stewardship throughout the coastal United States. Established by the Coastal Zone Management Act of 1972, as amended, each reserve is managed by a lead state agency or university, with input from local partners. NOAA provides funding and national programmatic guidance.

The He'eia Reserve Management Plan addresses research, monitoring, education, and stewardship/cultural resources needs for the proposed reserve. The Management Plan has been organized with goals, objectives and strategies that are based on an adaptive management planning framework. These goals, focusing on the He'eia estuary, traditional knowledge, coastal resources, and management issues, closely link the NERRS program sectors of education, research and training, and stewardship. The goals of the Management Plan can be applied beyond the five-year timeframe of the Management Plan.

On September 2, 2016, NOAA issued notice of a public hearing and a thirty-day public comment period for the He'eia Reserve Management Plan and a Draft Environmental Impact Statement associated with the Proposed Designation of the He'eia NERR (81 FR 60676). On October 13, 2016, NOAA announced a 13-day extension to the public comment period (81 FR 70666). Responses to the relevant written and oral comments on the Management Plan have been incorporated into Appendix D of the Final Environmental Impact Statement for the He'eia National Estuarine Research Reserve. The final Management Plan and final EIS, including the Appendix D response to comments, are available at the *regulations.gov* Web site by searching for Docket Number NOAA–NOS–2016–0114, and at *https://coast.noaa.gov/czm/compliance/.*

FOR FURTHER INFORMATION CONTACT: Joelle Gore, Chief, Stewardship Division, Office for Coastal Management at 240–533–0813 or via email at *joelle.gore@noaa.gov.*

Federal Domestic Assistance Catalog 11.420 Coastal Zone Management Program Administration

Dated: December 13, 2016.

Keelin Kuipers,

Division Chief, Policy, Planning and Communications, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2016–30441 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE201

Notice of Availability of an Alabama Trustee Implementation Group (Alabama TIG) Draft Recreational Use Restoration Plan I and Draft Environmental Impact Statement: Provide and Enhance Recreational Opportunities (RP/EIS)

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

ACTION: Notice of availability; request for comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA) and the National Environmental Policy Act (NEPA), the *Deepwater Horizon* Federal and State natural resource trustee agencies for the Alabama Trustee Implementation Group (Alabama TIG) have prepared a Draft Recreational Use Restoration Plan I and Draft Environmental Impact Statement: Provide and Enhance Recreational Opportunities (Draft RP/EIS). The Draft RP/EIS describes the restoration project alternatives considered by the Alabama TIG to compensate for recreational shoreline use lost as a result of the *Deepwater Horizon* oil spill. The Alabama TIG evaluated these alternatives under criteria set forth in the OPA natural resource damage assessment regulations and evaluated the environmental consequences of the restoration alternatives in accordance with NEPA. The purpose of this notice is to inform the public of the availability of the Draft RP/EIS and to seek public comments on the document.

DATES: The Alabama TIG will consider public comments received on or before January 30, 2017.

Public Meetings: The Alabama TIG will host two public meetings to facilitate public review and comment on the Draft RP/EIS. Both written and verbal public comments will be taken at each public meeting. The Alabama TIG will hold an open house for each meeting followed by a formal meeting where the Alabama TIG will take verbal public comments. Each public meeting will include a presentation of the Draft RP/EIS. Public meetings will be held on January 17 and 18, 2017. The full public meeting schedule is listed in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES:

Obtaining Documents: You may download the Draft RP/EIS at *http://www.gulfspillrestoration.noaa.gov.* Alternatively, you may request a CD of the Draft RP/EIS (see **FOR FURTHER INFORMATION CONTACT**). You may also view the document at any of the public facilities listed at *http://www.gulfspillrestoration.noaa.gov.*

Submitting Comments: You may submit comments on the Draft RP/EIS by one of following methods:

- Via the Web: *http://www.gulfspillrestoration.noaa.gov* or
- *U.S. Mail:* NOAA Gulf of Mexico Disaster Response Center; attn: Alabama Recreational Use Restoration Plan; 7344 Zeigler Blvd.; Mobile, AL 36608. Please note that mailed comments must be postmarked on or before the comment deadline of January 30, 2017 to be considered.

FOR FURTHER INFORMATION CONTACT:

- NOAA—Dan Van Nostrand, *dan.van-nostrand@noaa.gov.*
- AL—Amy Hunter, *amy.hunter@dcnr.alabama.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production Inc. (BP), in the Macondo prospect (Mississippi Canyon 252—MC252), exploded, caught fire and subsequently sank in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The *Deepwater Horizon* oil spill is the largest oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over one million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released to the environment as a result of the spill.

The *Deepwater Horizon* State and Federal natural resource trustees (DWH Trustees) conducted the natural resource damage assessment (NRDA) for the *Deepwater Horizon* oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their

trusteeship, including the loss of use and services from those resources from the time of injury until the time of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete.

The DWH Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service (NPS), U.S. Fish and Wildlife Service (FWS), and Bureau of Land Management (BLM);
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce (DOC);
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- For the State of Texas, Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

Upon completion of the NRDA, the DWH Trustees reached and finalized a settlement of their natural resource damage claims with BP in a Consent Decree [1] approved by the United States District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in Alabama are now chosen and managed by the Alabama TIG. The Alabama TIG is composed of the following Trustees:

- U.S. Department of the Interior (DOI), as represented by the National Park Service (NPS), U.S. Fish and Wildlife Service (FWS), and Bureau of Land Management (BLM);
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce (DOC);
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Alabama Department of Conservation and Natural Resources; and
- Geological Survey of Alabama.

This restoration planning activity is proceeding in accordance with the *Deepwater Horizon* Oil Spill: Final Programmatic Damage Assessment and Restoration Plan (PDARP) and Final Programmatic Environmental Impact Statement (PEIS). Information on the Restoration Type: Provide and Enhance Recreational Opportunities, as well as the OPA criteria against which project ideas are being evaluated, can be found in the PDARP/PEIS (*http://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan*) and in the Overview of the PDARP/PEIS (*http://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan*).

This restoration planning activity is occurring, in part, in accordance with the February 16, 2016, decision in *Gulf Restoration Network* v. *Jewell,* Case 1:15–cv–00191–CB–C (S.D. Ala.), in which the court enjoined the use of *Deepwater Horizon* early restoration that had been allocated to partially fund construction of a lodge and conference center at Alabama's Gulf State Park (GSP) as part of the GSP Enhancement Project, pending additional analysis under NEPA and OPA. This restoration planning activity fulfills the Federal and State natural resources trustees' responsibilities under this court order while looking more broadly at the potential to provide restoration for lost recreational shoreline use within Alabama.

Background

On July 6, 2016, the Alabama TIG initiated a 30-day formal scoping and public comment period for this Draft RP/EIS (81 FR 44007–44008) through a Notice of Intent to Prepare a RP/EIS, and to Conduct Scoping. The Trustees conducted the scoping in accordance with OPA (15 CFR 990.14(d)), NEPA (40 CFR 1501.7), and State authorities. That NOI requested public input to identify and evaluate a range of restoration types that could be used to compensate the public for lost recreational use opportunities in Alabama caused by the *Deepwater Horizon* oil spill in the Gulf of Mexico.

Overview of the Draft RP/EIS

The Draft RP/EIS is being released in accordance with the OPA, NRDA regulations found in the Code of Federal Regulations (CFR) at 15 CFR part 990, and the NEPA (42 U.S.C. 4321 *et seq.*).

In the Draft RP/EIS, the Alabama TIG presents to the public their plan for compensating for lost recreational shoreline use in Alabama. The Draft RP/EIS proposes ten individual restoration alternatives, including a no action alternative, evaluated in accordance with OPA and NEPA. One or more may be selected for implementation to compensate for lost recreational shoreline use as a result of the *Deepwater Horizon* oil spill.

The ten alternatives under the Draft RP/EIS are as follows:

- Alternative 1 (Preferred Alternative): Gulf State Park Lodge and Associated Public Access Amenities
- Alternative 2 (Preferred Alternative): Fort Morgan Pier Rehabilitation
- Alternative 3: Fort Morgan Peninsula Public Access Improvements
- Alternative 4: Gulf Highlands Land Acquisition and Improvements
- Alternative 5: (Preferred Alternative) Laguna Cove Little Lagoon Natural Resource Protection
- Alternative 6 (Preferred Alternative): Bayfront Park Restoration and Improvements
- Alternative 7 (Preferred Alternative): Dauphin Island Eco-Tourism and Environmental Education Area
- Alternative 8: Mid-Island Parks and Public Beach Improvements (Parcels A, B, and C)
- Alternative 9: (Preferred Alternative): Mid-Island Parks and Public Beach Improvements (Parcels B and C)
- Alternative 10: No Action/Natural Recovery

The Alabama TIG has examined and assessed the extent of injury and the restoration alternatives. In the Draft RP/EIS, the Alabama TIG presents to the public their plan for providing partial compensation to the public for lost recreational use in Alabama. In particular, it considers restoration approaches to help restore, replace, rehabilitate, or acquire the equivalent of the lost recreational shoreline use in Alabama. The Alabama TIG believes that the preferred alternatives in this Draft RP/EIS are most appropriate for addressing lost recreational shoreline use in Alabama at this time. Additional restoration planning for lost recreational use in Alabama will occur at a later time.

Next Steps

The public is encouraged to review and comment on the Draft RP/EIS. As described above, public meetings are scheduled to facilitate the public review and comment process. After the close of the public comment period, the Alabama TIG will consider and address the comments received before issuing a Final RP/EIS. A summary of comments received, the Alabama TIG's responses, and any revisions to the document, as

[1] *https://www.justice.gov/enrd/file/838066/download.*

appropriate, will be included in the final document. After issuing the Final RP/EIS, the Alabama TIG will prepare a Record of Decision that formally selects the restoration project alternatives.

PUBLIC MEETING SCHEDULE

Date	Time (local times)	Location
January 17, 2017	6 p.m. Open House 6:30 p.m. Public Meeting.	Shelby Auditorium, Shelby Fisheries Center, Dauphin Island Sea Lab, 101 Bienville Boulevard, Dauphin Island, AL 36528.
January 18, 2017	6 p.m. Open House 6:30 p.m. Public Meeting.	Erie H. Meyer Civic Center, 1930 W. 2nd Street, Gulf Shores, AL 36542.

Invitation to Comment

The Alabama TIG seeks public review and comment on the Draft RP/EIS. 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 publicly available at any time.

Administrative Record

The documents included in the Administrative Record can be viewed electronically at the following location: *http://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority of this action is the OPA of 1990 (33 U.S.C. 2701 *et seq.*) and the implementing NRDA regulations found at 15 CFR part 990.

Dated: December 8, 2016.

Carrie Selberg,

Deputy Director, Office of Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 2016–29952 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Western Alaska Community Development Quota (CDQ) Program.

OMB Control Number: 0648–0269.

Form Number(s): None.

Type of Request: Regular (extension of a currently approved information collection).

Number of Respondents: 13.

Average Hours per Response: 5 minutes to register and 5 minutes to print letter for CDQ Vessel Registration System; 35 minutes for Groundfish/Halibut CDQ or Prohibited Species Quota (PSQ) Transfer Request; 5 hours for Application for Approval of Use of Non-CDQ Harvest Regulations; and 4 hours for Appeals.

Burden Hours: 25.

Needs and Uses: This request is for extension of a current information collection.

The Western Alaska Community Development Quota (CDQ) Program is an economic development program associated with federally managed fisheries in the Bering Sea and Aleutian Islands Management Area (BSAI). The CDQ Program receives apportionments of the annual catch limits for a variety of commercially valuable species in the BSAI, which are in turn allocated among six different non-profit managing organizations representing different affiliations of communities (CDQ groups). The CDQ Program redistributes a portion of commercially important BSAI fisheries species to adjacent communities. There are 65 communities participating in the program. CDQ groups use the revenue derived from the harvest of their fisheries allocations as a basis both for funding economic development activities and for providing employment opportunities. Thus, the successful harvest of CDQ Program allocations is integral to achieving the goals of the program.

National Marine Fisheries Service (NMFS) manages the groundfish fisheries in the exclusive economic zone off Alaska. NMFS manages the groundfish and crab fisheries of the BSAI under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMPs). The North Pacific Fishery Management Council prepared the FMPs under the authority of the Magnuson-Stevens Fishery Conservation & Management Act (16 U.S.C. 1801 *et seq.*) as amended in 2006. The International Pacific Halibut Commission and NMFS manage fishing for Pacific halibut through regulations established under the authority of the Northern Pacific Halibut Act of 1982. Regulations implementing the FMPs appear at 50 CFR parts 300, 679, and 680.

Affected Public: Not for profit institutions; business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 12, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–30217 Filed 12–15–16; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions And Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add products and a service to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete products and a service previously furnished by such agencies.

DATES: Comments must be received on or before January 15, 2017.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely

Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products and service are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Products

NSN(s)—Product Name(s): 6645–01–NIB–0153—Clock, LCD Digital Display, Radio-Controlled, Silver, 9.75″ x 7.25″ x 1″
Mandatory for: Total Government Requirement
Mandatory Source(s) of Supply: Chicago Lighthouse Industries, Chicago, IL
Contracting Activity: General Services Administration, New York, NY
Distribution: A-List

NSN(s)*—Product Name(s):* MR 357—Tumblers, Red, White and Blue, Includes Shipper 10357
Mandatory for: Military commissaries and exchanges in accordance with the Code of Federal Regulations, Chapter 51, 51–6.4.
Mandatory Source(s) of Supply: Industries for the Blind, Inc., West Allis, WI
Contracting Activity: Defense Commissary Agency
Distribution: C-List

Service

Service Type: Document Destruction Service
Mandatory for: U.S. Department of Labor (DOL), Office of Workers' Compensation Programs, Charles E. Bennett Federal Building, 400 West Bay Street, Suites 722, 826 and 943 Jacksonville, FL
Mandatory Source(s) of Supply: Challenge Enterprises of North Florida, Inc., Green Cove Springs, FL
Contracting Activity: Dept of Labor, Office of the Assistant Secretary for Administration and Management OASAM-Atlanta Reg

Deletions

The following products and service are proposed for deletion from the Procurement List:

Products

NSN(s)—Product Name(s): 8520–00–NIB–0116—PURELL/SKILCRAFT Instant Hand Sanitizer, Gel, 1200ml
Mandatory Source(s) of Supply: Travis Association for the Blind, Austin, TX
Contracting Activity: Department of Veterans Affairs

NSN(s)—Product Name(s): 8950–01–E60–5752—Garlic Powder, 160 oz. Container, 5 lb. per container, 3/CS
Mandatory Source(s) of Supply: CDS Monarch, Webster, NY
Contracting Activities: Department of Veterans Affairs, Defense Logistics Agency Troop Support

NSN(s)—Product Name(s): 5340–01–527–6885—Clamp, Loop, CRES, 1/2″ loop x 1/2″ wide
Mandatory Source(s) of Supply: Provail, Seattle, WA
Contracting Activity: Defense Logistics Agency Troop Support

Service

Service Type: Document Destruction Service
Mandatory for: Internal Revenue Service: 2725 N. Westwood Blvd., Poplar Bluff, MO
Mandatory Source(s) of Supply: Cape Girardeau Community Sheltered Workshop, Inc., Cape Girardeau, MO
Contracting Activity: Department of the Treasury

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–30347 Filed 12–15–16; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Addition and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Addition to and Deletions from the Procurement List.

SUMMARY: This action adds a service to the Procurement List that will be furnished by the nonprofit agency employing persons who are blind or have other severe disabilities, and deletes products and services from the Procurement List previously furnished by such agencies.

DATES: Effective January 15, 2017.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Addition

On 11/10/2016 (81 FR 78996–78997), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed addition to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agency to provide the service and impact of the addition on the current or most recent contractors, the Committee has determined that the service listed below is suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organization that will provide the service to the Government.

2. The action will result in authorizing small entities to provide the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service is added to the Procurement List:

Service

Service Type: Custodial Service
Service Mandatory For: U.S. Army, U.S. Military Academy, First Class Club and Grant Hall, West Point, NY
Mandatory Source(s) of Supply: Access: Supports for Living Inc., Middletown, NY
Contracting Activity: Dept. of the Army, W6QM MICC-West Point

Deletions

On 11/10/2016 (81 FR 78996–78997), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

NSN(s)—Product Name(s): 7520–00–282–2137—Trimmer, Paper 7520–00–224–7621—Trimmer, Paper, Drop Knife, Beige, 24″ x 24″
Mandatory Source(s) of Supply: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, WA.
Contracting Activity: General Services Administration, New York, NY.

NSN(s)—Product Name(s): 7195–01–484–0017—Bulletin Board, Granite Finish, 36″ x 24″, Aluminum Frame.
Mandatory Source(s) of Supply: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, WA.
Contracting Activities: Department of Veterans Affairs, Strategic Acquisition Center General Services Administration, Philadelphia, PA.

Services

Service Type: Document Destruction Service
Mandatory for: Internal Revenue Service Offices at the following locations:
Service Locations:
2628 S. Cherry Avenue, Fresno, CA
5104 N. Blyth, Fresno, CA
890 West Ashlan, Fresno, CA
1728 Van Ness, Fresno, CA
Cross Point Tower One: 900 Chelmsford Street, Lowell, MA
53 North Sixth Street, New Bedford, MA
921 N. Nova Boulevard, Holly Hill, FL
675 W. Moana Lane, Reno, NV
Jackson: 234 Louis Glick Hwy, Jackson, MI
2628 S. Cherry Avenue, Fresno, CA
5104 N. Blyth, Fresno, CA
890 West Ashlan, Fresno, CA
1728 Van Ness, Fresno, CA
Mobile: 1110 Montlimar Dr., Mobile, AL
One Pensacola Plaza: 125 W Romana Street, Pensacola, FL
Springfield: 3333 S. National Ave, Springfield, MO
El Dorado: 1115 North Madison Ave, El Dorado, AR
Pine Bluff: 100 East 8th Ave, Pine Bluff, AR
Effingham: 405 South Banker Street, Effingham, IL
Indy Bldg: 7525 East 39th Street, Indianapolis, IN
Evansville: 7409 Eagle Crest Blvd., Evansville, IN
7 East Ohio Street, Rm 442, Indianapolis, IN
Creekside IV: 12 Cadillac Dr., Ste 400, Brentwood, TN
Defiance: 208 Perry St, Defiance, OH
Lorain: 300 Broadway, Lorain, OH
Painesville: 8 North State Street, Painesville, OH
Steubenville: 500 Market Street, Steubenville, OH
Warrendale: 547 Keystone Drive, Warrendale, PA
11620 Caroline Road, Philadelphia, PA
9815 B Roosevelt Blvd., Philadelphia, PA
Greensboro: 2303 W Meadowview Road, Greensboro, NC
Winston Salem: 251 N Main Street, Winston Salem, NC
201 Como Park Blvd., Cheektowaga, NY
1314 Griswald Plaza, Erie, PA
7th & State Street, Erie, PA
101 Park Deville Drive, Columbia, MO
919 Jackson Street, Chillicothe, MO
3702 W. Truman Blvd., Suite 113, Jefferson City, MO
Mission: 5799 Broadmoor St., Mission, KS
Chillicothe: 1534 North Bridge St., Chillicothe, OH
The Plains: 70 N. Plains Road, The Plains, OH
Zanesville: 710 Main St., Zanesville, OH
11 South 12th Street, Richmond, VA
600 Main Street, Richmond, VA
6021 Durand Avenue, Suite 600, Racine, WI
Janesville: 20 E Milwaukee St., Ste. 204, Janesville, WI
Sheboygan: 2108 Kohler Memorial Dr., Sheboygan, WI
2201 Cantu Court, Sarasota, FL
300 Lock Road, Deerfield Beach, FL
Multiple Locations, Chicago, IL
Grand Rapids: 678 Front Street NW., Grand Rapids, MI
Portage: 8075 Creekside Drive, Portage, MI
South Bend: One Michiana Square, South Bend, IN
Benton Harbor: 777 Riverview Drive, Benton Harbor, MI
Corporate Plaza 1: 8100 Corporate Drive, Hyattsville, MD
Customer Service Site: 120 Charles Street, Baltimore, MD
10 Metrotech Center, New York, NY
10 Richmond Terrace, New York, NY
107 Charles Lindbergh Blvd., Garden City, NY
30 Montgomery Street, Jersey City, NJ
518A East Main Street, Riverhead, NY
Beaufort: 1212 Charles Street, Beaufort, SC

Mandatory Source(s) of Supply:

Prime Contractor: SourceAmerica

Subcontractors:

AccessPoint RI, Cranston, RI
Challenge Enterprises of North Florida, Inc., Green Cove Springs, FL
Beacon Group, Inc., Tucson, AZ
Community Enterprises of St. Clair County, Port Huron, MI
The ARC Fresno/Madera Counties, Fresno, CA
Wiregrass Rehabilitation Center, Inc., Dothan, AL
United Cerebral Palsy of Central Arkansas Little Rock, AR
United Cerebral Palsy of the Land of Lincoln, Springfield, IL
Shares Inc., Shelbyville, IN
Weaver Industries, Inc., Akron, OH
The Orange Grove Center, Inc., Chattanooga, TN
Opportunity Center, Incorporated, Wilmington, DE
OE Enterprises, Inc., Hillsborough, NC
Lifetime Assistance, Inc., Rochester, NY
JobOne, Independence, MO
Greene, Inc., Xenia, OH
Goodwill Services, Inc., Richmond, VA
Goodwill Industries of Southeastern Wisconsin, Milwaukee, WI
Goodwill Industries of South Florida, Miami, FL
Glenkirk, Northbrook, IL
Gateway, Berrien Springs, MI
Athelas Institute, Inc., Hyattsville, MD
NYSARC, Inc., NYC Chapter, New York, NY
Florence County Disabilities and Special Needs Board, Florence, SC
Contracting Activity: Dept. of the Treasury/Internal Revenue Service, Washington, DC

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–30348 Filed 12–15–16; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2016–HQ–0003]

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.

DATES: Consideration will be given to all comments received by January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: DA Civilian Employment and Marketing Feedback; OMB Control Number 0702–XXXX.

Type of Request: New collection.

Number of Respondents: 128.

Responses per Respondent: 1.

Annual Responses: 128.

Average Burden per Response: 1.5 hours.

Annual Burden Hours: 192 hours.

Needs and Uses: The information collection requirement is necessary to provide the data needed to understand the best strategies and implementation tactics to build awareness of Army civilian opportunities and fill critical occupations.

Affected Public: Individuals or households.

Frequency: One-time.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *Oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

You may also submit comments and recommendations, identified by Docket ID 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 ID 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: Mr. Frederick Licari. Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: December 12, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–30214 Filed 12–15–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2016–OS–0117]

Proposed Collection; Comment Request

AGENCY: National Defense University, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* and as part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the Center for the Study of Weapons of Mass Destruction at the Institute for National Strategic Studies announces a proposed generic information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the 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 February 14, 2017.

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:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

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 Center for the Study of Weapons of Mass Destruction, Institute for National Strategic Studies, National Defense University, ATTN: Natasha E. Bajema, Ph.D., Washington, DC 20319–5066, or call at 202–685–4234.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Regular Generic Clearance for the Collection of NDU Emergence and Convergence; OMB Control Number 0704–XXXX.

Needs and Uses: The information collection requirement is necessary to assess the impact of emerging technologies (additive manufacturing, advanced robotics, nanotechnology, nuclear energy and synthetic biology) on the threat of weapons of mass destruction (WMD) and governance, tools and measures designed to counter WMD as part of a multi-year study entitled Emergence and Convergence. These surveys will generate important new data on the risk of misuse and governability of these technologies and support in-depth analysis of national security risks.

Current Actions: Processing New as Generic.

Type of Review: New.

Affected Public: Business or other for profit; Not-for-profit institutions.

Estimated Number of Annual Respondents: 65.

Average Expected Annual Number of Activities: 1.

Below we provide projected *average* estimates for the next three years:

Average Number of Respondents per Activity: 65.

Responses per Respondent: 2.

Annual Responses: 130.

Average Burden per Response: 60 minutes.

Annual Burden Hours: 130.

Frequency: On occasion.

Respondents are subject matter experts including scientists, engineers and technologists at academic institutions, non-for-profit organizations and industry. Structured techniques for the elicitation of expert judgment are key tools for national security risk assessments. The Delphi method involves an iterative series of questionnaires designed to build an expert consensus on a topic for which there is little or no existing data. This survey offers significant public benefit by producing a report that will support a dialogue between policymakers and private sector stakeholders. The report generated by this survey will help to educate the private sector on the national security risks associated with emerging technologies.

Dated: December 13, 2016.

Aaron Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2016–30271 Filed 12–15–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–15]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SA&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–15 with attached Policy Justification and Sensitivity of Technology.

Dated: December 12, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 07 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-15, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to the Government of the United Arab Emirates for defense articles and services estimated to cost $3.5 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Transmittal No. 16–15

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* United Arab Emirates.

(ii) *Total Estimated Value:*

Major Defense Equipment *	$1.68 billion
Other	$1.82 billion
TOTAL	$3.50 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Twenty-eight (28) AH–64E Remanufactured Apache Attack Helicopters

Nine (9) new AH–64E Apache Attack Helicopters

Seventy-six (76) T700–GE–701D Engines (56 remanufactured, 18 new, 2 spares)

Thirty-nine (39) AN/ASQ–170 Modernized Target Acquisition and Designation Sight/AN/AAR–11 Modernized Pilot Night Vision Sensors (28 remanufactured, 9 new, 2 spares)

Thirty-two (32) remanufactured AN/APR–48B Modernized—Radar Frequency Interferometers

Forty-six (46) AAR–57 Common Missile Warning Systems (31 remanufactured, 9 new, 6 spares)

Eighty-eight (88) Embedded Global Positioning Systems with Inertial Navigation (72 new, 16 spares)
Forty-four (44) Manned-Unmanned Teaming-International (MUMTi) Systems (28 remanufactured, 9 new, 7 spares)
Fifteen (15) new MUMTi System Upper Receivers

Non-MDE: Training devices, helmets, simulators, generators, transportation, wheeled vehicles and organization equipment, spare and repair parts, support equipment, tools and test equipment, technical data and publications, personnel training and training equipment, U.S. government and contractor engineering, technical, and logistics support services, and other related elements of logistics support.

(iv) *Military Department:* Army (AE–B–GUA).

(v) *Prior Related Cases, if any:* FMS case: AE–B–JAH–02 Jan 92–$617M, FMS case: AE–B–UDE–06 Jan 00–$195M, FMS case: AE–B–UDN–28 Nov 05–$755M, FMS case: AE–B–ZUL–21 Oct 09–$252M, FMS case: AE–B–ZUF–22 Dec 08–$174M.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached.

(viii) *Date Report Delivered to Congress:* December 7, 2016.

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Arab Emirates—Apache AH–64E Helicopters and Services

The Government of the United Arab Emirates (UAE) has requested a possible sale of twenty-eight (28) AH–64E Remanufactured Apache Attack Helicopters; nine (9) new AH–64E Apache Attack Helicopters; Seventy-six (76) T700–GE–701D Engines (56 remanufactured, 18 new, 2 spares); thirty-nine (39) AN/ASQ–170 Modernized Target Acquisition and Designation Sight/AN/AAR–11 Modernized Pilot Night Vision Sensors (28 remanufactured, 9 new, 2 spares); thirty-two (32) remanufactured AN/APR–48B Modernized—Radar Frequency Interferometers forty-six (46) AAR–57 Common Missile Warning Systems (31 remanufactured, 9 new, 6 spares); eighty-eight (88) Embedded Global Positioning Systems with Inertial Navigation (72 new, 16 spares); forty-four (44) Manned-Unmanned Teaming-International (MUMTi) systems (28 remanufactured, 9 new, 7 spares); and fifteen (15) new MUMTi System Upper Receivers. This request also includes training devices, helmets, simulators, generators, transportation, wheeled vehicles and organization equipment, spare and repair parts, support equipment, tools and test equipment, technical data and publications, personnel training and training equipment, U.S. government and contractor engineering, technical, and logistics support services, and other related elements of logistics support. Total estimated program cost is $3.5 billion.

This proposed sale will enhance the foreign policy and national security of the U.S. by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.

The proposed sale will improve the UAE's capability to meet current and future threats and provide greater security for its critical infrastructure. The UAE will use the enhanced capability to strengthen its homeland defense. The UAE will have no difficulty absorbing these Apache aircraft into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be Boeing in Mesa, AZ and Lockheed Martin in Orlando, FL. Offsets are a requirement of doing business in UAE; however offsets are negotiated directly between the Original Equipment Manufactures or other vendors and the UAE government and details are not known at this time.

Implementation of this proposed sale will not require the assignment of contractor representatives to the UAE.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–15

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The AH–64E Apache Attack Helicopter weapon system contains communications and target identification equipment, navigation equipment, aircraft survivability equipment, displays, and sensors. The airframe itself does not contain sensitive technology; however, the pertinent equipment listed below will be either installed on the aircraft or included in the sale:

a. The AN/APG–78 Fire Control Radar (FCR) is an active, low-probability of intercept, millimeter-wave radar, combined with a passive AN/APR–48B Modernized Radar Frequency Interferometer (M–RFI) mounted on top of the helicopter mast. The FCR Ground Targeting Mode detects, locates, classifies and prioritizes stationary or moving armored vehicles, tanks and mobile air defense systems as well as hovering helicopters, helicopters, and fixed wing aircraft in normal flight If desired, the radar data can be used to refer targets to the regular electro-optical Modernized Target Acquisition and Designation Sight (MTADS), This information is provided in a form that cannot be extracted by the foreign user, The content of these items is classified SECRET. User Data Module (UDM) on the RFI processor, contains the Radio Frequency threat library. The UDM, which is a hardware assemblage, is classified CONFIDENTIAL when programmed with threat parameters, threat priorities and/or techniques derived from U.S. intelligence information.

b. The AN/ASQ–170 Modernized Target Acquisition and Designation Sight/AN/AAQ–11 Pilot Night Vision Sensor (MTADS/PNVS) provides day, night, and limited adverse weather target information, as well as night navigation capabilities. The PNVS provides thermal imaging that permits nap-of-the-earth flight to, from, and within the battle area, while TADS provides the co-pilot gunner with search, detection, recognition, and designation by means of Direct View Optics (DVO), EI²television, and Forward Looking Infrared (FLIR) sighting systems that may be used singularly or in combinations. Hardware is UNCLASSIFIED. Technical manuals for authorized maintenance levels are UNCLASSIFIED. Reverse engineering is not a major concern.

c. The AN/APR–48B Modernized Radar Frequency Interferometer (M–RFI) is an updated version of the passive radar detection and direction finding system. It utilizes a detachable UDM on the M–RFI processor, which contains the Radar Frequency (RF) threat library. The UDM, which is a hardware assemblage item is classified CONFIDENTIAL when programmed. Hardware becomes CLASSIFIED when populated with threat parametric data. Releasable technical manuals are Unclassified/restricted distribution.

d. The AAR–57 Common Missile Warning System (CMWS) detects energy emitted by threat missiles in-flight, evaluates potential false alarm emitters in the environment, declares validity of threat and selects appropriate countermeasures. The CMWS consists of an Electronic Control Unit (ECU),

Electro-Optic Missile Sensors (EOMSs), and Sequencer and Improved Countermeasures Dispenser (ICMD). The ECU hardware is classified CONFIDENTIAL; releasable technical manuals for operation and maintenance are classified SECRET.

e. The AN/APR–39 Radar Signal Detecting Set is a system that provides warnings of radar-directed air defense threats and allows appropriate countermeasures. This is the 1553 databuscompatible configuration. The hardware is classified CONFIDENTIAL when programmed with U.S. threat data; releasable technical manuals for operation and maintenance are classified CONFIDENTIAL; releasable technical data (technical performance) is classified SECRET. The system can be programmed with threat data provided by the purchasing country.

f. The AN/AVR–2B Laser Warning Set is a passive laser warning system that receives, processes, and displays threat information resulting from aircraft illumination by lasers on the multi functional display. The hardware is classified CONFIDENTIAL; releasable technical manuals for operation and maintenance are classified SECRET.

g. The Embedded Global Positioning System/Inertial Navigation System plus Multi Mode Receiver (EGI+MMR) The aircraft has two EGIs which use internal accelerometers, rate gyro measurements, and external sensor measurements to estimate the aircraft state, provides aircraft flight and position data to aircraft systems. The EGI is a velocity-aided, strap down, ring laser gyro based inertial unit. The EGI unit houses a GPS receiver. The receiver is capable of operating in either non-encrypted or encrypted. When keyed, the GPS receiver will automatically use anti-spoof/jam capabilities when they are in use. The EGI will retain the key through power on/off/on cycles. Because of safeguards built into the EGI, it is not considered classified when keyed. Integrated within the EGI is an Inertial Measurement Unit (IMU) for processing functions. Each EGI also houses a Multi-Mode Receiver (MMR). The MMR is incorporated to provide for reception of ground based NAVAID signals for instrument aided flight. Provides IMC I IFR integration and certification of improved Embedded Global Positioning System and Inertial (EGI) unit, with attached MMR, with specific cockpit instrumentation allows Apaches to operate within the worldwide IFR route structure. Also includes integration of the Common Army Aviation Map (CAAM), Area Navigation (RNAV), Digital Aeronautical Flight Information File (DAFIF) and Global Air Traffic Management (GATM) compliance.

h. Manned-Unmanned Teaming-International (MUMT–I) provides Manned-Unmanned Teaming with Unmanned Aerial Systems (UASs), other Apaches and other interoperable aircraft and land platforms. Provides ability to display real-time UAS sensor information to aircraft and transmit MTADS video. Capability to receive video and metadata from Interoperability Profile compliant (IOP) as well as legacy systems. It is a data link for the AH–64E that provides a fully integrated multiband, interoperable capability that allows pilots to receive off-board sensor video streaming from different platforms in non-Tactical Common Data Link (TCDL) bands. The MUMT–I data link can retransmit Unmanned Aerial System (UAS) or Apache Modernized Target Acquisition Designation Sight full-motion sensor video and metadata to another MUMT–I-equipped Apache. It can also transmit to ground forces equipped with the One Station Remote Video Terminal. It provides Apache aircrews with increased situational awareness and net-centric interoperability while significantly reducing sensor-to-shooter timelines. This combination results in increased survivability of Apache aircrews and ground forces by decreasing their exposure to hostile fire.

i. Link 16 is a military tactical data exchange network. Its specification is part of the family of Tactical Data Links. Link 16 provides aircrews with enhanced situational awareness and the ability to exchange target information to Command and Control (C2) assets via Tactical Digital Information Link-Joint (TADIL–J). Link 16 can provide a range of combat information in near-real time to U.S. and allies' combat aircraft and C2 centers. This will contribute to the integrated control of fighters by either ground-based or airborne controllers and will greatly increase the fighters' situational awareness and ability either to engage targets designated by controllers or to avoid threats, thereby increasing mission effectiveness and reducing fratricide and attrition. The Link 16 enables the Apache to receive information from the command-and-control platforms and enables it to share this data with all the other services, making it more efficient at locating and prosecuting targets. The material solution for the AH–64E is currently the Small Tactical Terminal (SIT) KOR–24A from Harris to satisfy its requirement for an Airborne and Maritime/Fixed Station (AMF) Small Airborne Link 16 Terminal (SALT). The SIT is the latest generation of small, two-channel, Link 16 and VHF/UHF radio terminals. While in flight, the SIT provides simultaneous communication, voice or data, on two key waveforms.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. A determination has been made that the recipient country can provide the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of the United Arab Emirates.

[FR Doc. 2016–30225 Filed 12–15–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Military Family Readiness Council (MFRC); Notice of Federal Advisory Committee Meeting

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing this notice to announce a Federal Advisory Committee meeting of the Department of Defense Military Family Readiness Council (MFRC). This meeting will be open to the public.

DATES: Thursday, January 26, 2017, from 1:00 p.m. to 3:00 p.m.

ADDRESSES: Pentagon Library & Conference Center, Room B6 (escorts will be provided from the Pentagon Metro entrance).

FOR FURTHER INFORMATION CONTACT: Ms. Melody McDonald or Dr. Randy Eltringham, Office of the Deputy Assistant Secretary of Defense (Military Community & Family Policy), Office of Family Readiness Policy, 4800 Mark Center Drive, Alexandria, VA 22350–2300, Room 3G15. Telephones (571) 372–0880; (571) 372–5315 or email: OSD Pentagon OUSD P–R Mailbox Family Readiness Council, *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.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.

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public, subject to the availability of space. Members of the public who are entering the Pentagon should arrive at the visitors' center next to the Metro entrance 30 minutes before the scheduled meeting time to allow time to pass through the security check points. Members of the public need to email the Council at *osd.pentagon.ousd-p-rmbx.family-readiness-council@mail.mil* no later than 5:00 p.m., on Thursday, January 12, 2017 to arrange for an escort from the security check point to the Conference Room area.

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, interested persons may submit a written statement for consideration by the Council. Persons desiring to submit a written statement to the Council must submit to the email address *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil,* no later than 5:00 p.m., on Thursday, January 12, 2017.

The purpose of this meeting is to receive information related to programs and services for DoD Family Members with Special Needs, including healthcare and the Exceptional Family Member Program.

Thursday, January 26, 2017 Meeting Agenda

Welcome & Administrative Remarks

Programs and Services for DoD Family Members With Special Needs Healthcare

Exceptional Family Member Program Update

DoD State Liaison Office Update

Closing Remarks

Note: Exact order may vary

Dated: December 13, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–30274 Filed 12–15–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–52]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SA&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives,

Transmittal 16–52 with attached Policy Justification and Sensitivity of Technology.

Dated: December 12, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 07 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-52, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to the Kingdom of Morocco for defense articles and services estimated to cost $108 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

James Worm
Dep Dir (A)
For J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Transmittal No. 16–52

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Kingdom of Morocco.

(ii) *Total Estimated Value:*

Major Defense Equipment *	$101 million
Other	$ 7 million
TOTAL	$108 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

One thousand two-hundred (1,200) TOW 2A, Radio Frequency (RF) Missiles (BGM–71–4B–RF)

Fourteen (14) TOW 2A, Radio Frequency (RF) Missiles (Fly-to-Buy Lot Acceptance Missiles)

Non-MDE includes:

U.S. Government and contractor engineering; technical and logistics support services; and other related elements of logistics and program support.

(iv) *Military Department:* Army (VTG).

(v) *Prior Related Cases, if any:* MO–B–USZ for $137,034.913 signed on 4 May 2016.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* December 7, 2016.

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Government of Morocco—Radio Frequency (RF) TOW 2A, Radio Frequency (RF) Missile (BGM–71–4B–RF and Support)

The Government of Morocco has requested a possible sale of one thousand two-hundred (1,200) TOW 2A, Radio Frequency (RF) Missiles (BGM–71–4B–RF) and fourteen (14) TOW 2A, Radio Frequency (RF) Missiles (Fly-to-Buy Lot Acceptance Missiles). Also included with this request is U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistics and program support. The estimated MDE sale is $101 million. The total estimated value is $108 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally that continues to be an important force for the political stability and economic progress in North Africa. This proposed sale directly supports Morocco and serves the interests of the Moroccan people and the United States.

The proposed sale of TOW 2A Missiles and technical support will advance Morocco's efforts to develop an integrated ground defense capability. Morocco will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors involved in this program are: Raytheon Missile Systems, Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the U.S. Government or contractor representatives to travel to Morocco.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–52

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The Radio Frequency (RF) TOW 2A Missile (BGM–71E–4B–RF) is designed to defeat armored vehicles, reinforced urban structures, field fortifications and other such targets. TOW missiles are fired from a variety of TOW launchers in the U .S. Army, USMC, and FMS customer forces. The TOW 2A RF missile can be launched from the same launcher platforms as the existing wire-guided TOW 2A missile without modification to the launcher. The TOW 2A missile (both wire & RF) contains two trackers for the launcher to track and guide the missile in flight. Guidance commands from the launcher are provided to the missile by a RF link contained within the missile case. The hardware, software, and technical publications provided with the sale thereof are UNCLASSIFIED. However, the system itself contains sensitive technology that instructs the system on how to operate in the presence of countermeasures.

2. The highest level of classified information that must be disclosed in training to use the end item is UNCLASSIFIED. The highest level of classified information that must be disclosed in maintenance of the end item is UNCLASSIFIED. The highest level of classified information that could be disclosed by sale of the end item is SECRET. The highest level of classified information that could be revealed by testing the end item is SECRET. The highest level of classified information that could be revealed by reverse engineering of the end item is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Morocco.

[FR Doc. 2016–30229 Filed 12–15–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Implementation of Executive Orders on Floodplain Management and Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers (USACE) has developed draft internal agency implementation guidance for the Executive Order on Floodplain Management to incorporate the new requirements of the Executive Order on Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input. USACE is seeking feedback from partners, other government and non-government stakeholders, Tribes, and members of the general public on the proposed draft guidance that has been developed.

DATES: Comments must be submitted on or before January 30, 2017.

ADDRESSES:

Email: USACE–EO11988@usace.army.mil and include ''Implementation Comments'', in the subject line of the message.

Mail: HQ, U.S. Army Corps of Engineers, ATTN: EO13690/CECW–HS/3G68, 441 G Street NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

FOR FURTHER INFORMATION CONTACT: Dr. Stephanie Bray, Headquarters, Office of Homeland Security, Washington, DC at 202–761–4827.

SUPPLEMENTARY INFORMATION: Executive Order 11988, Floodplain Management, was issued in 1977 and directed agencies to avoid to the extent possible the long and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative. EO 11988 applied to Federal agencies carrying out its responsibilities for:

- Acquiring, managing, and disposing of federal lands and facilities;
- Providing federally-undertaken, financed, or assisted construction and improvements;
- Conducting federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulation, and licensing activities.

It required agencies performing federal actions in the base floodplain (floodplain associated with the 1 percent annual chance (also known as 1 percent annual exceedance probability) flood) to do the following:

1. Determine if a proposed action is in the base floodplain (that area which has a one percent or greater chance of flooding in any given year).

2. Conduct early public review, including public notice.

3. Identify and evaluate practicable alternatives to locating in the base floodplain, including alternative sites outside of the floodplain.

4. Identify impacts of the proposed action.

5. If impacts cannot be avoided, develop measures to minimize the impacts and restore and preserve the floodplain, as appropriate.

6. Reevaluate alternatives.

7. Present the findings and a public explanation.

8. Implement the action.

Following issuance of EO 11988 and the corresponding interagency Implementing Guidelines, USACE developed Engineering Regulation (ER) 1165–2–26 for interpreting and implementing the requirements of EO 11988. The regulation applies to all field operating activities having Civil Works responsibilities, with the exception of the Regulatory Program which implements EO 11988 through its regulations. Section 14 of ER 1165–2–26 explains how EO 11988 applies to specific Civil Works programs.

On January 30, 2015, the White House issued Executive Order 13690—Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Public Input. EO 13690 and the Federal Flood Risk Management Standard (FFRMS), implemented through guidelines established by the Water Resources Council (''Implementing Guidelines''), updated EO 11988 to include the following:

- Requires the use of an expanded floodplain for some actions that are federal investments.
- Requires that the elevation and horizontal extent of the expanded floodplain be determined using one of three approaches: The climate-informed science approach, the freeboard value approach, and the 500-year flood elevation approach.
- Requires agencies to use natural and nature based approaches, where possible.
- Establishes higher standards for critical actions.

USACE established a Product Development Team (PDT) to investigate what impacts EO 13690 and the FFRMS would have on its policies and programs and, in particular, to develop revised implementation guidance for EO 11988, as amended. A draft Engineer Circular (EC) that will ultimately rescind ER 1165–2–26 has been developed to provide overarching guidance for the implementation of EO 11988, as amended. The EC will expire two years from issuance, which will provide USACE time to evaluate the guidance provided, consider initial implementation experience to identify any necessary clarifications or changes, and incorporate any changes introduced by the reassessment of the FFRMS required by EO 13690. After two years, the EC will either be revised and reissued or converted to an ER, which does not expire and is more permanent agency guidance.

The draft EC is intended to provide overarching guidance to all USACE Civil Works mission areas. As such, it does not provide extensive detail about how the requirements will be implemented within specific program areas or activities; instead it establishes intended implementation principles that will be clarified in greater detail in individual program specific guidance documents, to be developed or revised at a later date. Generally, the new requirements will be incorporated into specific guidance documents as they are updated through the agency's regular process and schedule, unless a new guidance document needs to be prepared to address some aspect of implementation of the requirements. USACE now invites review and comment from our partners and stakeholders on the proposed implementation guidance contained within the draft EC.

Instructions for Providing Comments Online

USACE is requesting assistance in the form of data, comments, literature references, or field experiences, to help clarify the policy requirements for implementing EO 11988 and EO 13690 for agency activities. The draft EC is available for review on the USACE EO 13690 Implementation Web site (*http://www.iwr.usace.army.mil/Missions/FloodRiskManagement/FloodRiskManagementProgram/AbouttheProgram/PolicyandGuidance/FederalFloodRiskManagementStandard.aspx*). An Executive Summary of the draft EC is also available on the Web site to provide a high-level overview of the document and summary of the more substantial changes since the original 1984 ER. Additionally, a list of topics and issues for which feedback would be especially helpful is posted for reviewer's consideration. While USACE welcomes any and all feedback on the draft EC, feedback responding to the list of identified topics and issues will be particularly helpful to USACE in clarifying areas requiring new policy or practice. The most useful comments are from specific experiences and case examples. Commenters should use their knowledge of working with USACE on various types of federal actions as well as their understanding of EO 11988 and EO 13690. When comments are being made on specific sections of the document, USACE requests that commenters identify the relevant page and line numbers to which the comment applies.

All comments, literature citations, experiential references, data, other relevant reports, and input in response to the guiding topics and issues are being accepted through email, or through the postal service. All comments submitted by the date identified above will be compiled and sent to the PDT for their consideration.

Future Actions

Feedback and comments provided in response to this notice will be considered and the draft EC will be updated as appropriate. When the final EC is published, a notice will be placed in the **Federal Register** and on the USACE EO 13690 Implementation Web site, and the document itself will be made available through the USACE publications Web site (*http://www.publications.usace.army.mil/*).

Dated: December 12, 2016.

Karen Durham-Aguilera,

Director of Contingency, Operations and Homeland Security.

[FR Doc. 2016–30240 Filed 12–15–16; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

Notice of Availability of the Draft Missouri River Recovery Management Plan and Environmental Impact Statement

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The Kansas City and Omaha Districts of the U.S. Army Corps of Engineers (USACE), in cooperation with the U.S. Fish and Wildlife Service (USFWS), have developed the Missouri River Recovery Management Plan and Environmental Impact Statement (MRRMP–EIS). This document is a programmatic assessment of (1) major federal actions necessary to avoid a finding of jeopardy to the pallid sturgeon (*Scaphirhynchus albus*), interior least tern (*Sterna antillarum athalassos*), and the Northern Great Plains piping plover (*Charadrius melodus*) caused by operation of the Missouri River Mainstem and Kansas River Reservoir System and operation

and maintenance of the Missouri River Bank Stabilization and Navigation Project (BSNP) in accordance with the Endangered Species Act (ESA) of 1973, as amended; and (2) the Missouri River BSNP fish and wildlife mitigation plan described in the 2003 Record of Decision (ROD) and authorized by the Water Resources Development Acts (WRDA) of 1986, 1999, and 2007.

DATES: Submit written comments on the draft EIS on or before February 24, 2017.

ADDRESSES: Send written comments to U.S. Army Corps of Engineers, Omaha District, ATTN: CENWO–PM–AC—MRRMP–EIS, 1616 Capitol Ave, Omaha, NE 68102; or provide comments via an online comment form (preferred method) at *http://parkplanning.nps.gov/MRRMP.*

FOR FURTHER INFORMATION CONTACT: The above address or email to *cenwo-planning@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The USACE is issuing this notice pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (43 CFR parts 1500 through 1508). This notice announces the availability of the draft MRRMP–EIS and begins the public comment period. The MRRMP–EIS, its appendices, and other supporting documents can be accessed at: *www.moriverrecovery.org* under the ''Management Plan'' tab on the Web site homepage.

Background Information. The Missouri River flows for 2,341 miles from Three Forks, Montana at the confluence of the Gallatin, Madison, and Jefferson Rivers in the Rocky Mountains through the states of Montana, North Dakota, South Dakota, Nebraska, Iowa, Kansas, and Missouri. It is the longest river in the United States. USACE operates the Missouri River Mainstem Reservoir System (System) consisting of six dams and reservoirs with a capacity to store 72.4 million acre-feet (MAF) of water, the largest reservoir system in North America. The System is operated as an integrated system for eight congressionally authorized purposes, which include flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife. USACE operates the System in accordance with the policies and procedures prescribed in the *Missouri River Mainstem Reservoir System Master Water Control Manual* (Master Manual) (USACE, 2006a). The Kansas River Reservoir System includes the primary downstream flood control projects of Clinton, Perry, Tuttle Creek, Milford, Waconda (U.S. Bureau of Reclamation), Wilson, and Kanopolis. USACE also constructed and maintains the Missouri River Bank Stabilization and Navigation Project which provides a 9-foot deep navigation channel with a minimum width of 300 feet during the navigation season from April 1 to November 30 between Sioux City, Iowa, and the mouth near St. Louis, Missouri. The BSNP consists mainly of rock pile structures and revetments along the outsides of bends and transverse dikes along the insides of bends to force the river into a channel alignment that is self-maintaining or self-scouring.

During the course of the Master Manual Review and Update Study, developed from 1989 to 2004, USACE entered into formal consultation with USFWS on the effects of the operation of the Missouri River Mainstem Reservoir System, operation and maintenance of the BSNP, and operation of the Kansas River Reservoir System on the pallid sturgeon, interior least tern, and piping plover. A biological opinion (BiOp) was issued by USFWS in 2000 with a finding of jeopardy for all the listed species and a proposed Reasonable and Prudent Alternative (RPA) that was accepted by the USACE. In 2003, following additional consultation, USFWS provided an amended BiOp that determined the new proposed action by USACE would avoid jeopardizing the continued existence of the two listed bird species, but would continue to jeopardize the continued existence of the pallid sturgeon in the wild. The Missouri River Recovery Program (MRRP) was established in 2005 to implement the RPA requirements contained in the 2000 and 2003 BiOps and the BSNP fish and wildlife mitigation plan.

A substantial amount of new knowledge about the species, their habitats, and management actions has been developed since the 2003 Amended BiOp was completed. The Independent Scientific Advisory Panel (ISAP), established by the Missouri River Recovery Implementation Committee (MRRIC), issued a report in 2011 that recommended development of an overarching adaptive management (AM) plan that would anticipate implementation of combined flow management actions and mechanical habitat construction. They recommended an AM plan should be used to guide future management actions, monitoring, research, and assessment. The ISAP report also recommended basing the AM plan on an effects analysis, which would precede the development of the AM plan and incorporate new knowledge about the species accrued since the 2003 Amended BiOp. Since the 2011 report, the first phase of the effects analysis has been completed and documented for pallid sturgeon, interior least tern, piping plover, and associated habitat analyses.

The purpose of this draft MRRMP–EIS is to develop a suite of actions that allows the USACE to meet its obligations under the Endangered Species Act while still operating its projects for the congressionally authorized purposes. Authorities used to meet this purpose may include existing USACE authorities related to Missouri River System operations for listed species and acquisition and development of land needed for creation of habitat for listed species provided by Section 601(a) of the Water Resources Development Act of 1986, as modified by Section 334(a) of WRDA 1999, and further modified by Section 3176 of WRDA 2007, although alternatives formulation was not limited to these authorities.

The draft MRRMP–EIS assesses the programmatic effects of alternatives for implementing the MRRP, which include actions necessary to avoid a finding of jeopardy to the federally-listed species and associated actions which comply with the BSNP mitigation plan during the implementation timeframe for this EIS. This EIS provides the necessary information for the public to fully evaluate a range of alternatives to best meet the purpose and need of the MRRMP–EIS and to provide thoughtful and meaningful comment for the Agency's consideration. Six alternatives were carried forward from the Effects Analysis results for detailed evaluation in the MRRMP–EIS (the no-action alternative and five action alternatives). The following management actions were included in all six of the alternatives:

—Mechanical construction of emergent sandbar habitat (ESH);
—Vegetation management, predator management, and human restriction measures on ESH;
—Pallid sturgeon propagation and augmentation;
—Pallid early life stage habitat construction downstream of Ponca, Nebraska;
—Habitat development and management of acquired lands; and
—Monitoring and evaluation of management actions.

However the actual scale and extent of mechanical ESH creation and pallid early life stage habitat construction would vary among the alternatives.

Under the no-action alternative, USACE would continue to implement the MRRP as it is currently. In addition to the actions common to all alternatives, the USACE would mechanically construct ESH at a rate of 107 acres per year in the Garrison and Gavins Point reaches and construct pallid early life stage habitat to achieve an average of 20 acres of shallow water habitat per river mile. The no-action alternative would also continue to implement the plenary spring pulse included in the Master Manual.

Alternative 2 represents the USFWS's interpretation of the management actions that could be ultimately implemented as part of the 2003 Amended BiOp RPA. In addition to the actions common to all alternatives, the USACE would mechanically construct ESH at a rate up to 3,546 acres per year in the Garrison, Fort Randall, Lewis and Clark Lake, and Gavins Point reaches and pallid early life stage habitat to achieve an average of 30 acres of shallow water habitat per river mile. Alternative 2 would also include a spring pallid flow release consisting of a bimodal pulse in March and May and a low summer flow.

Under Alternatives 3–6, the USACE would follow the processes and criteria in the AM plan (companion document to the MRRMP–EIS) that was developed based on the results of the Effects Analysis. The AM plan identifies the process and criteria to implement initial management actions, assess hypotheses, and introduce new management actions should they become necessary. Initial management actions include specific study efforts to fill data gaps in knowledge of the pallid sturgeon life cycle, creation of spawning habitat for pallid sturgeon to monitor effectiveness, and the construction of pallid early life stage habitat following the interception and rearing complex (IRC) concept identified in the Effects Analysis.

In addition to the actions common to Alternatives 3–6, Alternative 3 would include mechanical construction of ESH at an average rate of 391 acres per year when construction is needed in the Garrison, Fort Randall, and Gavins Point reaches. Alternative 3 would not implement the plenary spring pulse included in the Master Manual. However, as part of the AM plan the potential for a one-time spawning cue test release, if studies during the first 9–10 years do not provide a clear answer on whether a spawning cue is important, is included in Alternative 3.

In addition to the actions common to Alternatives 3–6, Alternative 4 would include mechanical construction of ESH at an average rate of 240 acres per year when construction is needed in the Garrison, Fort Randall, and Gavins Point reaches. Alternative 4 also includes implementation of a spring ESH creation release if System storage is at 42 MAF or greater on April 1, normal flows that could create 250 acres of ESH have not occurred in the previous four years, and downstream flow is below identified flood control constraints specific to this alternative. Alternative 4 also includes, as part of the AM plan, the potential for a one-time spawning cue release as described for Alternative 3.

In addition to the actions common to Alternatives 3–6, Alternative 5 would include mechanical construction of ESH at an average rate of 309 acres per year when construction is needed in the Garrison, Fort Randall, and Gavins Point reaches. Alternative 5 also includes implementation of a fall ESH creation release if System storage is at 54.5 MAF or greater on October 17, normal flows that could create 250 acres of ESH have not occurred in the previous four years, and downstream flow is below identified flood control constraints specific to this alternative. Alternative 5, also includes, as part of the AM plan, the potential for a one-time spawning cue release as described for Alternative 3.

In addition to the actions common to Alternatives 3–6, Alternative 6 would include mechanical construction of ESH at an average rate of 304 acres per year when construction is needed in the Garrison, Fort Randall, and Gavins Point reaches. Alternative 6 also includes implementation of a spawning cue release, attempted every 3 years, consisting of a bimodal pulse in March and May. These spawning cue releases would not be started or would be terminated whenever downstream flow is at identified flood control constraints specific to this alternative.

The draft EIS evaluates the potential effects on the human environment associated with each of the above alternatives. Resources and uses evaluated include: River infrastructure and hydrological processes; pallid sturgeon; piping plover and interior least tern; fish and wildlife habitat; other special status species; water quality; air quality; cultural resources; land use and ownership; commercial sand and gravel dredging; flood risk management and interior drainage; hydropower; irrigation; navigation; recreation; thermal power; water supply; wastewater facilities; tribal interests (other); human health and safety; environmental justice; ecosystem services; and Mississippi River resources.

Meetings. Six public meetings to share information and to allow the public to provide oral and written comments will be held from 5:00 p.m. to 8:45 p.m. on:

- Tuesday, February 7, 2017—Fort Peck Interpretive Center, Yellowstone Road, Fort Peck, Montana 59223.
- Wednesday, February 8, 2017—Bismarck State College, National Energy Center of Excellence, 1500 Edwards Ave., Bismarck, North Dakota 58506.
- Thursday, February 9, 2017—Ramkota Hotel and Conference Center, 920 W Sioux Avenue, Pierre, South Dakota 57501.
- Tuesday, February 14, 2017—Thompson Alumni Center, Bootstrapper Hall, 6705 Dodge Street, Omaha, Nebraska 68612.
- Wednesday, February 15, 2017—Hilton Kansas City Airport, Shawnee B, 8801 NW 112th Street, Kansas City, Missouri 64153.
- Thursday, February 16, 2017—Double Tree Inn by Hilton Hotel, Ballroom A & B, 16625 Swingley Ridge Road, Chesterfield, Missouri 63017.

Each public meeting will begin with an open house at 5:00 p.m. A formal presentation will be provided at 5:45 p.m. followed by a public hearing session. Several different methods of submitting comments will be available at each public meeting. The public meeting dates or locations may change based on inclement weather or exceptional circumstances. If the meeting date or location is changed, the USACE will issue a press release and post it on *www.moriverrecovery.org* to announce the updated meeting details.

Schedule. Public comments on the draft MRRMP–EIS must be received by February 24, 2017. The USACE will consider and respond to all comments received on the draft MRRMP–EIS when preparing the final MRRMP–EIS. The USACE expects to issue the final EIS in the spring of 2018, at which time a Notice of Availability will be published in the **Federal Register**. A Record of Decision is expected in the spring of 2018.

Special Assistance for Public Meeting. The meeting facilities are physically accessible to people with disabilities. People needing special assistance to attend and/or participate in the meetings should contact: U.S. Army Corps of Engineers, Omaha District, ATTN: CENWO–PM–AC, 1616 Capitol Ave., Omaha, NE 68102 or email *cenwo-planning@usace.army.mil.* To allow sufficient time to process special requests, please contact no later than one week before the public meeting.

Public Disclosure Statement. If you wish to comment, you may mail your comments as indicated under the

ADDRESSES section of this notice. Before including your address, phone number, email address, or any other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made available to the public at any time. While you can request us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 8, 2016.

Mark Harberg,

Missouri River Recovery Program Manager, U.S. Army Corps of Engineers.

[FR Doc. 2016–30294 Filed 12–15–16; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Availability—Final Environmental Impact Statement for the Update of the Water Control Manuals and Water Supply Storage Assessment for the Apalachicola-Chattahoochee-Flint River Basin

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that the U.S. Army Corps of Engineers, Mobile District (USACE), has released the Final Environmental Impact Statement (FEIS) for the update of the Apalachicola-Chattahoochee-Flint (ACF) Water Control Master Manual (Master Manual) Alabama, Florida, and Georgia including a water supply storage assessment addressing reallocation of storage in Lake Sidney Lanier (Lake Lanier).

A Notice of Availability was published by the Environmental Protection Agency on December 16, 2016. The review period will end 30 days after that date.

DATES: The review period of the FEIS ends on January 14, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Lewis Sumner at telephone (251) 694–3857.

SUPPLEMENTARY INFORMATION: The Master Manual includes appendices prepared for individual projects in the ACF Basin and is the guide used by USACE to operate a system of five federal reservoir projects in the basin—Buford Dam and Lake Lanier, West Point Dam and Lake, Walter F. George Lock and Dam and Lake, George W. Andrews Lock and Dam and Lake, and Jim Woodruff Lock and Dam and Lake Seminole.

The purpose and need for the federal action is to determine how federal projects in the ACF Basin should be operated for their authorized purposes, in light of current conditions and applicable law, and to implement those operations through updated water control plans and manuals. The proposed action will result in an updated Master Manual and individual project water control manuals (WCMs) that comply with existing USACE regulations and reflect operations under existing congressional authorizations, taking into account changes in basin hydrology and demands from years of growth and development, new/rehabilitated structural features, legal developments, and environmental issues. The action includes updates to account for a June 28, 2011, decision of the 11th Circuit Court of Appeals.

On May 16, 2000, the Governor of the State of Georgia submitted a formal request to the Assistant Secretary of the Army (Civil Works) to adjust the operation of Lake Lanier, and to enter into agreements with the state or water supply providers to accommodate increases in water supply withdrawals from Lake Lanier and downstream at Atlanta over the next 30 years, culminating in total gross withdrawals of 705 million gallons per day (mgd)—297 mgd from Lake Lanier and 408 mgd downstream—by the year 2030. The Assistant Secretary of the Army (Civil Works) in 2002 denied Georgia's request. The 2011 decision of the 11th Circuit Court of Appeals ordered USACE to reconsider whether it has the legal authority to operate the Buford project to accommodate Georgia's request. USACE provided a legal opinion concluding that it has sufficient authority under applicable law to accommodate that request, but noted that any decision to take action on Georgia's request would require a separate analysis. On January 11, 2013, the Governor of the state of Georgia provided updated demographic and water demand data to confirm the continued need for 705 mgd to meet Georgia's water needs from Lake Lanier and the Chattahoochee River to approximately the year 2040 rather than 2030 as specified in the 2000 request. On December 4, 2015, after the Draft Environmental Impact Statement (DEIS) had been published, the Georgia Environmental Protection Division (GAEPD), on behalf of the State of Georgia, provided additional updated demographic and water demand data (referred to as Georgia's 2015 request) that reduced the state's needs from a total of 705 mgd to a range of 597–621 mgd—242 mgd from Lake Lanier (instead of 297 mgd) and 355–379 mgd downstream (instead of 408 mgd)—through the year 2050 rather than 2040 as specified in the 2013 request.

USACE's objectives for the Master Manual are to develop a water control plan that meets the existing water resource needs of the basin, fulfills its responsibilities in operating for the authorized project purposes, and complies with all pertinent laws. The FEIS presents the results of USACE's analysis of the environmental effects of the Proposed Action Alternative (PAA) that the USACE believes accomplishes these objectives.

USACE evaluated an array of potential water management alternatives and optional water supply amounts during the Master Manual update process, resulting in the selection of the PAA. Additional information on the components of the PAA can be found at *http://www.sam.usace.army.mil/Missions/PlanningEnvironmental/ACFMasterWaterControlManualUpdate/ACFDocumentLibrary.aspx.*

One alternative available to USACE is to continue with current operations. This approach is termed the No Action Alternative (NAA). The PAA would update the water control plans and manuals for the ACF Basin as directed by Secretary of the Army Pete Geren on January 30, 2008. Additionally, the PAA would provide for releases from Buford Dam to satisfy Georgia's 2015 request of 379 mgd from the Chattahoochee River for Metro Atlanta and would reallocate storage in Lake Lanier of 252,950 acre-feet to satisfy Georgia's 2015 request and support average annual water supply withdrawals of up to 222 mgd.

The FEIS responds to, and incorporates agency and public comments received on the DEIS, which was available for public review from October 2, 2015, through January 15, 2016. Five open house style public meetings were held on October 26th through November 9th, 2015, and more than 300 persons attended these workshops, either representing various agencies and organizations or as interested individual citizens. Two hundred seventy (270) comments on the DEIS were submitted by agencies (Federal, state, and local), private organizations, and individuals. The USACE responses to substantive agency and public comments are provided in appendix C of the FEIS.

USACE incorporated pertinent revisions and updates to the EIS and the WCM based on input received during the public review process. The key revisions and updates to the documents

included in the FEIS for the WCM update include:

• Sections 1 through 12 were revised to make minor technical and administrative corrections and updates based on agency and public comments, independent external peer review comments, and relevant additional information obtained since the DEIS was published.

• Section 4 was also updated to more fully describe and clarify (1) the two-phased plan formulation process (water management alternatives/water supply options) to determine the alternatives evaluated in detail in section 6 (see the introduction to section 4); (2) how modeling was used in both phases of the plan formulation process to assess and narrow the array of alternatives considered in detail in section 6 and to provide a technical foundation for environmental impact assessment of the alternatives considered in detail in section 6; (3) the screening process for water management measures; and (4) consideration of an alternative offered by the ACF Stakeholders (ACFS) organization in comments on the DEIS.

• Section 5 was also updated to incorporate additional information provided by the State of Georgia in 2015 regarding (1) future water supply needs for communities withdrawing or expected to withdraw from Lake Lanier; (2) future water supply needs for communities withdrawing from the Chattahoochee River downstream of Buford Dam; and (3) expected return rates associated with lake and river withdrawals. The water supply needs considered in the FEIS were generally revised downward and extend over a longer planning horizon (from 2040 to 2050) than included in the previous 2013 request from Georgia, which was used in the formulation of alternatives presented in the DEIS. Further, the FEIS eliminated Glades Reservoir as a reasonably foreseeable source of future water supply when the GAEPD rescinded the *need certification* for the reservoir in early 2016. This additional information resulted in several new alternatives (including a new PAA), all of which are within the range of the alternatives evaluated in the DEIS.

• Section 6 was further updated to address additional alternatives (including the new PAA) that were developed in accordance with the additional water supply information from Georgia as presented in the updated section 5 of the FEIS. The updated analysis that includes the new alternatives was based on additional Hydrologic Engineering Center Reservoir Simulation and Water Quality models (HEC-ResSim) (HEC–5Q) that incorporated the revised water supply information. All pertinent subsections within section 6 have been updated accordingly.

• Appendix A (Master WCM and Individual Project WCMs) was updated to include pertinent technical corrections and administrative updates based on agency and public comments, independent external peer review comments, and relevant additional information obtained since the DEIS was published.

• Appendix B (Water Supply Storage Assessment Report) was updated to include the analysis of the new alternatives that incorporate additional population projections and water supply demand projections provided by Georgia in December 2015.

• Appendix C (Pertinent Correspondence) was updated to incorporate agency and public comments on the DEIS (with USACE responses) as well as relevant new correspondence.

• Appendix E (HEC-ResSim Modeling Report) was updated to reflect analysis of the additional alternatives based on changes presented in section 5 of the FEIS and to incorporate technical and administrative corrections and updates based on comments from agencies, the public, and independent external peer review.

• Appendix J (USFWS Coordination) was updated to incorporate documentation of Endangered Species Act Section 7 consultation that occurred following agency and public review of the DEIS as well as the final Fish and Wildlife Coordination Act Report for the Master Manual update.

• Appendix K (HEC–5Q Water Quality Modeling Report) was updated to reflect analysis of the additional alternatives based on changes presented in section 5 of the FEIS and to incorporate technical and administrative corrections and updates based on comments from agencies, the public, and independent external peer review.

• Appendix L (Coastal Zone Management Statement of Consistency) was updated to include administrative changes to the Florida Coastal Management Program reference, and to address Florida's comments on the Statement of Consistency in the DEIS.

• Appendix M (Recreation Benefit Analysis) was updated to reflect analysis of the additional alternatives based on changes presented in section 5 of the FEIS.

• Appendix N (USACE Institute for Water Resources ACF Climate Change Support Analysis) was updated to reflect the additional information available following coordination of the DEIS and in response to comments on the DEIS from agencies, the public, and independent external peer review.

• Appendix O (Unimpaired Flow Dataset) was added to describe the development of the unimpaired flow dataset.

Document Availability

The FEIS and appendices are available for review in the following formats:

• Online as PDF documents at *www.sam.usace.army.mil/Missions/PlanningEnvironmental/ACF-Master-Water-Control-Manual-Update/ACF-Document-Library.aspx*

• As a CD when requested in writing to: Commander, U.S. Army Corps of Engineers, Mobile District, Attn: PD–EI (ACF–FEIS), P.O. Box 2288, Mobile, AL 36628.

Next Steps

No sooner than 30 days after filing the final EIS with USEPA and publication of the EPA Notice of Availability for the FEIS in the **Federal Register,** USACE will prepare a Record of Decision (ROD) which documents the final decision on the proposed action. USACE will announce availability of the ROD in a newsletter, distribution to the project mailing list, press releases to local newspapers, radio and television news, and on the project Web site.

Dated: December 6, 2016.

James A. Delapp,

Colonel, District Commander, Mobile District, U.S. Army Corps of Engineers.

[FR Doc. 2016–30295 Filed 12–15–16; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2016–ICCD–0142]

Agency Information Collection Activities; Comment Request; Rehabilitation Services Administration Grant Re-Allotment Form

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), 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 an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 14, 2017.

ADDRESSES: To access and review all the documents related to the information

collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0142. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number 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 2E–349, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact David Steele, 202–245–6520.

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: Rehabilitation Services Administration Grant Re-allotment Form.

OMB Control Number: 1820–0692.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 140.

Total Estimated Number of Annual Burden Hours: 13.

Abstract: The Rehabilitation Act of 1973, as amended, authorizes the commissioner to re-allot to other grant recipients that portion of a recipient's annual grant that cannot be used. To maximize the use of appropriated funds under the formula grant programs, the Office of Special Education and Rehabilitative Services has established a re-allotment process for the Basic Vocational Rehabilitation State Grants; Supported Employment State Grants; Independent Living State Grants, Part B (IL-Part B); Independent Living Services for Older Individuals Who Are Blind (IL–OB); Client Assistance (CAP) and Protection and Advocacy of Individual Rights (PAIR) Programs. The authority for the Rehabilitation Services Administration to reallot formula grant funds is found at sections 110(b)(2) (VR), 622(b) (SE), 711(c) (IL-Part B), 752(j)(4) (IL–OB), 112(e)(2) (CAP), and 509(e) (PAIR) of the Act. The information will continue to be used by the Rehabilitation Services Administration State Monitoring and Program Improvement Division to reallot formula grant funds for the awards mentioned above. For each grant award, the grantee will be required to enter the amount of funds being relinquished and/or any additional funds being requested.

Dated: December 13, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–30321 Filed 12–15–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board Meeting

AGENCY: National Assessment Governing Board, U.S. Department of Education.

ACTION: Notice of open teleconference meeting.

SUMMARY: This notice sets forth the agenda for a teleconference meeting of the National Assessment Governing Board (hereafter referred to as Governing Board) to take action on the Governing Board's response to recommendations made by the National Academy of Sciences on an evaluation of the National Assessment of Educational Progress achievement levels. This notice provides information to members of the public who may be interested in listening to the teleconference or providing written comments on the report recommendations. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act (FACA). Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463; as amended, 5 U.S.C., App. 2) and is intended to notify the public of the meeting. This notice is being published less than 15 calendar days prior to the meeting in order to ensure there is a quorum of NAGB members at the meeting to make recommendations related to the National Academy of Sciences report.

DATES: The conference call will be held on Monday, December 19, 2016 from 6:00 p.m. to 7:00 p.m. EST.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Executive Officer/Designated Federal Official of the Governing Board, 800 North Capitol Street NW., Suite 825, Washington, DC 20002, telephone: (202) 357–6938, fax: (202) 357–6945.

SUPPLEMENTARY INFORMATION: *Statutory Authority and Function:* The Governing Board is established under the National Assessment of Educational Progress Authorization Act, Title III of Public Law 107–279. Information on the Governing Board and its work can be found at *www.nagb.gov.*

The Governing Board is established to formulate policy for the National Assessment of Educational Progress (NAEP). The Governing Board's congressionally mandated responsibilities include developing appropriate student achievement levels for each grade and subject tested. Based on recommendations from policymakers, educators, and members of the general public, the Governing Board sets specific achievement levels for each subject area and grade assessed on The Nation's Report Card. Achievement levels are performance standards that show what students should know and be able to do. Results are reported as percentages of students performing at or above the Basic and Proficient levels, and at the Advanced level. Additional information on the achievement levels can be found at *https://nagb.gov/publications/achievement.html.*

The National Assessment Governing Board's standing committees, the Executive Committee and the Committee on Standards, Design and Methodology (COSDAM) will

participate in a conference call on Monday, December 19th from 6:00–7:00 p.m. EST. The purpose of the call is to discuss and take action on the Governing Board's response to the recommendations of the November 2016 evaluation of NAEP achievement levels conducted by the National Academies of Sciences. The report titled *Evaluation of the Achievement Levels for Mathematics and Reading on the National Assessment of Educational Progress* is available at the following URL: *https://www.nap.edu/catalog/23409/evaluation-of-the-achievement-levels-for-mathematics-and-reading-on-the-national-assessment-of-educational-progress.*

The National Assessment Governing Board response will be sent to the Secretary of Education, the Committee on Education and the Workforce of the House of Representatives, and the Committee on Health, Education, Labor, and Pensions of the Senate following the teleconference.

The public is invited to call in ''listen only mode'' to the meeting by using the conference toll free number in the United States at 1–866–766–1003, participant code 7932547. Callers can expect to incur charges for calls they initiate over wireless lines; the National Assessment Governing Board will not refund any incurred charges. Callers will not incur charges for calls they initiate over landline connections to the toll free phone number.

Members of the public will have an opportunity to provide written feedback in advance of the call at *nagb@ed.gov,* with the email subject header titled Teleconference Feedback due to limited time availability for the call. Comments must be received no later than 12:00 p.m. ET on December 19, 2016.

Authority: Pub. L. 107–279, Title III—National Assessment of Educational Progress section 301.

Dated: December 13, 2016.

William J. Bushaw,

Executive Director.

[FR Doc. 2016–30328 Filed 12–15–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2016–ICCD–0143]

Agency Information Collection Activities; Comment Request; Measuring Educational Gain in the National Reporting System for Adult Education

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), 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 an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 14, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0143. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number 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 2E–349, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact John LeMaster, 202–245–6218.

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: Measuring Educational Gain in the National Reporting System for Adult Education.

OMB Control Number: 1830–0567.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 15.

Total Estimated Number of Annual Burden Hours: 600.

Abstract: Title 34 of the Code of Federal Regulations part 462 establishes procedures the Secretary uses to consider literacy tests for use in the National Reporting System (NRS) for adult education. This information is used by the Secretary to determine the suitability of published literacy tests to measure and report educational gain under the NRS.

Dated: December 13, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–30322 Filed 12–15–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–2514–170]

Appalachian Power Company; Notice of Application Accepted for Filing And Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Non-capacity amendment of license.

b. *Project No.:* 2514–170.

c. *Date Filed:* November 21, 2016.

d. *Applicant:* Appalachian Power Company.

e. *Name of Project:* Byllesby and Buck Hydroelectric Project.

f. *Location:* The project is located on the New River in Carroll County, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Bradley R. Jones, Plant Manager—Hydro, American Electric Power Service Corporation, 40 Franklin Road, Roanoke, VA 24011 (703) 985–2300.

i. *FERC Contact:* Steven Sachs, (202) 502–8666, *Steven.Sachs@ferc.gov*

j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance of this notice by the Commission. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/doc-sfiling/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–2514–170.

k. Description of Request: The applicant requests that its license be amended to allow the replacement of flashboards with inflatable Obermeyer crest gates. The applicant proposes to replace four, 31-foot-wide sections of the existing wooden flashboards at each of the project's two development in phases over the next 3 years. The proposal would not significantly modify the permanent reservoir elevations or project operation but the applicant would need to temporarily draw down the affected reservoir for up to 4 months while installing the Obermeyer gates.

l. Locations of the Applications: A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. The filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Motions to Intervene, or Protests: Anyone may submit comments, a motion to intervene, or a protest in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, motions to intervene, or protests must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents: Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''MOTION TO INTERVENE'', or ''PROTEST'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the temporary variance request. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 9, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30202 Filed 12–15–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL17–26–000]

Ad Hoc Renewable Energy Financing Group; Notice of Petition for Declaratory Order

Take notice that on December 9, 2016, pursuant to Rule 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207(a)(2) (2016), Ad Hoc Renewable Energy Financing Group (Petitioner) filed a petition for declaratory order requesting that the Commission find that non-managing, equity interests in a public utility or public utility holding company do not constitute voting securities for purposes of section 203 of the Federal Power Act and the Commission's regulations at 18 CFR part 33, all as more fully explained in the petition.

Any person desiring to intervene or to protest in this proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the

Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on January 9, 2017.

Dated: December 12, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30290 Filed 12–15–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–38–000; PF15–21–000]

Columbia Gas Transmission, LLC; Notice of Schedule For Environmental Review of the WB XPress Project

On December 30, 2015, Columbia Gas Transmission, LLC (Columbia) filed an application in Docket No. CP16–38–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the WB XPress Project (Project), and would expand the capacity of Columbia's existing natural gas pipeline system by 1.3 million dekatherms per day and provide bi-directional transportation service in order to meet growing market demands.

On January 14, 2016, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—March 24, 2017
90-day Federal Authorization Decision Deadline—June 22, 2017

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The Project would involve the replacement of 26.2 miles of replacement pipeline and 3.1 miles of new pipeline composed of varying diameters, two new compressor stations (one gas and one electric), expansions and modifications at seven existing gas compressor stations, and other minor aboveground facilities in West Virginia and Virginia.

Background

On July 22, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed WB XPress Project and Request for Comments on Environmental Issues* (NOI). The NOI was issued during the pre-filing review of the Project in Docket No. PF15–21–000 and was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received comments from Virginia and West Virginia state agencies; Fairfax County, and five landowners. After the NOI period closed, we received additional comments from the U.S. Environmental Protection Agency (Region 3), U.S. Forest Service, West Virginia Department of Natural Resources, Town of Strasburg, Virginia, and organizations such as the Dulles Regional Chamber of Commerce, the Southern Environmental Law Center, West Virginia Oil and Gas Association, Virginia Run Community Association, Sierra Club et al., Shenandoah Valley Network et al., Oil Change International et al., and 26 interested individuals. The primary issues raised included the need for the project; impacts on soils, karst geology, groundwater, waterbodies, wetlands, sensitive and listed species, forests, sensitive National Forest Service lands, air quality, climate change; and cumulative and indirect impacts. Alternatives, public safety, general support for the project, and the need for a programmatic environmental impact statement (EIS) were also raised.

The U.S. Forest Service, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, West Virginia Department of Environmental Protection, and West Virginia Department of Natural Resources are cooperating agencies in the preparation of the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP16–38), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: December 9, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30206 Filed 12–15–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–487–000]

Northern Natural Gas Company; Notice of Availability of the Environmental Assessment for the Proposed Cedar Station Upgrade Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Cedar Station Upgrade Project, proposed by Northern Natural Gas Company (Northern) in the above-referenced docket. Northern requests authorization to construct approximately 7.86 miles of natural gas pipeline in Dakota County, Minnesota in order to fulfill its contractual obligation with Northern States Power Company, a Minnesota Corporation (NSP–MN) to increase the delivery pressure to NSP–MN's existing Black Dog Generating Station from 400 pounds per square inch gauge (psig) to 650 psig. As part of NSP–MN's process

of reducing its carbon footprint, it has increased its use of natural gas-fired generation.

The EA assesses the potential environmental effects of the construction and operation of the Cedar Station Upgrade Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Cedar Station Upgrade Project includes the following facilities:

- Approximately 7.86 miles of new 20-inch-diameter pipeline loop; [1]
- a new pig [2] launcher and takeoff valve setting at Northern's existing Rosemount Junction facility; and
- a new pig receiver, tie-in valve setting, and modification of existing regulators and piping at Northern's existing Cedar Meter Station facility.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. In addition, the EA is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before January 9, 2017.

For your convenience, there are three methods you can use to file your comments to the Commission. In all instances, please reference the project docket number (CP16–487–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[3] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (*i.e.,* CP16–487). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp*.

Dated: December 9, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30207 Filed 12–15–16; 8:45 am]

BILLING CODE 6717–01–P

[1] A pipeline ''loop'' is a segment of pipe installed adjacent to an existing pipeline and connected to the existing pipeline at both ends.

[2] A ''pig'' is an internal pipeline tool used to clean a pipeline and/or to inspect for damage or corrosion.

[3] See the previous discussion on the methods for filing comments.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC17–2–000]

Commission Information Collection Activities (FERC–549D and FERC–733); Consolidated Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of information collections and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the requirements and burden [1] of the information collections described below.

DATES: Comments on the collections of information are due February 14, 2017.

ADDRESSES: You may submit comments (identified by Docket No. IC17–2–000) by either of the following methods:

- *eFiling at Commission's Web site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Please reference the specific collection number and/or title in your comments.

[1] The Commission defines burden as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Type of Request: Three-year extension of the information collection requirements for all collections described below with no changes to the current reporting requirements. Please note that each collection is distinct from the next.

Comments: Comments are invited on: (1) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FERC–549D [Quarterly Transportation and Storage Report for Interstate Gas and Hinshaw Pipelines]

OMB Control No.: 1902–0253.

Abstract: The reporting requirements under FERC–549D are required to carry out the Commission's policies in accordance with the general authority in Sections 1(c) of the Natural Gas Act (NGA) [2] and Sections 311 of the Natural Gas Policy Act of 1978 (NGPA).[3] This collection promotes transparency by collecting and making available intrastate and Hinshaw pipeline transactional information. The Commission collects the data upon a standardized form with all requirements outlined in 18 CFR 284.126.

The FERC Form 549D collects the following information:

- Full legal name and identification number of the shipper receiving service;
- Type of service performed for each transaction;
- The rate charged under each transaction;
- The primary receipt and delivery points for the transaction, specifying the rate schedule/name of service and docket were approved;
- The quantity of natural gas the shipper is entitled to transport, store, and deliver for each transaction;
- The term of the transaction, specifying the beginning and ending month and year of current agreement;
- Total volumes transported, stored, injected or withdrawn for the shipper; and
- Annual revenues received for each shipper, excluding revenues from storage services.

Filers submit the Form-549D on a quarterly basis.

Access to the FERC–549D Information Collection Materials: A copy of the current form and related materials can be found at *http://www.ferc.gov/docs-filing/forms.asp#549d,* but will not be included in the **Federal Register**. The Commission will not publish these materials in the **Federal Register**.

Type of Respondent: Intrastate natural gas and Hinshaw pipelines.

Estimate of Annual Burden: The Commission estimates the annual public reporting burden for the information collection as:

FERC–549D

[Quarterly transportation and storage report for interstate natural gas and hinshaw pipelines]

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden and cost per response [4] (4)	Total annual burden hours and total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
PDF filings	76	4	304	12.5, $1,048	3,800, $318,516	$4,191
XML filings	33	4	132	10, $832	1,320, $110,642	3,352
Total			436		5,120, $429,158	

FERC–733 [Demand Response/Time-Based Rate Programs and Advanced Metering]

OMB Control No.: 1902–0271.

Abstract: Section 1252(e)(3) of the Energy Policy Act of 2005,[5] requires the Federal Energy Regulatory Commission (FERC or Commission) to prepare and publish an annual report, by appropriate region, that assesses demand response resources, including those available from all consumer classes. Specifically, EPAct 2005 Section 1252(e)(3) requires that the Commission identify and review:

(A) Saturation and penetration rate of advanced meters and communications technologies, devices and systems;

(B) existing demand response programs and time-based rate programs;

(C) the annual resource contribution of demand resources;

(D) the potential for demand response as a quantifiable, reliable resource for regional planning purposes;

(E) steps taken to ensure that, in regional transmission planning and operations, demand resources are provided equitable treatment as a quantifiable, reliable resource relative to the resource obligations of any load-serving entity, transmission provider, or transmitting party; and

[2] 15 U.S.C. 717–817–w.

[3] 15 U.S.C. 3301–3432.

[4] The hourly wage figure is $83.82/hour. This cost represents the average cost of four career fields: Legal ($129.12/hour), Accountants ($53.86/hour), Management Analyst ($60.53/hour), and Computer and Information ($91.76/hour); this cost also includes benefit costs within the hourly estimates. These figures were compiled using Bureau of Labor Statistics data that were specific to each occupational category: *http://bls.gov/oes/current/naics2_22.htm.*

[5] Public Law 109–58, 1252(e)(3), 119 Stat. 594, 966 (2005) (EPAct 2005).

(F) regulatory barriers to improved customer participation in demand response, peak reduction and critical period pricing programs.

Type of Respondent: Persons interested in the above topics.

Estimate of Annual Burden: The Commission estimates the annual public reporting burden for the information collection as:

Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden and cost per response [6]	Total annual burden hours and total annual cost	Cost per respondent ($)
(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
3,400	1	3,400	260.75, $19,426	886,550, $66,047,975	$19,426

Dated: December 9, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30208 Filed 12–15–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2512–075; Project No. 14439–001]

Hawks Nest Hydro, LLC; Notice of Availability of Draft Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the applications for new licenses for the Hawks Nest Hydroelectric Project (FERC Project No. 2512–075) and the Glen Ferris Hydroelectric Project (FERC Project No. 14439–001) located in Fayette County, West Virginia, and has prepared a Draft Environmental Assessment (Draft EA) for the projects.

The Draft EA contains the staff's analysis of the potential environmental effects of the projects and concludes that relicensing the projects, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the Draft EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

For assistance, please contact FERC Online Support. In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include the applicable project name(s) and docket number(s) (*e.g.,* Hawks Nest P–2512–075).

For further information, contact Monir Chowdhury at (202) 502–6736.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–30201 Filed 12–15–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2016–0696; FRL–9956–40]

Certain New Chemicals; Receipt and Status Information for November 2016

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is required under the Toxic Substances Control Act (TSCA) to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN); an application for a test marketing exemption (TME), both pending and/or expired; and a periodic status report on any new chemicals under EPA review and the receipt of notices of commencement (NOC) to manufacture those chemicals. This document covers the period from November 1, 2016 to November 30, 2016.

DATES: Comments identified by the specific case number provided in this document, must be received on or before January 17, 2017.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2016–2016–0696, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Jim Rahai, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania

[6] The estimates for cost per response are derived using the 2016 FERC average salary plus benefits of $154,647/year (or $74.50/hour). Commission staff finds that the work done for this information collection is typically done by wage categories similar to those at FERC.

Ave. NW., Washington, DC 20460–0001; telephone number: 202–564–8593; email address: *rahai.jim@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitters of the actions addressed in this document.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. What action is the Agency taking?

This document provides receipt and status reports, which cover the period from November 1, 2016 to November 30, 2016, and consists of the PMNs and TMEs both pending and/or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. What is the Agency's authority for taking this action?

Under TSCA, 15 U.S.C. 2601 *et seq.,* EPA classifies a chemical substance as either an ''existing'' chemical or a ''new'' chemical. Any chemical substance that is not on EPA's TSCA Inventory is classified as a ''new chemical,'' while those that are on the TSCA Inventory are classified as an ''existing chemical.'' For more information about the TSCA Inventory, please go to: *http://www.epa.gov/opptintr/newchems/pubs/inventory.htm.*

Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a), for ''test marketing'' purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: *http://www.epa.gov/oppt/newchems.*

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic reports on the status of new chemicals under review and the receipt of NOCs to manufacture those chemicals.

IV. Receipt and Status Reports

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that the information in the table is generic information because the specific information provided by the submitter was claimed as CBI.

For the 147 PMNs received by EPA during this period, Table 1 provides the following information (to the extent that such information is not claimed as CBI): The EPA case number assigned to the PMN; The date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer/importer; the potential uses identified by the manufacturer/importer in the PMN; and the chemical identity.

TABLE 1—PMNS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–16–0300	11/2/2016	1/31/2017	H.B. Fuller Company	(G) Industrial adhesive	(G) Oxirane, 2-methyl-, polymer with 1,3-xylylene diisocyanate, oxirane, and 3-(trimethoxysilyl)propyl isocyanate.
P–16–0359	11/9/2016	2/7/2017	CBI	(G) Pigment additive for industrial coatings	(G) Carbopolycycle-bis(diazonium), dihalo-, chloride (1:2), reaction products with metal hydroxide, 4-[(dioxoalkyl)amino]substituted benzene, 2-[(dioxoalkyl)amino]substituted benzene, 5-[(dioxoalkyl)amino]-2-hydroxy-substituted benzene and oxo-n-phenylalkanamide.
P–16–0379	11/16/2016	2/14/2017	Wacker Chemical Corporation.	(G) Intermediate for polymer synthesis	(S) Silane, 1,1'-(l,2-ethanediyl)bis[1,1-dichloro-1-methyl-, hydrolysis products with chloroethenyldimethylsilane.
P–16–0387	11/1/2016	1/30/2017	CBI	(G) Additives for polymers	(G) Aliphatic polycarboxylic acid, polymer with alicyclic polyhydric alcohol and polyoxyalkylene.
P–16–0399	11/22/2016	2/20/2017	Tryeco, LLC	(S) Compound to be used in preparation of advanced seed coatings.	(S) Starch, polymer with 2-propenoic acid, potassium salt oxidized.
P–16–0399	11/22/2016	2/20/2017	Tryeco, LLC	(S) Agricultural soil amendment for turf applications and direct soil injection with fertilizers.	(S) Starch, polymer with 2-propenoic acid, potassium salt oxidized.
P–16–0399	11/22/2016	2/20/2017	Tryec, LLC	(S) Agricultural soil amendment for filed crops as agrisorb plus granular soil amendment.	(S) Starch, polymer with 2-propenoic acid, potassium salt oxidized.
P–16–0412	11/18/2016	2/16/2017	Cardolite Corporation	(G) Epoxy coating	(G) Cashew, nutshell liq., polymer with amine and formaldehyde.

TABLE 1—PMNS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–16–0428	11/21/2016	2/19/2017	Cardolite Corporation	(S) Industrial	(G) Phenol, formaldehyde and amine.
P–16–0439	11/15/2016	2/13/2017	CBI	(G) Coloring agent	(G) Modified carbon black.
P–16–0440	11/15/2016	2/13/2017	CBI	(G) Coloring agent	(G) Modified carbon black.
P–16–0454	11/16/2016	2/14/2017	CBI	(G) Material for highly dispersive use in consumer products.	(G) Trisubstituted alkenol.
P–16–0487	11/18/2016	2/16/2017	CBI	(S) Mass coloration of paper	(G) Benzenesulfonic acid 1,2-diazenediylbis [6-ethenyl]-3-sulfophenyl diazenyl-2-sulfophenyl ethenyl salt.
P–16–0509	11/18/2016	2/16/2017	CBI	(G) For packaging application	(G) Modified ethylene-vinyl alcohol copolymer.
P–16–0509	11/18/2016	2/16/2017	CBI	(G) Resin or film/sheet for the industrial use	(G) Modified ethylene-vinyl alcohol copolymer.
P–16–0578	11/10/2016	2/8/2017	CBI	(G) Reactive polymer for waterborne coating applications.	(G) Alkenoic acid, alkyester, polymer with n-(dialkyl-oxoalkyl)-alkenamide, alkenylbenzene, alkyl alkenoate and alkenoic acid.
P–16–0595	11/15/2016	2/13/2017	CBI	(G) Polymer	(G) Polyether polyurethane.
P–16–0598	11/15/2016	2/13/2017	CBI	(G) Binder resin open non-dispersive use	(G) Styrene acrylate copolymer.
P–16–0599	11/15/2016	2/13/2017	CBI	(G) Binder resin open non-dispersive use	(G) Styrene acrylate copolymer.
P–17–0002	11/10/2016	2/8/2017	CBI	(G) Printing ink applications	(G) Styrene(ated) copolymer with alkyl(meth) acrylate, and (meth)acrylic acid.
P–17–0003	11/10/2016	2/8/2017	CBI	(G) Printing ink applications	(G) Styrene(ated) copolymer with alkyl(meth) acrylate, and (meth)acrylic acid.
P–17–0006	11/1/2016	1/30/2017	CBI	(S) Aerospace sealant	(G) Substituted, polymer with formaldehyde, glycidyl ether, reaction products with alkyl substituted-dioxa thio substituted ether diene, dioxaalkyl substituted thiol, alkylene substituted vinyl ether, alkyl cyclohexane.
P–17–0008	11/2/2016	1/31/2017	CBI	(S) Intermediate for use in the manufacture of polymers.	(G) Modified 1,3-isobenzofurandione, polymer with 1,2-ethanediol, 2-ethyl-2-(alkoxyalkyl)-1,3-propanediol and 1,3-isobenzofurandione, alkanoate.
P–17–0013	11/2/2016	1/31/2017	CBI	(G) Open dispersive use component in liquid paint coating.	(G) Formaldehyde, polymer with arylylpolyamine, 2-(chloromethyl)oxirane and phenol.
P–17–0026	11/3/2016	2/1/2017	CBI	(G) Industrial ink printing applications	(G) Cycloaliphatic diamine, polymer with .alpha-hydro-.omega.-hydroxypoly(oxy-alkanediyl), .alpha-hydro-.omega.-hydroxypoly(oxy-alkanediyl), and cycloaliphatic diisocyanate.
P–17–0027	11/9/2016	2/7/2017	CBI	(G) Industrial use of printing ink	(G) Diol polymer with .alpha.-hydro-.omega.-hydroxypoly[oxy(alkanediyl)] and aromatic diisocyante.
P–17–0028	11/4/2016	2/2/2017	Henkel Corporation	(S) One ingredient in the part a of a two component epoxy encapsulant designed for circuit board protection applications called loctite stycast 2750t kit.	(S) Fatty acid, castor oil, reaction products with epichlorohydrin.
P–17–0030	11/3/2016	2/1/2017	CBI	(G) Metalworking fluid additive	(G) Alkyl morpholine.
P–17–0031	11/1/2016	1/30/2017	CBI	(G) Paint raw material	(G) Unsaturated fatty acids polymer with polyalcohol, carboxylic anhydrides and dicarboxlic acid.
P–17–0033	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0034	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0035	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0036	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0037	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0038	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0039	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0040	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0041	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0042	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0043	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0044	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0045	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) of oil/gas well performance Monitoring	(G) Halogenated sodium benzoate salt.
P–17–0046	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.

TABLE 1—PMNS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–17–0047	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0048	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0049	11/3/2016	2/1/2017	CBI	(G) Starting material for synthesis	(G) Haloalkyl substituted carbomonocycle.
P–17–0050	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0051	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0052	11/3/2016	2/1/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0053	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0054	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0055	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0056	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0057	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0058	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0059	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated sodium benzoate salt.
P–17–0060	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0061	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0062	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0063	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0064	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0065	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0066	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0067	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0068	11/18/2016	2/16/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0069	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0070	11/21/2016	2/19/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0071	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring Of Oil/Gas Well Performance	(G) Halogenated sodium benzoate salt.
P–17–0072	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0073	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0074	11/21/2016	2/19/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0075	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0076	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0077	11/23/2016	2/21/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0078	11/21/2016	2/19/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0079	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0080	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0081	11/23/2016	2/21/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0082	11/21/2016	2/19/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0083	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0084	11/23/2016	2/21/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0085	11/4/2016	2/2/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0086	11/10/2016	2/8/2017	CBI	(G) Perfume	(G) Cycloalkyl, bis(ethoxyalkyl)-, trans-cycloalkyl, bis(ethoxyalkyl)-, cis-.

TABLE 1—PMNS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–17–0087	11/7/2016	2/5/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0090	11/7/2016	2/5/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0093	11/7/2016	2/5/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated sodium benzoate salt.
P–17–0094	11/7/2016	2/5/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0095	11/7/2016	2/5/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0096	11/7/2016	2/5/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0097	11/7/2016	2/5/2017	Spectrum Tracer Services.	(G) Monitoring of oil/gas well performance	(G) Halogenated benzoic acid.
P–17–0098	11/7/2016	2/5/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0099	11/7/2016	2/5/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0100	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0101	11/8/2016	2/6/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0102	11/8/2016	2/6/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0103	11/8/2016	2/6/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0104	11/8/2016	2/6/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0105	11/8/2016	2/6/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0107	11/15/2016	2/13/2017	CBI	(S) Coreactant used in an adhesive	(G) Hydroxyl terminated polyurethane of methylene diphenyldiisocyanate based on polyester and polyether-polyol.
P–17–0108	11/14/2016	2/12/2017	Crison, LLC	(G) Typically added at a reat of 3–5% of the collector package.	(S) Carbonodithioic acid, o-[2-[(dithiocarboxy)amino]-2-methylpropyl] ester, sodium salt (1:2).
P–17–0111	11/10/2016	2/8/2017	CBI	(S) Ink receptor coating for polyolefin film	(S) Propanoic acid, 3-hydroxy-2-(hydroxymethyl)-2-methyl-, polymer with 1,4-cyclohexanedimethanol, dimethyl carbonate, 1,6-hexanediol, hydrazine and 1,1'-methylenebis[4-isocyanatocyclohexane], pentaerythritol triacrylate-blocked, compds. with triethylamine.
P–17–0112	11/16/2016	2/14/2017	CBI	(S) Production moisture curing pu hot melts adhesive.	(S) 1,4-benzenedicarboxylic acid, polymer with hexanedioic acid and 1,6-hexanediol.
P–17–0113	11/16/2016	2/14/2017	Omg Americas, Inc	(S) Thickener for architectural paint	(S) Zirconium, acetate lactate sodium complexes.
P–17–0114	11/8/2016	2/6/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0115	11/16/2016	2/14/2017	CBI	(S) An adhesion promoter for coating formulations.	(G) Aminoalkyl alkoxysilane.
P–17–0117	11/17/2016	2/15/2017	CBI	(S) Used as a feedstock for hydrogenation to produce a saturated diol for use in urethane chemistry or as an additive in coatings adhesives or sealants.	(S) 1,6,10-dodecatriene, 7,11-dimethyl-3-methylene-, (6e)-, homopolymer, 2-hydroxypropyl-terminated.
P–17–0117	11/17/2016	2/15/2017	CBI	(G) Use as a polyol for polyurethane manufacture reaction of the new substance with a diisocyanate or polyisocyanate and other polyols will produce a higher mw polymer.	(S) 1,6,10-dodecatriene, 7,11-dimethyl-3-methylene-, (6e)-, homopolymer, 2-hydroxypropyl-terminated.
P–17–0118	11/17/2016	2/15/2017	CBI	(S) Used as a feedstock for hydrogenation to produce a saturated diol for use in urethane chemistry or as An Additive In Coatings Adhesives Or Sealants.	(S) 1,6,10-dodecatriene, 7,11-dimethyl-3-methylene-, (6e)-, homopolymer, 2-hydroxyethyl-terminated.
P–17–0118	11/17/2016	2/15/2017	CBI	(G) Use as a polyol for polyurethane manufacture reaction of the new substance with a diisocyanate or polyisocyanate and other polyols will produce a higher mw polymer.	(S) 1,6,10-dodecatriene, 7,11-dimethyl-3-methylene-, (6e)-, homopolymer, 2-hydroxyethyl-terminated.
P–17–0120	11/17/2016	2/15/2017	CBI	(G) Component of coatings	(G) Amine modified alkyl phenol.
P–17–0121	11/18/2016	2/16/2017	CBI	(S) Polyurethane used in an adhesive	(G) Methylene diphenyl diisocyanate terminated polyurethane resin.
P–17–0122	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0123	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0124	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0125	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.

TABLE 1—PMNS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016—Continued

Case No.	Received date	Projected notice end date	Manufacturer importer	Use	Chemical
P–17–0126	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0127	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0128	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0129	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0130	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0131	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0132	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0133	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0134	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0135	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0136	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0137	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0138	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0139	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0140	11/18/2016	2/16/2017	Spectrum Tracer Services.	(S) Chemical tracer pumped into an oil and/or gas well to monitor well performance.	(G) Halogenated benzoic acid ethyl ester.
P–17–0141	11/18/2016	2/16/2017	CBI	(G) Ingredient used in fertilizer manufacturing.	(G) Substituted heteromonocycle, potassium salt.
P–17–0142	11/18/2016	2/16/2017	CBI	(G) Ingredient Used In Fertilizer Manufacturing.	(G) Substituted heteromonocycle, potassium salt.
P–17–0144	11/18/2016	2/16/2017	CBI	(G) Coating component	(S) Amines, c36-alkylenedi-, polymers with octahydro-4,7-methano-1h-indenedimethanamine and pyromellitic dianhydride, maleated.
P–17–0145	11/21/2016	2/19/2017	CBI	(G) Intermediate	(G) Silane ammonium salt.
P–17–0148	11/21/2016	2/19/2017	Robertet, Inc	(S) As an odoriferous component of fragrance compounds.	(S) Oils, hedychium flavescens.
P–17–0149	11/21/2016	2/19/2017	CBI	(G) Electronic device use	(G) Fluorocyanophenyl alkylbenzoate.
P–17–0150	11/21/2016	2/19/2017	CBI	(G) Electronic use	(G) Fluorocyanophenyl alkylbenzoate.
P–17–0150	11/21/2016	2/19/2017	CBI	(G) Electronic device use	(G) Fluorocyanophenyl alkylbenzoate.
P–17–0151	11/21/2016	2/19/2017	CBI	(G) Electronic device use	(G) Fluorocyanophenyl alkylbenzoate.
P–17–0152	11/28/2016	2/26/2017	CBI	(G) Additive in home care products	(G) Poly-(2-methyl-1-oxo-2-propen-1-yl) ester with ethanaminium, n,n,n-trialkyl, chloride and methoxypoly(oxy-1,2-ethanediyl).
P–17–0153	11/23/2016	2/21/2017	Clariant Corporation	(S) Neutralizing agent for paints and coatings.	(S) D-glucitol, 1-deoxy-1-(dimethylamino)-.
P–17–0154	11/23/2016	2/21/2017	CBI	(G) Coating	(G) Carboxylic acid amine (1:1).
P–17–0155	11/23/2016	2/21/2017	CBI	(G) Coating	(G) Mix fatty acids compd with amine (1:1).
P–17–0156	11/23/2016	2/21/2017	CBI	(G) Coating	(G) Mix fatty acids, compd with amine (1:1).
P–17–0157	11/29/2016	2/27/2017	CBI	(G) Open, non-dispersive use and destructive use.	(G) Silated urethane polymer.
P–17–0158	11/30/2016	2/28/2017	Dayglo Color Corp	(G) Fluorescent dye	(G) Perylene bisimide.
P–17–0159	11/30/2016	2/28/2017	CBI	(S) Tracer dye	(G) 1-h-benz[de] isoquinoline-1,3(2h)-dione-2-(-alkyl-)-(-alkyl-amino-).

For the 19 NOCs received by EPA during this period, Table 2 provides the following information (to the extent that such information is not claimed as CBI): The EPA case number assigned to the NOC; the date the NOC was received by EPA; the projected date of commencement provided by the submitter in the NOC; and the chemical identity.

TABLE 2—NOCS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016

Case No.	Received date	Commencement date	Chemical
J–16–0006	11/23/2016	11/16/2016	(G) Trichoderma reesei modified.
P–04–0856	11/3/2016	11/2/2016	(G) Long chain alkyl sulfonic acids.
P–12–0578	11/18/2016	11/7/2016	(G) Vegetable oil fatty acids, reaction products with substituted amine, compds. with substituted polyethylene glycol anhydride ester alkyl ethers.
P–13–0948	11/15/2016	8/31/2016	(G) Fatty acid mixed ester, reaction products with phosphorous oxide (p2o5), amine salts.

TABLE 2—NOCS RECEIVED FROM NOVEMBER 1, 2016 TO NOVEMBER 30, 2016—Continued

Case No.	Received date	Commencement date	Chemical
P–14–0323	11/22/2016	10/11/2016	(S) 1-propene, 2-chloro-3,3,3-trifluoro-.
P–14–0323	11/22/2016	10/12/2016	(S) 1-propene, 2-chloro-3,3,3-trifluoro-.
P–14–0852	11/14/2016	7/25/2016	(G) Alkanedioic acid, polymer with alkanediol, bis[n-[4-[(4-isocyanatophenyl)methyl]phenyl]carbamate].
P–15–0322	11/2/2016	9/26/2016	(G) Poly[oxy(alkanediyl)],.alpha.,.alpha.′,.alpha.″-1,2,3-propanetriyltris[.omega.-(2-hydroxy-3-mercaptopropoxy)-.
P–15–0464	11/18/2016	10/31/2016	(G) Polyfunctional aromatic polyester polyol.
P–15–0554	11/2/2016	10/7/2016	(G) Dialkylamino alkylamide salt.
P–15–0619	11/2/2016	10/11/2016	(G) Rosin ester cycloadduct.
P–16–0068	11/2/2016	10/6/2016	(G) Dialkylamino alkylamide.
P–16–0117	11/2/2016	10/21/2016	(S) Magnesium hydroxide hypochlorite oxide.
P–16–0242	11/14/2016	11/11/2016	(S) Cyclopentanol, 1-ethyl-2-(3-methylbutyl)-.
P–16–0268	11/3/2016	10/20/2016	(S) Fatty acids, c18-unsaturated, dimers, hydrogenated, polymers with n-[3-(dimethylamino)propyl] coco amides, n1,n1-dimethyl-1,3-propanediamine epichlorohydrin.
P–16–0343	11/18/2016	10/24/2016	(G) Modified urethane polymer.
P–16–0373	11/16/2016	10/28/2016	(S) Phenol, 2,2',2"-(1,3,5-triazine-2,4–6-triyl)tris[5-(hexyloxy)-6-methyl-.
P–16–0398	11/16/2016	11/16/2016	(G) Di-ammonium di-carboxylate.
P–16–0455	11/7/2016	11/4/2016	(S) Sodium tungsten oxide.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 12, 2016.

Pamela Myrick,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2016–30325 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2016–0607; FRL–9956–32]

Pesticide Experimental Use Permit; Receipt of Application; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of an application 56228–EUP–UG from the United States Department of Agriculture, Animal and Plant Health Inspection Service, requesting an experimental use permit (EUP) for chlorophacinone. EPA has determined that the permit may be of regional or national significance. Therefore, because of the potential significance, EPA is seeking comments on this application.

DATES: Comments must be received on or before January 17, 2017.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2016–0607, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, EPA has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, EPA seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

II. What action is the Agency taking?

Under section 5 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136c, EPA can

allow manufacturers to field test pesticides under development. Manufacturers are required to obtain an EUP before testing new pesticides or new uses of pesticides if they conduct experimental field tests on more than 10 acres of land or one surface acre of water.

Pursuant to 40 CFR 172.11(a), EPA has determined that the following EUP application may be of regional or national significance, and therefore is seeking public comment on the EUP application:

Submitter: United States Department of Agriculture, Animal and Plant Health Inspection Service (USDA APHIS), 4700 River Rd., MD 20737, (56228–EUP–UG).

Pesticide Chemical: Chlorophacinone.

Summary of Request: USDA APHIS is submitting an EUP application to test the efficacy of Chlorophacinone-50 Conservation (C-50) (EPA Registration Number 7173–151) under field conditions for control and eradication of wild, non-native house mice (*Mus musculus*) at the Pohakuloa Training Area, U.S. Army Garrison, Island of Hawaii, State of Hawaii.

Following the review of the application and any comments and data received in response to this solicitation, EPA will decide whether to issue or deny the EUP request, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 9, 2016.

Robert McNally,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2016–30326 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9030–8])

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EISs)

Filed 12/05/2016 Through 12/09/2016

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. 20160294, Draft, NMFS, LA, Reduce the Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries, *Comment Period Ends:* 01/30/2017, *Contact:* Michael Barnette 727–551–5794.

EIS No. 20160295, Draft Supplement, USACE, LA, Mississippi River Ship Channel, Gulf to Baton Rouge, Louisiana, *Comment Period Ends:* 01/30/2017, *Contact:* Steve Roberts 504–862–2517.

EIS No. 20160296, Final, USACE, AL, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment, *Review Period Ends:* 01/17/2017, *Contact:* Lewis Sumner 251–694–3857.

EIS No. 20160297, Draft, FTA, IN, West Lake Corridor Project, *Comment Period Ends:* 02/03/2017, *Contact:* Mark Assam 312–353–4070.

EIS No. 20160298, Draft, USFS, MT, Ten Lakes Travel Management Project, *Comment Period Ends:* 01/30/2017, *Contact:* Bryan Donner 406–296–2536.

EIS No. 20160299, Draft, BLM, AZ, Sonoran Desert National Monument Target Shooting Draft Resource Management Plan Amendment, *Comment Period Ends:* 03/16/2017, *Contact:* Darrel Wayne Monger 623–580–5683.

EIS No. 20160300, Final, BIA, CA, Wilton Rancheria Fee-to-Trust and Casino Project, *Review Period Ends:* 01/17/2017, *Contact:* John Rydzik 916–978–6051.

EIS No. 20160301, Draft, NOAA, AL, Deepwater Horizon Oil Spill Draft Restoration Plan I and EIS: Provide and Enhance Recreational Opportunities, *Comment Period Ends:* 01/30/2017, *Contact:* Dan Van Nostrand 251–544–5015.

EIS No. 20160302, Draft, NPS, MI, Address the Presence of Wolves, Isle Royale National Park, *Comment Period Ends:* 03/15/2017, *Contact:* Kelly Daigle 303–987–6897.

EIS No. 20160303, Draft Supplement, USFS, ID, Johnson Bar Fire Salvage Project, *Comment Period Ends:* 01/30/2017, *Contact:* Sara Daugherty 208–935–4263.

EIS No. 20160304, Final, NOAA, HI, Heeia National Estuarine Research Reserve, *Review Period Ends:* 01/17/2017, *Contact:* Jean Tanimoto 808–725–5253.

EIS No. 20160305, Final, USFWS, MA, Silvio O. Conte National Fish and Wildlife Refuge Final Comprehensive Conservation Plan, *Review Period Ends:* 01/17/2017, *Contact:* Nancy McGarigal 413–253–8562.

EIS No. 20160306, Final, NRC, WY, Reno Creek In Situ Recovery Project, *Review Period Ends:* 01/17/2017, *Contact:* Jill Caverly 301–415–7674.

EIS No. 20160307, Final Supplement, EPA, CT, Designation of Dredged Material Disposal Site(s) in Eastern Long Island Sound (ELIS), *Review Period Ends:* 01/04/2017, *Contact:* Jean Brochi 617–918–1536. Note: On 12/6/16, EPA published a notice in the **Federal Register** (81 FR 87820) for the Final Rule and Final Supplemental EIS.

EIS No. 20160308, Final, USFS, WY, Oil and Gas Leasing in Portions of the Wyoming Range in the Bridger-Teton National Forest, *Review Period Ends:* 01/17/2017, *Contact:* Donald Kranendonk 435–781–5245.

Dated: December 13, 2016.

Dawn Roberts.

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2016–30350 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2016–0744; FRL 9956–94–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree to address a lawsuit filed by the States of New York, State of Connecticut, New Hampshire, Rhode Island, Vermont, and the Commonwealth of Massachusetts (collectively ''Plaintiffs'') in the United States District Court for the Southern District of New York: *State of New York, et al.* v. *McCarthy, et al.* No. 1:16–cv–07827 (S.D. N.Y.). On October 6, 2016, Plaintiffs filed a complaint alleging that Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (''EPA'') failed to perform duties mandated by CAA to take final action to approve or disapprove the December 9, 2013 Petition submitted by the Plaintiff states, all of which are currently part of the Ozone Transport Region (''OTR''),

requesting EPA to expand the OTR to include numerous ''upwind'' states. The proposed consent decree would establish deadlines for EPA to take certain specified actions with respect to the December 9, 2013 Petition.

DATES: Written comments on the proposed consent decree must be received by *January 17, 2017.*

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2016–0744, online at *www.regulations.gov.* For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the ''For Further Information Contact'' section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Alexander Bond, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–3822; fax number: (202) 564–5603; email address: *Bond.Alexander@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

On October 6, 2016, Plaintiffs filed a complaint alleging that EPA failed to perform duties mandated by CAA to take final action to approve or disapprove the December 9, 2013 submitted by the Plaintiff states, all of which are currently part of the OTR, requesting EPA to expand the OTR pursuant to 42 U.S.C 7506a(a) to include several upwind states. Under the terms of the proposed consent decree, EPA must sign a notice for public comment that proposes certain actions regarding the December 9, 2013 Petition, no later than January 18, 2017, and must sign a final notice of final action regarding the petition thereon no later than October 27, 2017. See the proposed consent decree for the specific details.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this proposed consent decree should be withdrawn, the terms of the consent decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the proposed consent decree?

The official public docket for this action (identified by EPA–HQ–OGC–2016–0744) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, 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 OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public

docket, and made available in EPA's electronic public docket.

Dated: December 9, 2016.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2016–30329 Filed 12–15–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0526]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 14, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0526.

Title: Section 69.123, Density Pricing Zone Plans, Expanded Interconnection with Local Telephone Company Facilities.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 13 respondents; 13 responses.

Estimated Time per Response: 48 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 154(j), 201–205, 303(r), and 403.

Total Annual Burden: 624 hours.

Total Annual Cost: $12,025.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: No information of a confidential nature is being sought. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission requires Tier 1 local exchange carriers (LECs) to provide expanded opportunities for third party interconnection with their interstate special access facilities. The LECs are permitted to establish a number of rate zones within study areas in which expanded interconnection are operational. In a previous rulemaking, Fifth Report and Order, CC Docket No. 96–262, the Commission allowed price cap LECs to define the scope and number of zones within a study area. These LECs must file and obtain approval of their pricing plans which will be used by FCC staff to ensure that the rates are just, reasonable and nondiscriminatory.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2016–30230 Filed 12–15–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

[Docket No. R–1535; RIN 7100 AE–49]

Banking Organization Systemic Risk Report (FR Y–15)

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Extension of filing deadline; request for comment.

SUMMARY: The Board is extending the deadline to complete Schedule G of the Banking Organization Systemic Risk Report (FR Y–15) for certain firms.

DATES: Compliance with the filing requirements for Schedule G of the FR Y–15 is immediately extended until December 31, 2017, for certain firms and is immediately extended until June 30, 2018, for certain other firms. Comments must be received on or before February 14, 2017.

ADDRESSES: When submitting comments, please consider submitting your comments by email or fax because paper mail in the Washington, DC area and at the Board may be subject to delay. You may submit comments, identified by Docket No. R–1535; RIN 7100 AE–49, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets NW., Washington, DC 20551) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Anna Lee Hewko, Associate Director, (202) 530–6260, Constance M. Horsley,

Assistant Director, (202) 452–5239, Elizabeth MacDonald, Manager, (202) 475–6316, or Sean Healey, Supervisory Financial Analyst, (202) 912–4611, Division of Banking Supervision and Regulation; or Benjamin McDonough, Special Counsel, (202) 452–2036, Mark Buresh, Senior Attorney, (202) 452–5270, or Mary Watkins, Attorney, (202) 452–3722, Legal Division. Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. For the hearing impaired only, Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Banking Organization Systemic Risk Report (FR Y–15) reporting form collects systemic risk data from U.S. bank holding companies, covered savings and loan holding companies,[1] and intermediate holding companies with total consolidated assets of $50 billion or more. The Federal Reserve primarily uses the FR Y–15 data to monitor, on an ongoing basis, the systemic risk profile of the institutions that are subject to enhanced prudential standards under section 165 of the Dodd-Frank Act. The information reported on the FR Y–15 also is used in the calculation of a bank holding company's method 1 and method 2 scores under the Board's risk-based capital surcharge for global systemically important bank holding companies (GSIB surcharge rule).[2]

In connection with issuance of the GSIB surcharge rule, the Board revised the FR Y–15 to include Schedule G, which contains data used in the calculation of the short-term wholesale funding score that is a component of the method 2 score calculation.[3] The revised FR Y–15 required firms to begin providing Schedule G with the FR Y–15 as of December 31, 2016.[4]

The Board's complex institution liquidity monitoring report (FR 2052a) collects data on an institution's overall liquidity profile. While the FR 2052a collects a broader range of data on a more frequent and granular basis than the FR Y–15, the information collected on the FR 2052a includes the information necessary to complete Schedule G of the FR Y–15. When the Board finalized the FR 2052a reporting form, it provided a phase-in schedule to allow firms sufficient time to implement the systems necessary to complete the FR 2052a.[5] Under the transition periods set forth in FR 2052a, firms with total consolidated assets of less than $700 billion and less than $10 trillion in assets under custody are not required to submit the FR 2052a until at least February 2017, a full year after the current effective date of the FR Y–15.

II. Extension of Deadline

This extension of the filing deadline to complete Schedule G of the FR Y–15 (extension) delays the initial filing date of Schedule G for all firms, except for those that have $700 billion or more in total consolidated assets or $10 trillion or more in assets under custody. This delay will allow the FR 2052a phase-in schedule to be completed before a firm is required to complete Schedule G of the FR Y–15.

Under the extension, firms that are required to file the FR Y–15 that have $700 billion or more in total consolidated assets or $10 trillion or more in assets under custody do not have an extended filing date and must complete Schedule G for the FR Y–15 filed as of December 31, 2016. However, firms that are required to file the FR Y–15 and that have less than $10 trillion in assets under custody and less than $700 billion in total consolidated assets, but have $250 billion or more in total consolidate assets or $10 billion or more in on balance sheet foreign exposure are not required to begin completing Schedule G until the report with the December 31, 2017, as of date. Firms that are required to file the FR Y–15 and that have less than: $10 trillion in assets under custody; $250 billion in total consolidated assets; and $10 billion in on-balance-sheet foreign exposure are not required to begin completing Schedule G until the report with the June 30, 2018, as of date. The table below describes the interaction between initial filing of the FR 2052a and the initial filing of Schedule G of the FR Y–15:

	FR 2052a			FR Y–15
U.S. firms with total consolidated assets:	Filing frequency	First as-of date	First submission date	First as-of date for Schedule G
≥$700 billion or with ≥$10 trillion in assets under custody	Daily	12/14/2015	12/16/2015	12/31/2016
<$700 billion and with <$10 trillion in assets under custody, but total consolidated assets ≥$250 billion or foreign exposure ≥$10 billion.	Monthly	01/31/2017	02/15/2017	12/31/2017
≥$50 billion, but total consolidated assets <$250 billion and foreign exposure <$10 billion.	Monthly	07/31/2017	08/15/2017	06/30/2018

The extension revises the initial filing dates of Schedule G of the FR Y–15 to be consistent with the phase-in schedule for the FR Y 2052a. Without this change, firms would be required to implement the systems necessary to complete both the Schedule G of the FR Y–15 and much of the FR 2052a for the FR Y–15 report as of December 31, 2016. This would create significant immediate expense for firms and would be contrary to the phase-in schedule for completion of the FR 2052a.

III. Request for Comments

The Board seeks comment on all aspects of the extension.

IV. Date of Action; Solicitation of Comments

The interim final rule is being issued without prior notice and opportunity to comment and with an immediate effective date. Pursuant to the Administrative Procedure Act (APA), general notice and opportunity for public comment are not required prior to final agency action, if the agency, for good cause, finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [6] Immediate adoption of the extension would give

[1] Covered savings and loan holding companies are those which are not substantially engaged in insurance or commercial activities. For more information, see the definition of ''covered savings and loan holding company'' provided in 12 CFR 217.2.

[2] 12 CFR part 217, subpart H.

[3] *See,* 80 FR 77344 (December 14, 2015); 12 CFR 217.405–406.

[4] 80 FR 77344, 77345.

[5] 80 FR 71795 (November 17, 2015).

[6] 5 U.S.C. 553(b)(B). The APA also generally requires that notice of a final action be published in the **Federal Register** no less than 30 days before its effective date, unless the action grants or recognizes an exception or relieves a restriction, or as otherwise provided by the agency for good cause. 5 U.S.C. 553(d)(3).

effect to the intended phase-in schedule for the FR 2052a by allowing certain firms additional time to complete Schedule G of the FR Y–15. Immediate adoption of this change also would provide clarity to firms required to file the FR Y–15 and FR 2052a regarding the interaction of the forms, and relieve burden on these firms by allowing additional time to develop the systems necessary to complete the FR Y–15 and FR 2052a. Without the revised schedule of Schedule G of the FR Y–15 in the extension, many holding companies would expend significant resources to develop liquidity reporting systems significantly in advance of when these systems would otherwise become necessary. Further, since only certain summary statistics reported on Schedule G are released to the public, allowing certain firms additional time to complete Schedule G will not have a significant impact on the amount of information available to the public.[7]

The Board finds that, under these circumstances, prior notice and comment through the issuance of a proposal are impracticable and that the public interest is best served by making the extension effective as quickly as possible.

VI. Regulatory Analysis

A. Regulatory Flexibility Act Analysis

The requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) are not applicable to this interim extension.[8] Nonetheless, the Board believes that this extention would not have a significant economic impact on a substantial number of small entities. The Board requests comment on its conclusion that the extension should not have a significant economic impact on a substantial number of small entities.

The RFA generally requires an agency to assess the impact a rule is expected to have on small entities.[9] The RFA requires an agency either to provide a regulatory flexibility analysis or to certify that the extension will not have a significant economic impact on a substantial number of small entities. Based on this analysis and for the reasons stated below, the Board believes that the extension will not have a significant economic impact on a substantial number of small entities.

Under regulations issued by the U.S. Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $550 million or less (a small banking organization).[10] As of June 30, 2016, there were approximately 3,203 top-tier small bank holding companies and 162 small savings and loan holding companies.

The Board believes that the extension will reduce regulatory burden by providing additional time for certain firms to complete Schedule G of the FR Y–15. The firms required to file the FR Y–15 are bank holding companies, savings and loan holding companies, and intermediate holding companies with $50 billion or more in total consolidated assets, as well as any U.S.-based organization designated as a global systemically important bank holding company. Therefore, neither Schedule G of the FR Y–15 nor this extension apply to small entities.

The Board is aware of no other Federal rules that duplicate, overlap, or conflict with this extension. The Board does not believe that there are significant alternatives to the extension that would reduce the economic impact on small banking organizations supervised by the Board.

B. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies invite comment on how to make this extension easier to understand. For example:

- Have the agencies organized the material to suit your needs? If not, how could it be more clearly stated?
- Are the requirements in the rule clearly stated? If not, how could they be more clearly stated?
- Does the notice contain technical language or jargon that is not clear? If so, what language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the notice easier to understand? If so, what changes would make the notice easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could be done to make the notice easier to understand?

C. Paperwork Reduction Act

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

D. Administrative Procedure Act

As noticed, the Administrative Procedure Act allows an agency to act immediately to adopt a rule without public notice and comment if the agency has ''good cause.'' [11] In this case, the Board has good cause to issue the extension and to have the extension be effective immediately.[12] The extension will provide certain firms additional time to complete Schedule G of the FR Y–15. The delay provides clarity to the industry regarding the Board's expectations for implementation of systems for monitoring and reporting liquidity positions and to ensure that these firms have sufficient time to develop these systems and the related risk management processes.

By order of the Board of Governors of the Federal Reserve System, December 9, 2016.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2016–29967 Filed 12–14–16; 11:15 am]

BILLING CODE P

[7] Items one through four of Schedule G receive confidential treatment until the liquidity coverage ratio disclosure standard has been implemented. Information for which confidential treatment is provided may subsequently be released in accordance with the terms of 12 CFR 261.16 or as otherwise provided by law.

[8] The requirements of the RFA are not applicable to rules adopted under the Administrative Procedure Act's ''good cause'' exception, see 5 U.S.C. 601(2) (defining ''rule'' and notice requirements under the APA).

[9] Under standards the U.S. Small Business Administration has established, an entity is considered ''small'' if it has $175 million or less in assets for banks and other depository institutions. U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[10] *See* 13 CFR 121.201. Effective July 14, 2014, the Small Business Administration revised the size standards for banking organizations to $550 million in assets from $500 million in assets. 79 FR 33647 (June 12, 2014).

[11] 12 U.S.C. 553(b).

[12] 12 U.S.C. 553(d).

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the

assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 17, 2017.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Farmers Bancorp, Inc.,* Blytheville, Arkansas; to acquire 100 percent of Tennessee Bank & Trust, Nashville, Tennessee, a de nova bank.

Board of Governors of the Federal Reserve System, December 13, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–30301 Filed 12–15–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–5521–N]

Medicare Program; Start-Up Funding in Support of the Vermont All-Payer Accountable Care Organization (ACO) Model—Cooperative Agreement

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: The purpose of this notice is to announce issuance of the November 23, 2016 single-source cooperative agreement funding opportunity available solely to Vermont's Agency of Human Services in order to provide care coordination and bolster collaboration for practices and community-based health care providers as part of the Vermont All-Payer Accountable Care Organization (ACO) Model.

DATES: The performance period of the Vermont All-Payer ACO Model will begin on January 1, 2017, and conclude on December 31, 2022.

FOR FURTHER INFORMATION CONTACT: Stephen Cha, (410) 786–1876.

SUPPLEMENTARY INFORMATION:

I. Background

The Vermont All-Payer Accountable Care Organization Model (Model) is the Centers for Medicare & Medicaid Services' (CMS) new test within the Center for Medicare and Medicaid Innovation of an alternative payment model in which the major health care payers—Medicare, Medicaid, and commercial health care payers—incentivize health care value and quality under the same payment structure for health care providers throughout the state's care delivery system to transform health care for the entire state and its population. An Accountable Care Organization (ACO) is an entity formed by certain health care providers that accepts financial accountability for the overall quality and cost of medical care furnished to, and health of, beneficiaries attributed to the entity.

CMS believes that states can be critical partners of the federal government and other health care payers to facilitate the design, implementation, and evaluation of community-centered health systems that can deliver significantly improved cost, quality, and population health performance results for all state residents, including Medicare, Medicaid, and Children's Health Insurance Program (CHIP) beneficiaries. States have policy and regulatory authorities, as well as ongoing relationships with commercial healthcare payers, health plans, and health care providers that can accelerate delivery system reform. CMS has previously partnered with states to accelerate delivery system reform through initiatives such as the State Innovations Model (SIM). SIM provides state-based healthcare transformation efforts with funding to test the ability of states to utilize policy and regulatory levers to accelerate multi-payer health care transformation.

Vermont, a SIM state awardee, approached CMS with a desire to include Medicare in the state's multipayer payment and care delivery model, and Vermont publicly released its proposal on January 25, 2016. CMS reviewed Vermont's proposal and determined that it met the necessary requirements to explore a potential Vermont-specific model in which Medicare aligns with Vermont's healthcare transformation efforts. In October 2016, CMS and the State of Vermont entered into the Vermont All-Payer Accountable Care Organization Model Agreement (''State Agreement'') to implement the Vermont All-Payer ACO Model. The Vermont All-Payer ACO Model will be a 6-year model beginning in 2017 and ending in 2022.

As part of the Model, Vermont health care providers will participate in a Vermont-specific Medicare ACO initiative (the Vermont Medicare ACO Initiative), which is largely based on CMS' Next Generation ACO Model. CMS will provide one-time start-up funding in the amount of $9,500,000 to the State to assist Vermont health care providers with care coordination and bolster their collaboration with community-based resources. CMS will provide the start-up funding as a cooperative agreement funding opportunity available solely to Vermont's Agency of Human Services, as announced in this notice. More information about the Vermont All-Payer ACO Model can be found at *https://innovation.cms.gov/initiatives/vermont-all-payer-aco-model/.*

Through the Model, CMS will test whether the quality of health care for Vermont residents improves and healthcare expenditures for beneficiaries across payers (including Medicare fee-for-service, Vermont Medicaid, Vermont commercial plans, and Vermont self-insured plans) decrease if—

- The aforementioned payers offer Vermont ACOs risk-based arrangements tied to health outcomes and healthcare expenditures;
- The majority of Vermont health care providers enter into such risk-based arrangements; and
- The majority of Vermont residents across payers are aligned to an ACO bound by these arrangements.

CMS and Vermont aim for broad ACO participation throughout the state, across all the significant payers and the majority of the care delivery system, to make redesigning the entire care delivery system a rational business strategy for Vermont health care providers and payers. As set forth in the State Agreement, Vermont commits to achieving statewide health outcomes, financial targets, and ACO scale (percentage of Vermont residents

aligned to an ACO) targets—both for Medicare and across all significant healthcare payers. Additionally, CMS and Vermont aim for this Model to deliver meaningful improvements in the health of a state's entire population by transforming the relationships between and amongst care delivery and public health systems across Vermont.

II. Provisions of the Notice

The purpose of this notice is to announce a single source cooperative agreement funding opportunity in the amount of $9,500,000 available solely to Vermont's Agency of Human Services (AHS) to support care coordination and bolster collaboration for practices and community-based health care providers as part of the Vermont All-Payer ACO Model. A single-source award to the AHS will enable CMS to provide assistance to Vermont for the following purposes: To connect Medicare fee-for-service beneficiaries with community-based resources, coordinate transitions across care settings with appropriate involvement of the Medicare fee-for-service beneficiaries' primary care providers, coordinate care across health care providers, support health promotion and self-management by Medicare fee-for-service beneficiaries, and support practice improvement and transformation. These activities are necessary for Vermont to achieve the health outcomes and financial goals required under the Vermont All-Payer ACO Model.

CMS and Vermont believe the Vermont All-Payer ACO Model can support health care providers, including physicians in small practices, to succeed as health care moves from fee-for-service to value-based payment systems. Participation by health care providers and payers in the model will be voluntary, and CMS and Vermont expect to work closely together to achieve sufficient uptake. In particular, this Model is being implemented using the Secretary's authority in section 1115A of the Social Security Act (the Act) and Vermont's Global Commitment to Health demonstration project authorized under section 1115 of the Act. Together these authorities make it possible for physicians and other clinicians in Vermont to participate the aligned and state-specific Vermont Medicare ACO Initiative and Medicaid ACO initiative. Under the Quality Payment Program, the two-sided risk portion of the Vermont Medicare ACO Initiative meets the criteria to be an Advanced Alternative Payment Model. Health care providers participating in the two-sided risk portion of the Vermont Medicare ACO Initiative may potentially qualify for the APM Incentive Payments starting in performance year 2018.

This single-source funding opportunity to the AHS is designed to meet the goals of the cooperative agreement based on the AHS' existing knowledge and role in supporting the Model, its existing partnerships and collaborations with Vermont health care providers, and its resources and ability to deploy the funding immediately.

III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: December 6, 2016.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2016–30269 Filed 12–15–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–4040, CMS–10156, CMS–10170, CMS–10198, CMS–10227, CMS–10344, CMS–10501, CMS–R–266, and CMS–10282]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: the necessity and utility of the proposed information collection for the proper performance of the agency's functions; the accuracy of the estimated burden; ways to enhance the quality, utility, and clarity of the information to be collected; and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by February 14, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____ Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–4040 Request for Enrollment in Supplementary Medical Insurance

CMS–10156 Retiree Drug Subsidy (RDS) Application and Instructions

CMS–10170 Retiree Drug Subsidy (RDS) Payment Request and Instructions

CMS–10198 Creditable Coverage Disclosure to CMS On-Line Form and Instructions
CMS–10227 PACE State Plan Amendment Preprint
CMS–10344 Elimination of Cost-Sharing for Full Benefit Dual-Eligible Individuals Receiving Home and Community-Based Services
CMS–10501 Healthcare Fraud Prevention Partnership HFPP Data Sharing and Information Exchange
CMS–R–266 Medicaid Disproportionate Share Hospital Annual Reporting
CMS–10282 Conditions of Participation for Comprehensive Outpatient Rehabilitation Facilities (CORFs) and Supporting Regulations

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Request for Enrollment in Supplementary Medical Insurance; *Use:* Form CMS–4040 is used to establish entitlement to and enrollment in Medicare Part B for beneficiaries who file for Part B only. The collected information is used to determine entitlement for individuals who meet the requirements in section 1836(2) of the Social Security Act as well as the entitlement of the applicant (or their spouses) to an annuity paid by OPM for premium deduction purposes. *Form Number:* CMS–4040 (OMB control number: 0938–0245); *Frequency:* Once; *Affected Public:* Individuals or households; *Number of Respondents:* 10,000; *Total Annual Responses:* 10,000; *Total Annual Hours:* 2,500. (For policy questions regarding this collection contact Carla Patterson at 410–786–8911.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Retiree Drug Subsidy (RDS) Application and Instructions; *Use:* Plan sponsors (*e.g.,* employers, unions) who offer prescription drug coverage to their qualified covered retirees are eligible to receive a 28 percent tax-free subsidy for allowable drug costs. To qualify, plan sponsors must submit a complete application with a list of retirees for whom it intends to collect the subsidy. Once we review and analyze the information on the application and the retiree list, notification will be sent to the plan sponsor about its eligibility to participate in the RDS program. *Form Number:* CMS–10156 (OMB control number: 0938–0957); *Frequency:* Yearly and monthly; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 2,482; *Total Annual Responses:* 2,482; *Total Annual Hours:* 158,848. (For policy questions regarding this collection contact Ivan Iveljic at 410–786–3312.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Retiree Drug Subsidy (RDS) Payment Request and Instructions; *Use:* Plan sponsors (*e.g.,* employers, unions) who offer prescription drug coverage meeting specified criteria to their qualified covered retirees are eligible to receive a 28 percent tax-free subsidy for allowable drug costs. Plan sponsors must submit required prescription drug cost data and other information in order to receive the subsidy. Plan sponsors may elect to submit RDS payment requests on a monthly, quarterly, interim annual, or annual basis; once selected, the payment frequency may not be changed during the plan year. *Form Number:* CMS–10170 (OMB control number: 0938–0977); *Frequency:* Occasionally; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 2,482; *Total Annual Responses:* 2,482; *Total Annual Hours:* 374,782. (For policy questions regarding this collection contact Ivan Iveljic at 410–786–3312.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Creditable Coverage Disclosure to CMS On-Line Form and Instructions; *Use:* Most entities that currently provide prescription drug benefits to any Medicare Part D eligible individual must disclose whether their prescription drug benefit is creditable (expected to pay at least as much, on average, as the standard prescription drug plan under Medicare). The disclosure must be provided annually and upon any change that affects whether the coverage is creditable prescription drug coverage. *Form Number:* CMS–10198 (OMB control number: 0938–1013); *Frequency:* Yearly and semi-annually; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions), and State, Local, or Tribal Governments; *Number of Respondents:* 85,635; *Total Annual Responses:* 87,265; *Total Annual Hours:* 7,272. (For policy questions regarding this collection contact Tammie Wall at 410–786–3317.)

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* PACE State Plan Amendment Preprint; *Use:* If a state elects to offer PACE as an optional Medicaid benefit, it must complete a state plan amendment preprint packet described as ''Enclosures 3, 4, 5, 6, and 7.'' CMS will review the information provided in order to determine if the state has properly elected to cover PACE services as a state plan option. In the event that the state changes something in the state plan, only the affected page must be updated. *Form Number:* CMS–10227 (OMB control number: 0938–1027); *Frequency:* Once and occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 7; *Total Annual Responses:* 2; *Total Annual Hours:* 140. (For policy questions regarding this collection contact Angela Cimino at 410–786–2638.)

6. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Elimination of Cost-Sharing for Full Benefit Dual-Eligible Individuals Receiving Home and Community-Based Services; *Use:* This collection eliminates Part D cost-sharing for full benefit dual-eligible beneficiaries who are receiving home and community based services. In this regard, states are required to identify the affected beneficiaries in their monthly Medicare Modernization Act Phase Down reports. *Form Number:* CMS–10344 (OMB control number: 0938–1127); *Frequency:* Monthly; *Affected Public:* Private sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 51; *Total Annual Responses:* 612; *Total Annual Hours:* 612. (For policy questions regarding this collection

contact Roland Herrera at 410–786–0668.)

7. *Type of Information Collection Request:* Revision of a previously approved collection; *Title of Information Collection:* Healthcare Fraud Prevention Partnership (HFPP): Data Sharing and Information Exchange; *Use:* The advance directives requirement was enacted because Congress wanted individuals to know that they have a right to make health care decisions and to refuse treatment even when they are unable to communicate. Steps have been taken at both the Federal and State level, to afford greater opportunity for the individual to participate in decisions made concerning the medical treatment to be received by an adult patient in the event that the patient is unable to communicate to others, a preference about medical treatment. The individual may make his preference known through the use of an advance directive, which is a written instruction prepared in advance, such as a living will or durable power of attorney. This information is documented in a prominent part of the individual's medical record. Advance directives as described in the Patient Self-Determination Act have increased the individual's control over decisions concerning medical treatment. Sections 4206 of the Omnibus Budget Reconciliation Act of 1990 defined an advance directive as a written instruction recognized under State law relating to the provision of health care when an individual is incapacitated (those persons unable to communicate their wishes regarding medical treatment).

All states have enacted legislation defining a patient's right to make decisions regarding medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives. Participating hospitals, skilled nursing facilities, nursing facilities, home health agencies, providers of home health care, hospices, religious nonmedical health care institutions, and prepaid or eligible organizations (including Health Care Prepayment Plans (HCPPs) and Medicare Advantage Organizations (MAOs) such as Coordinated Care Plans, Demonstration Projects, Chronic Care Demonstration Projects, Program of All Inclusive Care for the Elderly, Private Fee for Service, and Medical Savings Accounts must provide written information, at explicit time frames, to all adult individuals about: (a) The right to accept or refuse medical or surgical treatments; (b) the right to formulate an advance directive; (c) a description of applicable State law (provided by the State); and (d) the provider's or organization's policies and procedures for implementing an advance directive. *Form Number:* CMS–10507 (OMB control number: 0938–1251); Frequency: Occasionally; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 20; *Total Annual Responses:* 20; *Total Annual Hours:* 160. (For policy questions regarding this collection contact Marnie Dorsey at 410–786–5942.)

8. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Disproportionate Share Hospital (DSH) Annual Reporting Requirements; *Use:* States are required to submit an annual report that identifies each disproportionate share hospital (DSH) that received a DSH payment under the state's Medicaid program in the preceding fiscal year and the amount of DSH payments paid to that hospital in the same year along with other information that the Secretary determines necessary to ensure the appropriateness of DSH payments; *Form Number:* CMS–R–266 (OMB control number: 0938–0746); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 51; *Total Annual Hours:* 2,142. (For policy questions regarding this collection contact Robert Lane at 410–786–2015.)

9. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Conditions of Participation for Comprehensive Outpatient Rehabilitation Facilities (CORFs) and Supporting Regulations; *Use:* The Conditions of Participation (CoPs) and accompanying requirements specified in the regulations are used by our surveyors as a basis for determining whether a comprehensive outpatient rehabilitation facility (CORF) qualifies to be awarded a Medicare provider agreement. We believe the health care industry practice demonstrates that the patient clinical records and general content of records are necessary to ensure the well-being and safety of patients and that professional treatment and accountability are a normal part of industry practice. *Form Number:* CMS–10282 (OMB control number: 0938–1091); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 549; *Total Annual Responses:* 549; *Total Annual Hours:* 6,945. (For policy questions regarding this collection contact Jacqueline Leach at 410–786–4282.)

Dated: December 13, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–30340 Filed 12–15–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–2744]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: the necessity and utility of the proposed information collection for the proper performance of the agency's functions; the accuracy of the estimated burden; ways to enhance the quality, utility, and clarity of the information to be collected; and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by January 17, 2017.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR* Email: *OIRA_ submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*
2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*
3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a previously approved collection; *Title of Information Collection:* End Stage Renal Disease (ESRD) Medical Information Facility Survey; *Use:* The ESRD Program Management and Medical Information System (PMMIS) Facility Certification/Survey Record contains provider-specific and aggregate patient population data on beneficiaries treated by that provider obtained from the Annual Facility Survey form (CMS–2744). The Facility Certification portion of the record captures certification and other information about ESRD facilities approved by Medicare to provide kidney dialysis and transplant services. The Facility Survey portion of the record captures activities performed during the calendar year as well as aggregate year-end population counts for both Medicare beneficiaries and non-Medicare patients. The survey includes the collection on hemodialysis patients dialyzing more than 4 times per week, vocational rehabilitation and staffing. The aggregate patient information is collected from each Medicare-approved provider of dialysis and kidney transplant services. The information is used to assess and evaluate the local, regional and national levels of medical and social impact of ESRD care and is used extensively by researchers and suppliers of services for trend analysis. *Form Number:* CMS–2744 (OMB control number: 0938–0447); *Frequency:* Yearly; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 5,964; *Total Annual Responses:* 5,964; *Total Annual Hours:* 47,712. (For policy questions regarding this collection contact Renee Dupee at 410–786–6747)

Dated: December 13, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–30349 Filed 12–15–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: OCSE–75 Tribal Child Support Enforcement Program Annual Data Report.

OMB No.: 0970–0320.

Description: The data collected by form OCSE–75 are used to prepare the OCSE preliminary and annual data reports. In addition, Tribes administering CSE programs under Title IV–D of the Social Security Act are required to report program status and accomplishments in an annual narrative report and submit the OCSE–75 report annually.

Respondents: Tribal Child Support Enforcement Organizations or the Department/Agency/Bureau responsible for Child Support Enforcement in each tribe.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–75	63	1	63	3,969

Estimated Total Annual Burden Hours: 3,969.

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201. Attention Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Email: OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2016–30291 Filed 12–15–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1352]

International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products; Bioequivalence: Blood Level Bioequivalence Study; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of guidance for industry (GFI) #224 entitled ''Bioequivalence: Blood Level Bioequivalence Study'' (VICH GL52). This guidance has been developed for veterinary use by the International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH). This VICH guidance document is intended to harmonize the data recommendations associated with in vivo blood level bioequivalence (BE) for veterinary pharmaceutical products.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–1352 for ''Bioequivalence: Blood Level Bioequivalence Study.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Marilyn Martinez, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0635, email: *Marilyn.Martinez@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote the international harmonization of regulatory requirements. FDA has participated in efforts to enhance harmonization and has expressed its commitment to seek scientifically based, harmonized technical procedures for the development of pharmaceutical products. One of the goals of harmonization is to identify, and then reduce, differences in technical requirements for drug development among regulatory agencies in different countries.

FDA has actively participated in the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) for several years to develop harmonized technical requirements for the approval of human pharmaceutical and biological products among the European Union, Japan, and the United States. The VICH is a parallel initiative for veterinary medicinal products. The VICH is concerned with developing harmonized technical requirements for the approval of veterinary medicinal products in the European Union, Japan, and the United States, and includes input from both regulatory and industry representatives.

The VICH Steering Committee is composed of member representatives from the European Commission and

European Medicines Agency; International Federation for Animal Health—Europe; FDA; the U.S. Department of Agriculture; the U.S. Animal Health Institute; the Japanese Ministry of Agriculture, Forestry, and Fisheries; and the Japanese Veterinary Products Association.

Six observers are eligible to participate in the VICH Steering Committee: One representative from the government of Australia/New Zealand, one representative from the industry in Australia/New Zealand, one representative from the government of Canada, one representative from the industry of Canada, one representative from the government of South Africa, and one representative from the industry of South Africa. The VICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation for Animal Health (IFAH).

II. Guidance on Bioequivalence: Blood Level Bioequivalence Study

In the **Federal Register** of September 24, 2014 (79 FR 57113), FDA published the notice of availability for a draft guidance for industry entitled ''Bioequivalence: Blood Level Bioequivalence Study'' (VICH GL52) giving interested persons until November 24, 2014, to comment on the draft guidance. FDA received one comment on the draft guidance, and that comment, as well as those received by other VICH member regulatory agencies, was considered as the guidance was finalized. The guidance announced in this notice finalizes the draft guidance dated September 2014. The final guidance is a product of the Bioequivalence Expert Working Group of the VICH.

This VICH guidance document is intended to harmonize the data recommendations associated with in vivo blood level bioequivalence (BE) for veterinary pharmaceutical products. To meet this objective, the guidance addresses the following topics: A harmonized definition of BE, factors/variables that should be considered when developing scientifically sound blood level BE study designs, and information that should be included in a blood level BE study report.

III. Significance of Guidance

This guidance, developed under the VICH process, is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). For example, the document has been designated ''guidance'' rather than ''guideline.'' In addition, guidance documents must not include mandatory language such as ''shall,'' ''must,'' ''require,'' or ''requirement,'' unless FDA is using these words to describe a statutory or regulatory requirement.

This guidance represents the current thinking of FDA on ''Bioequivalence: Blood Level Bioequivalence Study.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032. The collections of information in section 512(n)(1) of the FD&C Act (21 U.S.C. 360K) have been approved under OMB control number 0910–0669.

V. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *http://www.regulations.gov.*

Dated: December 12, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30309 Filed 12–15–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–4361]

Gifts to the Food and Drug Administration: Evaluation and Acceptance; Guidance for the Public and Food and Drug Administration; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA, we, or Agency) is announcing the availability of a guidance for industry entitled ''Gifts to FDA: Evaluation and Acceptance.'' The Secretary of the Department of Health and Human Services (HHS) has the authority to accept conditional or unconditional gifts on behalf of the United States. The Secretary has delegated this gift authority to the Commissioner of Food and Drugs. This guidance provides the process and principles we will use in implementing this authority.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2015–D–4361 for ''Gifts to FDA: Evaluation and Acceptance: Guidance for the Public and FDA Staff; Availability.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential

Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Office of Policy, Office of Policy, Planning, Legislation, and Analysis, Food and Drug Administration, Bldg. 32, Rm. 4238, 10903 New Hampshire Ave., Silver Spring, MD, 20993. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Robert Berlin, Office of Policy, Office of Policy, Planning, Legislation, and Analysis, Food and Drug Administration, Bldg. 32, Rm. 4238, 10903 New Hampshire Ave., Silver Spring, MD, 20993, 301–796–8828, *robert.berlin@fda.hhs.gov.* Alternate contact: Office of Policy, 301–796–4830.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for the public and FDA staff entitled ''Gifts to FDA: Evaluation and Acceptance.'' The Secretary of HHS has the authority to accept conditional or unconditional gifts on behalf of the United States. The Secretary has delegated this gift authority to the Commissioner of Food and Drugs. This guidance provides the process and principles we will use in implementing this authority.

FDA will consider gifts from all sources except the Reagan-Udall Foundation (RUF) on a case-by-case basis using a balancing test, described in the guidance. While any person may offer a gift, there are five reasons we should reject a gift without additional evaluation. We should not accept a gift if: (1) The donor imposes conditions that are illegal, are contrary to public policy, are unreasonable to administer, are contrary to FDA's current policies and procedures, or are contrary to generally accepted public standards; (2) the donor requires us to provide the donor with some privilege, concession, or other present or future benefit in return for the gift; (3) a debarred entity offers the gift; (4) a different authority or financial mechanism applies; or (5) the total costs associated with acceptance are expected to exceed the cost of purchasing a similar item and the cost of normal care and maintenance.

In the **Federal Register** of June 29, 2016 (81 FR 42365), FDA announced the availability of a draft guidance entitled ''Gifts to FDA: Evaluation and Acceptance: Evaluation and Acceptance.'' FDA received one comment expressing concern regarding the policy described in the guidance. It appears the commenter may have misunderstood the policy and incorrectly believed that gifts would not be limited, would be unreported, and would be provided to Federal employees themselves. As explained in the guidance, that is not the case. Rather, the recipients of any gifts would be the Agency, gifts are extensively reviewed to ensure receipt would be appropriate, and the Agency intends to publish a summary of received gifts. The Agency has made only minor changes to the guidance to clarify that the evaluation of gifts from RUF will reflect RUF's unique role in support of the Agency and the statutory safeguards in 21 U.S.C. 379dd. In addition, the discussion of restrictions on funds for travel has been clarified to better reflect the scope of statutes and policies governing the use of non-Agency funds for travel.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on this matter. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/RegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 13, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30312 Filed 12–15–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–3995]

Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Devices; Pediatric Uses of Devices; Requirement for Submission of Information on Pediatric Subpopulations That Suffer From a Disease or Condition That a Device Is Intended To Treat, Diagnose, or Cure

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection associated with the requirement for submission of information on pediatric subpopulations

that suffer from a disease or condition that a device is intended to treat, diagnose, or cure.

DATES: Submit either electronic or written comments on the collection of information by February 14, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–N–3995 for ''Medical Devices; Pediatric Uses of Devices; Requirement for Submission of Information on Pediatric Subpopulations That Suffer From a Disease or Condition That a Device Is Intended to Treat, Diagnose, or Cure.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Devices; Pediatric Uses of Devices; Requirement for Submission of Information on Pediatric Subpopulations That Suffer From a Disease or Condition That a Device Is Intended To Treat, Diagnose, or Cure—21 CFR Part 814—OMB Control Number 0910–0748—Extension

Section 515A(a) of the FD&C Act requires applicants who submit certain medical device applications to include readily available information providing a description of any pediatric subpopulations that suffer from the disease or condition that the device is intended to treat, diagnose, or cure, and the number of affected pediatric patients. The information submitted will allow FDA to track the number of approved devices for which there is a pediatric subpopulation that suffers from the disease or condition that the device is intended to treat, diagnose, or cure and the review time for each such device application.

These requirements apply to applicants who submit humanitarian device exemption requests (HDEs), premarket approval applications (PMAs) or PMA supplements, or a product development protocol (PDP).

FDA expects to receive approximately 45 original PMA/PDP/HDE applications

each year, 5 of which FDA expects to be HDEs. This estimate is based on the average of FDA's receipt of new PMA applications. The Agency estimates that 10 of the estimated 40 original PMA submissions will fail to provide the required pediatric use information and their sponsors will therefore be required to submit PMA amendments. The Agency also expects to receive approximately 700 supplements that will include the pediatric use information required by section 515A(a) of the FD&C Act and part 814 (21 CFR part 814).

All that is required is to gather, organize, and submit information that is readily available, using any approach that meets the requirements of section 515A(a) of the FD&C Act and part 814. We believe that because the applicant is required to organize and submit only readily available information, no more than 8 hours will be required to comply. Furthermore, because supplements may include readily available information on pediatric populations by referencing a previous submission, FDA estimates the average time to obtain and submit the required information in a supplement to be 2 hours. FDA estimates that the total estimated burden is 1,760 hours.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1]

Activity/21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Pediatric information in an original PMA or PDP—814.20(b)(13)	30	1	30	8	240
Pediatric information in a PMA amendment—814.37(b)(2)	10	1	10	8	80
Pediatric information in a PMA supplement—814.39(c)(2)	700	1	700	2	1,400
Pediatric information in an HDE—814.104(b)(6)	5	1	5	8	40
Total					1,760

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 12, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30243 Filed 12–15–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Extension of Effective Date of NIH Policy on the Use of a Single Institutional Review Board for Multi-Site Research

The National Institutes of Health (NIH) is extending the effective date of the NIH Policy on the Use of a Single Institutional Review Board for Multi-Site Research from May 25, 2017, to September 25, 2017. A copy of the NIH Policy was published in the **Federal Register** on June 21, 2016 (81 FR 40325). See *https://www.gpo.gov/fdsys/pkg/FR-2016-06-21/pdf/2016-14513.pdf.* Guidance and Frequently Asked Questions to assist in the implementation of the policy will soon be available at *http://osp.od.nih.gov/office-clinical-research-and-bioethics-policy/clinical-research-policy/models-irb-review.*

For further information contact the NIH Office of Science Policy, Telephone: 301–496–9838, Email: *SingleIRBPolicy@mail.nih.gov.*

Dated: December 12, 2016.

Lawrence A. Tabak,

Deputy Director, National Institutes of Health.

[FR Doc. 2016–30398 Filed 12–15–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: February 9, 2017.

Closed: 9:00 a.m. to 9:30 a.m.

Agenda: BSC Report: Evaluation of the NIAAA Intramural Program.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Terrace Conference Rooms, Bethesda, MD 20892.

Closed: 9:40 a.m. to 10:50 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Terrace Conference Rooms, Bethesda, MD 20892.

Open: 11:00 a.m. to 3:15 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Terrace Conference Rooms, Bethesda, MD 20892.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Rockville, MD 20852, 301–443–9737 *bautista@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niaaa.nih.gov/AboutNIAAA/AdvisoryCouncil/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: December 12, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–30218 Filed 12–15–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, March 28, 2017, 08:30 a.m. to March 28, 2017, 05:00 p.m., National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Terrace Conference Room 508, Rockville, MD, 20892 which was published in the **Federal Register** on November 29, 2016, 81FR85983.

This notice is amended to change the meeting date from March 28, 2017 to March 29, 2017. The meeting is closed to the public.

Dated: December 12, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–30219 Filed 12–15–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Synthesis and Distribution of Opioid and Related Peptides (7795).

Date: January 5, 2017.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Lyle Furr, Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 827–5702, *lf33c.nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Affordable Care Act (ACA) Web Platform to Integrate Behavioral Health and Prevention with Primary Care (5679).

Date: January 10, 2017.

Time: 10:00 a.m. to 11:00 a.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Lyle Furr, Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 827–5702, *lf33c.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 12, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–30220 Filed 12–15–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Intertek USA, Inc., as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of Intertek USA, Inc. as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Intertek USA, Inc. has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of May 25, 2016.

DATES: *Effective Dates:* The accreditation and approval of Intertek USA, Inc. as commercial gauger and laboratory became effective on May 25, 2016. The next triennial inspection date will be scheduled for May 2019.

FOR FURTHER INFORMATION CONTACT: Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Intertek USA, Inc., 1211 Belgrove Drive, St. Louis, MO 63137 has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Intertek USA, Inc. is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API chapters	Title
3	Tank Gauging.
7	Temperature Determination.
8	Sampling.
12	Calculations.
17	Marine Measurement.

Intertek USA, Inc. is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27–03	D 4006	Standard Test Method for Water in Crude Oil by Distillation.
27–04	D 95	Standard Test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27–05	D 4928	Standard Test Method for Water in Crude Oils by Coulometric Karl Fischer Titration.
27–06	D 473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27–08	D 86	Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure.
27–11	D 445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and Calculation of Dynamic Viscosity).
27–13	D 4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy Dispersive X-ray Fluorescence Spectrometry.
27–46	D 5002	Standard Test Method for Density and Relative Density of Crude Oils by Digital Density Analyzer.
27–48	D 4052	Standard Test Method for Density and Relative Density of Liquids by Digital Density Meter.
27–50	D 93	Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester.
27–53	D 2709	Standard Test Method for Water and Sediment in Middle Distillate Fuels by Centrifuge.
27–54	D 1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method (Laboratory Procedure).
27–58	D 5191	Standard Test Method For Vapor Pressure of Petroleum Products (Mini Method).

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov*. Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories*.

Dated: December 5, 2016.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services Directorate.

[FR Doc. 2016–30297 Filed 12–15–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–51]

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 7266, 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), call the toll-free Title V information line at 800–927–7588 or send an email to *title5@hud.gov.*

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 8, 2016.

Brian P. Fitzmaurice,

Director, Division of Community Assistance, Office of Special Needs Assistance Programs.

[FR Doc. 2016–29821 Filed 12–15–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2016–N207; BAC–4333–99]

Silvio O. Conte National Fish and Wildlife Refuge; Final Comprehensive Conservation Plan and Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; final comprehensive conservation plan and environmental impact statement.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability for review of our final comprehensive conservation plan (CCP) and environmental impact statement (EIS) for Silvio O. Conte National Fish and Wildlife Refuge (Conte NFWR). The CCP/EIS describes how we propose to manage the refuge for the next 15 years.

DATES: The Service's decision on issuance of an the final CCP/EIS will occur no sooner than 30 days after the publication of the U.S. Environmental Protection Agency's (EPA) notice of the final EIS in the **Federal Register** and will be documented in a Service Record of Decision (ROD).

ADDRESSES: You may view or obtain copies of the final CCP/EIS by any of the following methods. You may also request a copy on CD–ROM and limited hard copies will be available.

Agency Web site: Download a copy of the document at *https://www.fws.gov/refuge/Silvio_O_Conte/what_we_do/conservation.html.*

Email: Send requests to *northeastplanning@fws.gov,* and include ''Conte NFWR CCP'' in the subject line of your email.

U.S. Mail: Nancy McGarigal, Refuge Planner, 300 Westgate Center Drive, Hadley, MA 01035.

Fax: Attention: Nancy McGarigal, 413–253–8468.

To view comments on the final CCP/EIS from the EPA, or for information on EPA's role in the EIS process, see EPA's Role in the EIS Process under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Andrew French, Refuge Manager, 413–548–9725 (phone); *andrew_french@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Conte NFWR, which we began by publishing a notice of intent in the **Federal Register** (71 FR 62006) on October 20, 2006. For more about the initial process and the history of this refuge, please see that notice. On August

18, 2015, we announced the release of the draft CCP/EIS to the public and requested comments in a notice of availability in the **Federal Register** (80 FR 50023). In addition, EPA published a notice in the **Federal Register** (80 FR 52273) announcing the draft CCP/EIS on August 28, 2015, as required under section 309 of the Clean Air Act (CAA) (42 U.S.C. 7401 *et seq.*). We now announce the final CCP/EIS. Under the CAA, EPA also will announce the final CCP/EIS via the **Federal Register**.

EPA's Role in the EIS Process

The EPA is charged under section 309 of the CAA with reviewing all Federal agencies' EISs and commenting on the adequacy and the acceptability of the environmental impacts of proposed actions in the EISs.

EPA also serves as the repository (EIS database) for EISs prepared by Federal agencies and provides notice of their availability in the **Federal Register**. The EIS database provides information about EISs prepared by Federal agencies, as well as EPA's comments concerning the EISs. All EISs are filed with EPA, which publishes a notice of availability on Fridays in the **Federal Register**.

A notice of availability is published at the start of the 45-day public comment period for draft EISs, as well as at the start of the 30-day ''wait period'' for final EISs. With final EISs, agencies are generally required to wait 30 days before making a decision on a proposed action. For more information, see *http://www.epa.gov/compliance/nepa/eisdata.html.* You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

This notice announces the availability of the final CCP/EIS for Conte NFWR in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)). The final CCP/EIS includes a detailed description of the four management alternatives we considered to guide us in managing and administering the refuge for the next 15 years. That document also contains a thorough analysis of impacts predicted from implementing each of the alternatives on the surrounding natural and human environments. We propose that alternative C, the Service-preferred alternative, serve as the foundation for the final, stand-alone CCP. We highlight the modifications we made to alternative C between the draft and final CCP/EIS in Comments, below.

Our next planning step is to complete a record of decision no sooner than 30 days after publication of this notice (40 CFR 1506.10(b)(2)).

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers and the public with a 15-year plan for achieving refuge purposes and goals and contributing to the mission of the National Wildlife Refuge System (NWRS). CCPs should be consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies, as well as respond to key issues and public concerns. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years, in accordance with the Refuge Administration Act.

Silvio O. Conte NFWR

Conte NFWR was established in 1997 to conserve, protect, and enhance the abundance and diversity of native plant, fish, and wildlife species, and the ecosystems on which they depend throughout the 7.2-million-acre Connecticut River watershed (watershed). Currently, the refuge is comprised of 37,000 acres within parts of the four watershed states of New Hampshire, Vermont, Massachusetts, and Connecticut.

CCP Alternatives

During the scoping phase of the planning process, we identified a variety of major issues based on input from the public, State or Federal agencies, other Service programs, and our planning team. We developed refuge management alternatives and strategies to address these issues; help achieve refuge goals, objectives, and purposes; support our partners' conservation efforts, and support the NWRS mission. Our draft CCP/EIS (80 FR 50023) and final CCP/EIS fully analyze four alternatives for the future management of the refuge: (1) Alternative A, Current Management; (2) Alternative B, Consolidated Stewardship; (3) Alternative C, Enhanced Conservation Connections and Partnerships (Service-preferred Alternative); and (4) Alternative D, Conservation Connections Emphasizing Natural Processes. Alternative A satisfies the NEPA requirement of a ''No Action'' alternative. Both the draft and final plans identify alternative C as the Service-preferred alternative, although Alternative C has been slightly modified in the final plan in response to public comments, as discussed below. Please refer to the final CCP/EIS for more details on each of the alternatives.

Comments

We solicited comments on the draft CCP/EIS for Conte NFWR from August 18 to November 16, 2015 (80 FR 50023). During this comment period, we held 14 public information meetings in towns across the Connecticut River watershed and four public hearings; one in each of the four states in the watershed. Overall, we received 363 separate written responses and collected 73 oral comments at the public hearings. We also received a petition to ban trapping at the refuge's Nulhegan Basin Division, signed by approximately 2,546 individuals. We evaluated all of the substantive comments we received, and include a summary of those comments, and our responses to them, as appendix O in the final CCP/EIS.

Changes to the Alternative C, the Service's Preferred Alternative

After considering the comments we received on our draft CCP/EIS, we have made several modifications to alternative C, including adding or revising several management strategies. Below we present a brief overview of these changes; a full description of the changes is included in appendix O in the final CCP/EIS.

- *Conservation Partnership Areas (CPAs)*—We added two CPAs, increased the size of five CPAs, and reduced the size of one CPA.
- *Conservation Focus Areas (CFAs)*—We updated maps to reflect new refuge acquisitions and an updated conserved lands base, and to incorporate core areas identified in the *Connect the Connecticut* landscape conservation design. We increased the size of one CFA. Combined total acreage in CFAs increased by 41 acres.
- *Land Acquisition Process*—We refined our proposal to pursue acquisition of 90 percent of target acreage in CFAs, on average, and 10 percent of target acreage in surrounding CPAs. The total acquisition authority we are seeking (197,337 acres) increased by the 41 acres noted above.
- *Public Uses*—We emphasize our intent to continue to allow priority public uses on newly acquired lands wherever compatible. We withdrew our

proposal to eliminate one section of snowmobile trail on Nulhegan Basin Division. We determined that recreational drone use is not appropriate.

• *Habitat Management*—We emphasize our intent to develop refuge division-specific habitat management plans with state agency and public involvement.

Alternative C, with these changes, is still our preferred alternative in the final CCP/EIS for Conte NFWR for several reasons. First, alternative C comprises a mix of actions that, in our professional judgment, work best towards achieving the refuge's purposes, vision, and goals, NWRS policies, and the goals of other state and regional conservation plans. Second, we also believe that alternative C most effectively addresses key issues raised during the planning process.

Public Availability of Documents

See **ADDRESSES**, above.

Next Steps

We will document the final decision in a record of decision, which will be published in the **Federal Register** after the 30-day ''wait period'' that begins when EPA announces this final CCP/EIS. For more information, see EPA's Role in the EIS Process.

Dated: December 1, 2016.

Deborah Rocque,

Deputy Regional Director, Northeast Region.

[FR Doc. 2016–30420 Filed 12–15–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920000.L51010000.ER0000. LVRWK09K1000.15X; WYW174597; COC72909; UTU87237]

Notice of Availability of the Record of Decision for the Energy Gateway South Transmission Project and Approved Land Use Plan Amendments in Colorado, Utah, and Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Energy Gateway South Transmission Project (Project) and approved land use plan amendments of the Rawlins, Little Snake, Pony Express, Price, and Vernal Resource Management Plans (RMPs). The ROD constitutes the BLM's final decision regarding: granting a right-of-way to PacifiCorp (doing business as Rocky Mountain Power) to construct and operate an extra-high voltage alternating-current transmission system; and amending certain BLM land use plans. The decisions are effective immediately.

ADDRESSES: The complete text of the ROD along with the Final Environmental Impact Statement (EIS) and supporting documents are available for public viewing on the BLM Web site: *http://bit.ly/2eErxWA.*

Copies of the ROD text will be placed in all involved BLM offices for public viewing as well as at public libraries in Colorado, Utah, and Wyoming. For a list of these libraries, please see the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Tamara Gertsch, National Project Manager, Bureau of Land Management, Wyoming State Office, P.O. Box 21150, Cheyenne, WY 82003; by telephone at (307) 775–6115; or email to *GatewaySouth_WYMail@blm.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at (800) 877–8339 to contact the above individual during normal business hours. The FRS 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: Copies of the ROD text are available at the following public libraries:

• Carbon County Library, Rawlins, WY;
• Carbon County Library-Little Snake River Branch, Baggs, WY;
• Moffat County Library, Craig, CO;
• Rangely Regional Library District, Rangely, CO;
• Mesa County Library, Grand Junction, CO;
• Grand County Public Library, Moab, UT;
• Uintah County Library, Vernal, UT;
• Duchesne County Library, Duchesne, UT;
• Emery County Library, Castle Dale, UT; and
• Nephi Public Library, Nephi, UT.

PacifiCorp (doing business as Rocky Mountain Power), a regulated public utility, filed an application for a right-of-way to construct, operate and maintain a 500-kilovolt (kV) overhead, alternating current transmission line across public and private lands for the Project on November 28, 2007. Pacificorp amended the application on December 17, 2008; October 11, 2010; January 15, 2013; and April 8, 2015. When completed, the Project will transmit about 1,500 megawatts of electricity generated from renewable sources at planned facilities in Wyoming, as well as from existing thermal sources.

The Project will begin in south central Wyoming near Medicine Bow, at the permitted Aeolus Substation, and traverses from northeast to southwest across northwestern Colorado to the existing Clover Substation near Mona, Utah, a distance of approximately 416 miles.

The facilities will include:

• Construction of a single-circuit, alternating current 500kV overhead transmission line (including associated structures, shield wires, conductors, and insulators) between the Aeolus Substation and Clover Substation;
• Construction of two series compensation stations, at points between the Aeolus and Clover substations, to improve the transport capacity and efficiency of the transmission line;
• Construction of communication regeneration stations associated with the transmission line (approximately every 55 miles);
• Rebuilding of two existing 345kV transmission lines between the Clover and Mona Substations (in the existing rights-of-way);
• Rerouting of the Mona to Huntington 345kV transmission line through the Clover Substation; and
• Relocation of an approximate 2-mile portion of an existing line (Bears Ears to Bonanza 345kV transmission line) to eliminate multiple line crossings in a short distance and avoid the BLM Raven Ridge Area of Critical Environmental Concern.

The Selected Alternative is the Agency Preferred Alternative identified in the Final EIS. The EIS has been developed in accordance with applicable laws, regulations, policies, and plans, and discloses the impacts of the Project. The Selected Alternative was identified as the route that best meets the BLM's purpose and need, and the Applicant's objectives, and that avoids and minimizes minimized impacts to sensitive resources to the extent possible. The ROD addresses the mitigation and monitoring requirements applicable to the Project, including identifying and requiring compensatory mitigation where impacts to sensitive resources cannot be avoided, as further described in the ROD and its appendices.

Based on the analysis in the Final EIS, the ROD also amends five BLM RMPs, as follows:

• Rawlins RMP (Wyoming)—modifies 21 acres of visual resource management (VRM) Class III to Class IV;

• Little Snake RMP (Colorado)—modifies 18 acres of VRM Class III to Class IV;

• Pony Express RMP (Salt Lake Field Office, Utah)—establishes the 1.3 miles of the Project right-of-way as a 250 foot wide utility corridor;

• Price Field Office, Utah—widens a portion of a utility corridor designated in a land use plan from 1 mile to 1.5 miles in width, to include the Project right-of-way; and

• Vernal Field Office, Utah—modifies 58 acres of VRM Class II to Class III.

The approved land use plan amendments specifically amend the RMPs to allow for the development of the Project and ancillary facilities on land managed by the BLM. NEPA disclosure of these plan amendments has been integrated with the EIS process for the Project, including the scoping and public availability periods for the EIS. With these amendments, the Selected Alternative will conform with the applicable the BLM land use plan along the project's route (43 CFR 1610.5–3).

On May 13, 2016, the Notice of Availability (NOA) for the Final EIS and Proposed Land use Plan Amendments for the Project was published in the **Federal Register** (81 FR 29912). The publication of the NOA initiated a 30-day protest period for the proposed land use planning decisions and a 60-day Governors' consistency review. At the close of the 30-day protest period, five protests were received and subsequently resolved as explained in the Director's Protest Resolution Report, available online at *http://bit.ly/2eErxWA*. The proposed land use plan amendments were not modified as a result of the protests. Individual protest response letters were sent to the protesting parties.

Copies of the ROD are available for public inspection during normal business hours at the following locations.

• BLM, Wyoming State Office, Public Reading Room, 5353 Yellowstone Road, Cheyenne, Wyoming 82009;

• BLM, Colorado State Office, Public Reading Room, 2850 Youngfield Street, Lakewood, Colorado 80215–7093; and

• BLM, Utah State Office, Public Reading Room, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345.

Simultaneous with the protest period, the Governors of Wyoming, Colorado, and Utah conducted consistency reviews for the proposed land use plan amendments to identify any inconsistencies with State or local plans, policies, or programs. No inconsistencies were identified.

Authority: 40 CFR 1506.6.

Mary Jo Rugwell,

Wyoming State Director.

[FR Doc. 2016–30346 Filed 12–15–16; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR936000.L14400000.ET0000. 16XL1109AF; HAG 16–0075 ORE–03587]

Notice of Application for Extension of Public Land Order No. 1144, as Modified by PLO 7325, and Opportunity for Public Meeting; Miller Lake Recreational Area, Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Forest Service (USFS) has filed an application with the Bureau of Land Management (BLM) requesting that the Secretary of the Interior extend the duration of Public Land Order (PLO) No. 1144, as modified by PLO No. 7325, for an additional 20-year term subject to valid existing rights. PLO No. 1144, as modified by PLO 7325, withdrew 949.43 acres of Forest System Lands in the Fremont-Winema National Forest from location and entry under United States mining laws, but not from leasing under the mineral leasing laws. The purpose of the proposed withdrawal extension is to protect the Miller Lake Recreational Area. PLO No. 1144, as modified by PLO No. 7325 will expire on May 20, 2018, unless extended. This notice also gives the public an opportunity to comment on the application and to request a public meeting.

DATES: Comments and public meeting requests must be received by March 16, 2017.

ADDRESSES: Comments and public meeting requests should be sent to the BLM Oregon/Washington State Director, P.O. Box 2965, Portland, OR 97208–2965.

FOR FURTHER INFORMATION CONTACT: Jacob Childers, BLM Oregon/Washington State Office, 503–808–6225 or Candice Polisky, USFS Pacific Northwest Region, 503–808–2479. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact either of the above individuals. The Service is available 24 hours a day, 7 days a week. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The USFS has filed an application requesting that the Secretary of the Interior extend PLO No. 1144, as modified by PLO No. 7325, for an additional 20-year term, subject to valid existing rights. PLO No. 1144 (20 FR 3151 (1955)), as modified by PLO No. 7325 (63 FR 19744 (1998)), withdrew 949.43 acres of National Forest System Lands from location and entry under the United States mining laws, but not from leasing under the mineral leasing laws, to protect the Miller Lake Recreational Area. The withdrawal encompasses Digit Point Campground and Miller Lake Trail. The USFS would not need to acquire water rights to fulfill the purpose of the requested withdrawal extension.

Willamette Meridian

Fremont-Winema National Forest

T. 27 S., R. 6½ E.,
- Sec. 11, those portions of Lots 1, 2, NE¼NW¼ lying outside the Mt. Thielsen Wilderness Area boundary, Lots 3 through 7, SE¼SW¼, and all of unsurveyed Miller Lake lying within the section;
- PB 37, SW¼, SW¼SE¼ lying outside the Mt. Thielsen Wilderness area boundary, and all of unsurveyed Miller Lake lying within aforementioned parts of PB 37;
- Sec. 13, Lots 1 through 7, NW¼SW¼;
- PB 38.

The area described contains 949.43 acres in Klamath County.

This legal description is identical in size, shape, and location as the description in PLO No. 7325, as published in the **Federal Register** (63 FR 19745 (1998)).

Records related to the application may be examined by contacting Jacob Childers, Bureau of Land Management, at the address or phone number listed above.

For a period until March 16, 2017, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM Oregon/Washington State Office State Director at the address indicated above.

Comments, including names and street addresses of respondents, will be available for public review at the address indicated above during regular business hours. Be advised that your entire comment, including your personal identifying information may be made publicly available. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Notice is hereby given that an opportunity for a public meeting is

afforded in connection with the withdrawal extension application. All interested parties who desire a public meeting for the purpose of being heard on the withdrawal extension application must submit a written request to the BLM State Director at the address indicated above by March 16, 2017. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and a local newspaper at least 30 days before the scheduled date of the meeting.

This extension will be processed in accordance with 43 CFR 2310.4.

Steve Storo,

Acting Chief, Branch of Land, Mineral, and Energy Resources.

[FR Doc. 2016–30317 Filed 12–15–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920000/L51010000.ER0000.16X/LVRWK09K1160/241A; WYW–177893, WYW–177893–01; COC–72929, COC–72929–01; UTU–87238, UTU–87238–01; NVN–86732, NVN–86732–01]

Notice of Availability of the Record of Decision for the TransWest Express Transmission Project in Wyoming, Colorado, Utah and Nevada

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice.

SUMMARY: The Department of the Interior, Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) approving the TransWest Express 600-kilovolt (kV) Direct Current Transmission Project (Project) right-of-way in Wyoming, Colorado, Utah, and Nevada and associated amendments to the Rawlins Field Office (FO) Resource Management Plan (RMP) in Wyoming, the Little Snake FO RMP in Colorado, the Vernal FO and Pony Express RMPs in Utah, and the Ely District RMP in Nevada.

ADDRESSES: Copies of the ROD are being sent to Federal, State and local governments, public libraries in the Project area, and interested parties who previously requested a copy. Copies of the ROD and support documents are also available for public inspection at the locations identified in the **SUPPLEMENTARY INFORMATION** section of this notice and electronically on the following Web site: *http://bit.ly/TransWestExpress.*

FOR FURTHER INFORMATION CONTACT: Sharon Knowlton, Project Manager, BLM Wyoming State Office, P.O. Box 20879, Cheyenne, WY 82003, by telephone at 307–775–6124, or by email at *sknowlto@blm.gov.* Any persons wishing to be added to a mailing list of interested parties may write or call the Project Manager at this address or phone number. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339. The Service 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: In November 2007, National Grid filed a ROW application with the BLM to construct and operate an extra high voltage transmission line between Wyoming and delivery points in the Southwestern United States. An amended application was filed on September 2, 2008, and the Project application was transferred to TransWest Express LLC (TransWest), a subsidiary of the Anschutz Corporation. TransWest submitted additional amended applications to the BLM in 2008, 2010, 2011, 2012, 2014, and 2015 to reflect minor changes and refinements to the proposed Project.

In April 2010, the BLM and Western Area Power Administration (Western) entered into a Memorandum of Understanding (MOU) in which the BLM and Western agreed to act as joint lead agencies in the preparation of an Environmental Impact Statement (EIS) for the Project. The BLM's status as a joint lead agency is based on the BLM's potential Federal action to grant a ROW across BLM lands. Western's status as a joint lead agency is based on its potential Federal action to provide Federal funds for the proposed Project. Western and TransWest entered into a development agreement (executed in September 2011, amended in June 2014) wherein Western agreed to support Project development by providing technical assistance and/or financing.

The U.S. Forest Service (USFS), U.S. Bureau of Reclamation, and Utah Reclamation Mitigation Conservation Commission are cooperating agencies in the proposed Project, based on their potential issuance of permits authorizing the use of lands under their management. Additional cooperating agencies include Federal, State, tribal, and local agencies. On January 4, 2011, the BLM and Western jointly published in the **Federal Register** (76 FR 379) a Notice of Intent to Prepare an EIS in compliance with the requirements of the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA). To allow the public an opportunity to review information associated with the proposed Project, the BLM held public scoping meetings from January through March 2011 in Baggs, Rawlins, and Rock Springs, Wyoming; Craig, Grand Junction, and Rangely, Colorado; Castledale, Cedar City, Central, Delta, Duchesne, Enterprise, Milford, Moab, Nephi, Pine Valley, Richfield, and St. George, Utah; and Caliente, Henderson, Las Vegas, and Overton, Nevada. Issues and potential impacts to specific resources were identified during the scoping period and the preparation of the Draft EIS.

The BLM and Western, in coordination with the USFS and other federal, state, and local governments and agencies, considered all public scoping comments received, as well as TransWest's refinements to the Proposed Action, when they identified the Agency Preferred Alternative in the Draft EIS. The Agency Preferred Alternative was developed through a comparative evaluation of routing opportunities and constraints and the relative impacts among the various alternative segments.

The Environmental Protection Agency published a Notice of Availability (NOA) for the Draft EIS/Draft RMP Amendments on June 28, 2013 in the **Federal Register** (78 FR 38975), which began a 90-day public comment period. The BLM and Western published their NOA for the Draft EIS/Draft RMP Amendments on July 3, 2013 in the **Federal Register** (78 FR 40163). To help facilitate the public review of and comment on the Draft EIS, the agencies held public meetings in July, August, and September 2013 in Baggs and Rawlins, Wyoming; Craig, Colorado; Cedar City, Delta, Duchesne, Fort Duchesne, Nephi, Price, St. George, and Vernal, Utah; and Henderson and Panaca, Nevada.

On December 6, 2013, the USFS published an additional NOA in the **Federal Register** (78 FR 73524) to initiate an additional 30-day public comment period specific to the USFS decision whether to authorize the Project across USFS-managed lands. Similarly, the USFS will publish their own NOA to notify the public of their decision whether to authorize the Project.

The agencies received over 1,800 comments, contained in 457 submissions, during the Draft EIS public comment periods. All submitted

comments were addressed in the Final EIS.

As a result of cooperating agency input and public comments, refinements were made to the Agency Preferred Alternative presented in the Final EIS. These refinements include:

- Reduction in the separation distance from existing transmission to reflect updated Western Electricity Coordinating Council guidance;
- Removal of or adjustment to portions of the proposed Project to address resource impacts or conflicts; and
- Reduction in the width of the study area and refinements to the transmission alignment to reflect preliminary engineering designed to reduce resource impacts and conflicts.

In addition to these refinements, the agencies also developed a suite of hierarchical mitigation requirements for application on an on-site, regional and compensatory basis, including landscape-level conservation and management actions to reduce resource impacts and achieve planning objectives across the area impacted by the Project. Project linear mileage lengths of the Agency Preferred Alternative by agency jurisdiction are found in the Final EIS, Chapter 2.0, Tables 2–23 through 2–26 and also below. The Final EIS and proposed RMP Amendments were made available for a 30-day protest period and a 60-day Governors' Consistency Review on May 1, 2015. Six protest letters were received and considered. The Director determined that the BLM followed applicable laws, regulations and policies; therefore, all protests were denied or dismissed. The Governors of Wyoming and Utah provided Consistency Review letters, which the BLM reviewed and considered in developing the route alignment approved in the ROD (referred to as the Selected Alternative).

The Selected Alternative approved by the BLM's ROD is a 728 mile, 600-kilovolt direct current transmission system centered within a 250 foot wide corridor, and includes access roads and ancillary permanent facilities. Approximately 275 miles (38 percent) of the Selected Alternative are located within designated federal utility corridors. It is also co-located with existing transmission lines for a distance of 398 miles (55 percent of the total length).

In Wyoming, the Selected Alternative crosses 58 miles of federal, 4 miles of state, and 29 miles of private land. In Colorado, the Selected Alternative crosses 63 miles of Federal, 13 miles of State, and 15 miles of private land. In Utah, the Selected Alternative crosses 210 miles of Federal, 27 miles of State, and 153 miles of private land. In Nevada, the Selected Alternative crosses 137 miles of Federal, 14 miles of tribal, and 5 miles of private land. The Selected Alternative largely follows the Agency Preferred Alternative, in the Final EIS, except for two minor modifications.

The Final EIS' analysis of the Project was organized into four geographic regions based on region-specific topographical or other resource constraints and issues (Southern Wyoming, Northwestern Colorado; Northwestern Colorado, Eastern Utah, and Central Utah; Central Utah, Southwestern Utah, and Southern Nevada; Southern Nevada-Apex to the Marketplace Hub). The approximately 728-mile Selected Alternative is discussed below, by region.

BLM Decision—ROW Grant: The ROD approves, subject to mitigation measures identified in the ROD, a ROW grant as outlined below by EIS Region:

- *Region I: (Southern Wyoming, Northwestern Colorado).* Final EIS Alternative I–B with the Tuttle Micro-siting Option 4 and the Bolten Ranch ground electrode system siting. The Selected Alternative transmission line route would extend approximately 157 miles from the vicinity of Sinclair, Carbon County, Wyoming to the vicinity of U.S. Highway 40 southwest of Maybell in western Moffat County, Colorado.
- *Region II: (Northwestern Colorado, Eastern Utah, and Central Utah).* Final EIS Alternative II–G. The Selected Alternative transmission line route would extend approximately 252 miles from Maybell Colorado, through eastern Utah, to the vicinity of the Intermountain Power Project (IPP) near Delta, Millard County, Utah.
- *Region III: (Central Utah, Southwest Utah, and Southern Nevada).* Final EIS Alternative III–D with the Halfway Wash-Virgin River ground electrode system siting. The Selected Alternative transmission line route would extend approximately 282 miles from the vicinity of the IPP, Millard County, Utah, to the vicinity of Apex on Interstate 15, northeast of Las Vegas, Nevada.
- *Region IV: (Southern Nevada—Apex to the Marketplace Hub).* Final EIS Alternative IV–A. The Selected Alternative transmission line route would extend approximately 37 miles from Apex on Interstate 15 to the Marketplace Hub in the Eldorado Valley, southeast of Las Vegas.

In addition to approving the configuration identified above, the ROD also affirmatively recognizes two design options that provide minor variations to the approved route. The Applicant has the option of construction either one of these design options with prior notification and approval by the BLM.

BLM Decision—Land Use Plan Amendments: The BLM planning regulations (43 CFR 1610) require authorized uses of public lands to conform to approved land use plans. To bring the Project into conformance, the ROD approves the following amendments to BLM RMPs in the Project area:

- *Rawlins Field Office RMP (Wyoming):* Amendment designates new utility corridor and expands an existing corridor to allow for overhead utilities and exceptions to other resource stipulations if avoidance measures or mitigation are not feasible.
- *Little Snake Field Office RMP (Colorado):* Amendment designates a new utility corridor to allow for overhead utilities and exceptions to other resource stipulations if avoidance measures or mitigation are not feasible.
- *Vernal Field Office RMP (Utah):* Amendment designates a new aboveground utility corridor. This corridor will allow for exceptions to other resource stipulations if avoidance measures or impact mitigation are not feasible.
- *Pony Express RMP (Salt Lake Field Office, Utah):* Amendment designates a new aboveground utility corridor to accommodate future high voltage transmission lines.
- *Ely RMP (Caliente Field Office, Nevada):* Amendment provides a one-time exception to accommodate one high-voltage transmission line through the ROW exclusion area adjacent to the existing utility corridor through the Mormon Mesa-Ely ACEC.

All plan amendments comply with applicable Federal laws and regulations and apply only to Federal lands and mineral estates administered by the BLM.

Approval of the ROW grant is subject to the terms and conditions laid out in the ROD and ROD appendices, and construction cannot begin until TransWest completes satisfies all terms and conditions identified in the ROD necessary to receive a written Notice to Proceed from the BLM (43 CFR 2805).

Copies of the ROD are available for public inspection during normal business hours at the following locations.

- BLM, Wyoming State Office, Public Reading Room, 5353 Yellowstone Road, Cheyenne, Wyoming 82009;
- BLM, Colorado State Office, Public Reading Room, 2850 Youngfield Street, Lakewood, Colorado 80215–7093;

• BLM, Utah State Office, Public Reading Room, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345; and

• BLM, Nevada State Office, Public Reading Room, 1340 Financial Blvd., Reno, Nevada 89502.

The Assistant Secretary of Land and Minerals Management, Department of the Interior, has approved the ROD. That approval constitutes the final decision of the Department and, in accordance with the regulations at 43 CFR 4.410, is not subject to appeal under Departmental regulations at 43 CFR part 4.

Any challenge to these decisions must be brought in the Federal District Court and is subject to 42 U.S.C. 4370m–6.

Mary Jo Rugwell,

Wyoming State Director.

[FR Doc. 2016–30345 Filed 12–15–16; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22526; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent to Repatriate Cultural Items: Allen County-Fort Wayne Historical Society, Fort Wayne, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Allen County-Fort Wayne Historical Society, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Allen County-Fort Wayne Historical Society. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Allen County-Fort Wayne Historical Society at the address in this notice by January 17, 2017.

ADDRESSES: Walter Font, Curator, Allen County-Fort Wayne Historical Society, 302 East Berry Street, Fort Wayne, IN 46802, telephone 260–426–2882, email *wfont@comcast.net.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Allen County-Fort Wayne Historical Society that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

In 1912, 76 cultural items were removed from the Miami Chief Little Turtle (Mishikinakaw, 1747–1812) grave in Fort Wayne, Allen County, IN. The objects were excavated at 634 Lawton Place in Fort Wayne, IN, during the construction of a house for George W. Gillie in 1912. Jacob M. Stouder, a local collector, acquired many, but not all, of the objects discovered during the excavations. Most of the objects were acquired by the Allen County-Fort Wayne Historical Society in the 1930s from the J.M. Stouder family, from Mrs. George Gillie (7 items), and E.L. Dotson (3 items). Three objects were donated by George Carey in 1962. The objects were acquired by purchase, donation and loans with each source saying the objects were from the Lawton Place site. The 76 unassociated funerary objects, are 8 Armband/armband fragments; 1 axe head; 3 beads; 2 beads, string of; 1 razor blade; 2 bracelets; 9 brooch/brooch fragments; 1 buckle/leather remnants; 1 bullet mold; 3 buttons; 1 earring; 1 flintlock; 1 flint & steel; 3 gorgets; 1 gun stock fragment; 2 kettles, copper; 1 kettle, iron; 6 knife/knife blades; 3 iron nails; 2 musket barrels; 1 pewter cup; 1 pewter flask; 1 pigment jar; 1 pipe; 2 pocketknife fragments; 2 ramrod guides; 1 scissors; 7 silver crosses; 1 silver necklace; 2 spoons; 2 spurs; 1 sword; 1 tomahawk; and 1 trigger guard.

Jacob M. Stouder's research led him to believe that the site of Little Turtle's grave had been found. A contemporary historian, Calvin M. Young, supported Stouder's observations. The objects were appropriate to Little Turtle's stature as a great chief and they reasoned that the sword and peace medal found in the grave gave weight to their conclusion. Except for a few items (ceramic, stone, or miscellaneous remnants), the funeral-related artifacts are trade items of French, British or American manufacture. Most were made in the late-eighteenth and early-nineteenth centuries. Stouder's research included interviews with old-time residents in the area and published sources available to him at the time. A review of his research and research using additional sources (fourteen altogether) has not negated Stouder's findings, that the objects he collected were from grave of Little Turtle. On June 12, 1960, the Historical Society dedicated a small park along with a memorial plaque at the Lawton Place burial site. An inventory and detailed historical assessment was submitted for review and consultation to representatives of Little Turtle's lineal descendants, the Miami Tribe of Oklahoma, Miami, Oklahoma and the Pokagon Band of Potawatomi Indians, Dowagiac, Michigan. Allen County-Fort Wayne Historical Society staff and the consultants agreed that the objects found at Lawton Place in 1912 were from Little Turtle's burial.

Determinations Made by the Allen County-Fort Wayne Historical Society

Officials of the Allen County-Fort Wayne Historical Society have determined that:

• Pursuant to 25 U.S.C. 3001(3)(B), the 76 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.

• Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and lineal descendants of Chief Little Turtle. They include families represented by Daryl Baldwin, Oxford, OH, and John Froman, Miami, OK, whose confirmed genealogies are on file at the Allen County-Fort Wayne Historical Society.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Walter Font, Curator, Allen County-Fort

Wayne Historical Society, 302 East Berry Street, Fort Wayne, IN 46802, telephone 260–426–2882, email *wfont@comcast.net,* by January 17, 2017. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary objects to the lineal descendants of Little Turtle represented by Daryl Baldwin and John Froman may proceed.

The Allen County-Fort Wayne Historical Society is responsible for notifying the lineal descendants, the Miami Tribe of Oklahoma and the Pokagon Band of Potawatomi Indians that this notice has been published.

Dated: December 6, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–30338 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22488; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: St. Joseph Museums, Inc., St. Joseph, MO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The St. Joseph Museums, Inc. has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the St. Joseph Museums, Inc. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the St. Joseph Museums, Inc. at the address in this notice by January 17, 2017.

ADDRESSES: Trevor Tutt, St. Joseph Museums, Inc., P.O. Box 8096, St. Joseph, MO 64508, telephone (816) 232–8471, email *trevor@stjosephmuseum.org.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the St. Joseph Museums, Inc., St. Joseph, MO. The human remains were donated on April 27, 1928 by Mary S. McNeil.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the St. Joseph Museums, Inc. professional staff in consultation with representatives of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

History and Description of the Remains

On April 27, 1928, human remains representing, at minimum, one individual were donated to the St. Joseph Museums, Inc. by Mrs. Mary S. McNeil. These human remains were identified at the time of donation as a Flathead Indian skull over forty years old. The exact location of removal of the human remains and the means by which Mrs. McNeil acquired them were not documented. Based on the original documentation, the human remains most likely were removed in the late nineteenth century. Their identification as Flathead was made by Mrs. McNeil, and/or the director of the St. Joseph Museum, Mrs. Orel Andrews, at the time of accession. Mrs. McNeil's collection spans Native American cultures from Alaska to New Mexico, across the plains and in the American Northeast. As she studied these cultures extensively, the St. Joseph Museums, Inc. believes her assignment of these human remains to the Flathead to be correct. No known individuals were identified. No associated funerary objects are present.

Determinations Made by the St. Joseph Museums, Inc.

Officials of the St. Joseph Museums, Inc. have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), no objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Trevor Tutt, St. Joseph Museums, Inc., P.O. Box 8096, St. Joseph, MO 64508, telephone (816) 232–8471, email *trevor@stjosephmuseum.org,* by January 17, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation may proceed.

The St. Joseph Museums, Inc. is responsible for notifying the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation that this notice has been published.

Dated: November 29, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–30336 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–ANRSS–22287; PPWONRADE2, PMP00EI05.YP0000]

Notice of Availability of the Draft Environmental Impact Statement To Address the Presence of Wolves at Isle Royale National Park, Michigan

AGENCY: National Park Service, Interior.

ACTION: Notice of availability.

SUMMARY: The National Park Service (NPS) announces the availability of the Draft Environmental Impact Statement (EIS) to address the presence of wolves at Isle Royale National Park.

DATES: All comments must be postmarked or submitted not later than March 15, 2017.

FOR FURTHER INFORMATION CONTACT: Please contact Superintendent Phyllis

Green, Isle Royale National Park, ISRO Wolves, 800 East Lakeshore Drive, Houghton, Michigan 49931–1896, or by telephone at (906) 482–0984. Information is available online for public review at *http://parkplanning.nps.gov/isrowolves.*

SUPPLEMENTARY INFORMATION: This process is being conducted pursuant to the National Environmental Policy Act of 1969, and the regulations of the Department of the Interior. The purpose of this Draft EIS is to determine whether and how to bring wolves to Isle Royale to function as the apex predator in the near term within a changing and dynamic island ecosystem. A decision is needed because the potential absence of wolves raises concerns about possible effects to Isle Royale's current ecosystem, including effects to both the moose population and Isle Royale's forest/vegetation communities. Although wolves have not always been part of the Isle Royale ecosystem, they have been present for more than 65 years, and have played a key role in the ecosystem, affecting the moose population and other species during that time. The average wolf population on the island over the past 65 years has been about 22, but there have been as many as 50 wolves documented on the island and as few as two. Over the past five years the population has declined steeply, which has given rise to the need to determine whether the NPS should bring additional wolves to the island. There were three wolves documented on the island in 2015 and only two wolves were confirmed in 2016. At this time, natural recovery of the population is unlikely.

This Draft EIS evaluates the impacts of the no-action alternative (Alternative A) and three action alternatives (Alternatives B, C, and D).

Alternative A would continue existing management practices and assume no new management actions would be implemented beyond those available at the outset of the wolf planning process. Wolves may arrive or depart independently via an ice bridge. Under Alternative A, wolves would not be introduced by management to Isle Royale National Park.

The action alternatives include the capture and relocation of wolves from the Great Lakes Region to Isle Royale National Park. The NPS would target wolves for relocation that are known to feed on moose as one of their prey sources, are in good health with no apparent injuries, and have the appropriate genetic diversity to sustain a viable population on the island. Capture and relocation efforts would take place between late fall and late winter when the island is closed to visitors. All of the action alternatives include monitoring which could include radio or GPS collar tracking from ground and air, scat sample collection, visual observations, and other methodology as funding is available.

Under Alternative B, between 20 and 30 wolves with a wide genetic diversity would be introduced to the island. The social makeup of introduced wolves could include packs, established pairs with pups, or unrelated individuals. Wolves may be supplemented as needed up to the third year after initial introduction. After the third year, should an unforeseen event occur that impacts the wolf population, such as a mass die-off or introduction of disease, and the goals of the alternative are not being met due to this event, wolves may be supplemented for an additional two years. No additional wolves would be brought to the island after five years from date of initial introduction.

Alternative C would involve the initial introduction of a smaller number of wolves than Alternative B. The social makeup of introduced wolves could include an established pair with pups, or a pack, as well as unrelated individuals. The NPS would bring wolves to the island as often as needed in order to maintain a population of wolves on the island for at least the next 20 years. Under this alternative, additional wolves may be brought based on one or more resource indicators that could include genetic health of the wolves, ecological health, and prey species population trends.

Under Alternative D, the NPS would not take immediate action and would continue current management, allowing natural processes to continue. This alternative is meant to continue the study of island ecosystem changes without an apex predator and only take action should the weight of evidence suggest an apex predator is necessary to ecosystem function. Resource indicators, such as population size and growth rate of moose would be used to determine if and when wolf introduction actions should be taken. If the weight of evidence indicates wolf introduction actions should be taken, the NPS would follow procedures outlined within Alternative C.

Public Participation: After the Environmental Protection Agency's Notice of Availability is published, the NPS will schedule public meetings to be held during the comment period in the Great Lakes Region near the park. Dates, times, and locations of these meetings will be announced in press releases and on the NPS Planning, Environment, and Public Comment Web site for the Draft EIS at *http://parkplanning.nps.gov/isrowolves.*

How to Comment: You are encouraged to comment on the Draft EIS online at *http://parkplanning.nps.gov/isrowolves.* You may also mail or hand-deliver your written comments to Superintendent Phyllis Green, Isle Royale National Park, ISRO Wolves, 800 East Lakeshore Drive, Houghton, Michigan 49931–1896. Written comments will also be accepted during scheduled public meetings discussed above. Comments will not be accepted by fax, email, or by any method other than those specified above. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 25, 2016.

Cameron H. Sholly,

Regional Director, Midwest Region.

[FR Doc. 2016–30247 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22537; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Seminole Tribe of Florida, Clewiston, FL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Seminole Tribe of Florida has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Seminole Tribe of Florida. If no additional requestors come forward, transfer of control of the

human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Seminole Tribe of Florida at the address in this notice by January 17, 2017.

ADDRESSES: Dr. Paul Backhouse, Tribal Historic Preservation Office, Seminole Tribe of Florida, 30290 Josie Billie Highway, PMB 1004, Clewiston, FL 33440, telephone (863) 983–6549 Ext. 12244, email *Paulbackhouse@semtribe.com.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Seminole Tribe of Florida, a federally recognized Indian Tribe organized pursuant to 25 U.S.C. 476, through one of its governmental departments, the Seminole Police Department (Seminole Police Department). The Seminole Tribe of Florida, Tribal Historic Preservation Office (Tribal Historic Preservation Office), another governmental department of the Seminole Tribe of Florida, is handling the NAGRPA process while the human remains continue to be in the physical control of the Seminole Police Department. The human remains were removed from an indeterminate location in Florida.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Seminole Tribe of Florida, (Tribal Historic Preservation Office) professional staff in consultation with representatives of the Alabama-Coushatta Tribe of Texas (previously listed as the Alabama-Coushatta Tribes of Texas); Alabama-Quassarte Tribal Town; Miccosukee Tribe of Indians; Seminole Tribe of Florida (previously listed as the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservation)); and The Muscogee (Creek) Nation. The Coushatta Tribe of Louisiana; Delaware Nation, Oklahoma; Kialegee Tribal Town; Kiowa Indian Tribe of Oklahoma; Mississippi Band of Choctaw Indians; Poarch Band of Creek Indians (previously listed as the Poarch Band of Creek Indians of Alabama); The Chickasaw Nation; The Seminole Nation of Oklahoma; and Thlopthlocco Tribal Town were contacted and invited to consult, but did not participate.

History and Description of the Remains

On an unknown date, human remains representing, at minimum, two individuals were removed from an unknown location in the state of Florida. In 1993, the human remains were anonymously mailed to a member of the Seminole Tribe of Florida. An unsigned handwritten note was included with the remains indicating that they had been excavated approximately 30 years prior from Florida, and that the sender believed the remains were Native American, and possibly Seminole. The tribal member contacted the Seminole Police Department, who then took possession of the remains. The remains were placed in the Seminole Police Department evidence vault as it was unknown if they were of modern forensic significance. In 2009, the remains were examined by the Broward County Medical Examiner's Office, and in 2013, the remains were examined by the Tribal Historic Preservation Office. The remains were determined to be archeological. The human remains include one partial cranium, a separate partial maxilla and mandible, and three cervical vertebrae. Both individuals were adults based on dental wear and cranial suture closure. One individual was likely female and the other male, based on cranio-facial features associated with sexual morphology. The remains were determined to be those of prehistoric Native American individuals, based on condition and anatomy associated with ancestry. No known individuals were identified. No associated funerary objects are present.

Based on the description in the hand written letter that accompanied the remains, as well as the decision of ancestry recorded in the osteological examination performed by District 17 Medical Examiner, the remains are determined to be those of early Seminole Native Americans. The present-day tribes associated with the early Seminole include the Miccosukee Tribe of Indians, Seminole Tribe of Florida (previously listed as the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservation)), and The Seminole Nation of Oklahoma.

Determinations Made by the Seminole Tribe of Florida

Officials of the Seminole Tribe of Florida have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Miccosukee Tribe of Indians; Seminole Tribe of Florida (previously listed as the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservation)); and The Seminole Nation of Oklahoma.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Paul Backhouse, Seminole Tribe of Florida, Tribal Historic Preservation Office, 30290 Josie Billie Hwy, PMB 1004, Clewiston, FL 33440, telephone (863) 983–6549 Ext. 12244, email *Paulbackhouse@semtribe.com,* by January 17, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Miccosukee Tribe of Indians, Seminole Tribe of Florida (previously listed as the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservation)); and The Seminole Nation of Oklahoma may proceed.

The Seminole Tribe of Florida is responsible for notifying the Alabama-Coushatta Tribe of Texas (previously listed as the Alabama-Coushatta Tribes of Texas); Alabama-Quassarte Tribal Town; Coushatta Tribe of Louisiana; Delaware Nation, Kialegee Tribal Town; Kiowa Indian Tribe of Oklahoma; Miccosukee Tribe of Indians; Mississippi Band of Choctaw Indians; Poarch Band of Creek Indians (previously listed as the Poarch Band of Creek Indians of Alabama) Seminole Tribe of Florida (previously listed as the Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservation); The Chickasaw Nation; The Muscogee (Creek) Nation; and The Seminole Nation of Oklahoma and Thlopthlocco Tribal Town that this notice has been published.

Dated: December 7, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–30335 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22506; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Office of the State Archaeologist, University of Iowa, Iowa City, IA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of Iowa Office of the State Archaeologist Bioarchaeology Program has completed an inventory of human remains, in consultation with the appropriate Indian tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the University of Iowa Office of the State Archaeologist Bioarchaeology Program. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the University of Iowa Office of the State Archaeologist Bioarchaeology Program, at the address in this notice by January 17, 2017.

ADDRESSES: Dr. Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email *lara-noldner@uiowa.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the University of Iowa Office of the State Archaeologist Bioarchaeology Program, Iowa City, IA. The human remains were removed from Woodbury County, IA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the University of Iowa Office of the State Archaeologist Bioarchaeology Program professional staff in consultation with representatives of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe; Rosebud Sioux Tribe of the Rosebud Indian Reservation; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe; Standing Rock Sioux Tribe; Upper Sioux Community, Minnesota; and the Yankton Sioux Tribe.

History and Description of the Remains

In 1988, human remains representing, at minimum, one individual were removed from the site of the War Eagle Monument (13WD69) in Woodbury County, IA, prior to the monument's relocation. In 1988, erosion caused human remains to be exposed along the upper edge of the bluff. These remains were recovered by personnel from the Office of the State Archaeologist (OSA) and were transferred to the OSA Bioarchaeology Program. An adult of indeterminate age, possibly female, is represented by the lower limb bones (Burial Projects 266 and 648). No known individuals were identified. No associated funerary objects are present.

The number of burials in the vicinity of the War Eagle Monument is unknown. According to various accounts, War Eagle, a Sioux chief, and at least two of his daughters were buried on the bluff. Additionally, some of War Eagle's grandchildren and at least four Euro-American settlers are believed to have been buried in the area. While identification of the individual cannot be determined, based on archival information, the remains represent a Sioux individual.

Determinations Made by the University of Iowa Office of the State Archaeologist Bioarchaeology Program

Officials of the University of Iowa Office of the State Archaeologist Bioarchaeology Program have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe; Rosebud Sioux Tribe of the Rosebud Indian Reservation; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe; Standing Rock Sioux Tribe; Upper Sioux Community, Minnesota; and the Yankton Sioux Tribe.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Dr. Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email *lara-noldner@uiowa.edu,* by January 17, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe; Rosebud Sioux Tribe of the Rosebud Indian

Reservation; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe; Standing Rock Sioux Tribe; Upper Sioux Community, Minnesota; and the Yankton Sioux Tribe may proceed.

The University of Iowa Office of the State Archaeologist Bioarchaeology Program is responsible for notifying the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe; Rosebud Sioux Tribe of the Rosebud Indian Reservation; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe; Standing Rock Sioux Tribe; Upper Sioux Community, Minnesota; and the Yankton Sioux Tribe that this notice has been published.

Dated: December 1, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–30339 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CONC–22415; PPWOBSADC0, PPMVSCS1Y.Y00000]

Notice of Extension of Concession Contracts

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: The National Park Service hereby gives public notice that it proposes to extend the expiring concession contract listed below for 1 year or until the effective date of a new contract, whichever occurs sooner.

DATES: Effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Brian Borda, Program Chief, Commercial Services Program, National Park Service, 1201 Eye Street NW., 11th Floor, Washington, DC 20005, Telephone: 202–513–7156.

SUPPLEMENTARY INFORMATION: The following concession contract will expire by its term on or before December 31, 2016. The National Park Service has determined the proposed extensions is necessary to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption. The publication of this notice merely reflects the intent of the National Park Service and does not bind the National Park Service to extend the contract listed below.

The National Park Service authorizes extension of visitor services for the following contract under the terms and conditions of the current contract (as amended if applicable). The extension of operations does not affect any rights with respect to selection for award of a new concession contract.

Park unit	CONCID	Concessioner
Rocky Mountain National Park	CC–ROMO002–02	Hi Country Stables, Inc.

Dated: November 28, 2016.

Teresa Austin,

Associate Director, Business Services.

[FR Doc. 2016–30248 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22444; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

SUMMARY: The Thomas Burke Memorial Washington State Museum, University of Washington (Burke Museum) has corrected an inventory of human remains and associated funerary objects, published in a Notice of Inventory Completion in the **Federal Register** on January 19, 2016. This notice corrects the total number of associated funerary objects and the transfer of control determination. Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Burke Museum. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Burke Museum at the address in this notice by January 17, 2017.

ADDRESSES: Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195, telephone (206) 685–3849 x2, email *plape@uw.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the correction of an inventory of human remains and associated funerary objects under the control of the Burke Museum, Seattle, WA. The human remains and associated funerary objects were removed from Island County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the total number of associated funerary objects and to whom the Burke Museum will transfer control of the items published in a Notice of Inventory Completion in the **Federal Register** (81 FR 2901–2902, January 19, 2016). This notice also corrects the list of Indian tribes in the determination of Additional Requestors and Disposition. Transfer of control of the items in this correction notice has not occurred.

Correction

In the **Federal Register** (81 FR 2902, January 19, 2016), column 1, paragraph 3 is corrected by substituting the following sentence:

The 35 associated funerary objects are 2 lots of unmodified wood; 2 lots of wood grave stakes; 2 metal objects; 1 pair of scissors; 1 black plastic comb; 2 shells; 1 modified bone fragment; 1 lot of unmodified bone fragment; 1 stone abrader; 1 .22 caliber gun; 3 bags of buttons (glass, porcelain, bone, copper); 8 U.S. coins; 1 porcelain doll head; 1 bag containing metal buckle fragments; 1 lot of marbles; 1 stone ulu; and 6 composite artifact bags containing wood, nails, charcoal, pebbles, metal, leather, watch faces, a watch chain, and organic and inorganic materials.

In the **Federal Register** (81 FR 2902, January 19, 2016), column 1, paragraph 5 is corrected by replacing the number ''35'' with the number ''36.''

In the **Federal Register** (81 FR 2902, January 19, 2016), column 1, paragraph 6, sentence 2, under the heading ''Additional Requestors and Disposition'' is corrected by substituting the following sentence:

After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Stillaguamish Tribe of Indians of Washington (previously listed as the Stillaguamish Tribe of Washington); Swinomish Indian Tribal Community (previously listed as the Swinomish Indians of the Swinomish Reservation of Washington); and the Tulalip Tribes of Washington (previously listed as the Tulalip Tribes of the Tulalip Reservation, Washington) may proceed.

The Burke Museum is responsible for notifying the Lummi Tribe of the Lummi Reservation; Samish Indian Nation (previously listed as the Samish Indian Tribe, Washington); Sauk-Suiattle Indian Tribe; Stillaguamish Tribe of Indians of Washington (previously listed as the Stillaguamish Tribe of Washington); Swinomish Indian Tribal Community (previously listed as the Swinomish Indians of the Swinomish Reservation of Washington); Tulalip Tribes of Washington (previously listed as the Tulalip Tribes of the Tulalip Reservation, Washington); and the Upper Skagit Indian Tribe that this notice has been published.

Dated: November 17, 2016.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2016–30337 Filed 12–15–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2016–0075; MMAA104000]

Atlantic Wind Lease Sale 6 for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore New York—Final Sale Notice; Correction

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice; correction.

SUMMARY: On Monday, October 31, 2016, the Bureau of Ocean Energy Management (BOEM) published the *Atlantic Wind Lease Sale 6 (ATLW–6) for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore New York—Final Sale Notice* (FSN) in the **Federal Register** (81 FR 75429). The FSN announced that BOEM will offer for lease an identified area offshore New York, and provided details regarding the terms of Lease OCS–A 0512 and the forthcoming auction. This Notice corrects a statement in the FSN describing the rental rate for the project easement associated with the lease, to ensure consistency with the rental rate for the project easement as specified in Addendum ''D'' to the lease.

DATES: This correction does not affect any of the dates or milestones provided in the FSN.

FOR FURTHER INFORMATION CONTACT: Wright Frank, New York Project Coordinator and Auction Manager, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM–OREP, Sterling, Virginia, 20166, (703) 787–1325 or *Wright.Frank@boem.gov.*

Technical Correction

The FSN at 81 FR 75433 incorrectly stated: ''Annual rent for a project easement is the greater of $5 per acre per year or $450 per year.'' In order to be consistent with the description of the rental rate for the project easement associated with Lease OCS–A 0512, as discussed in Addendum ''D'' to the lease, the above sentence is replaced by the following language from Addendum D:

Correction

In the **Federal Register** of October 31, 2016, in FR Doc. 16–26240, on page 75433, in the third column, correct the last sentence before the heading ''Operating Fee'' to read: ''Annual rent for a project easement 200 feet wide, centered on the transmission cable, is $70.00 per statute mile. For any additional acreage required, the lessee must also pay the greater of $5.00 per acre per year or $450.00 per year.''

Dated: December 13, 2016.

Abigail Ross Hopper,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2016–30352 Filed 12–13–16; 4:15 pm]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–972]

Certain Automated Teller Machines, ATM Products, Components Thereof, and Products Containing the Same; Notice of Request for Statements on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the presiding administrative law judge (''ALJ'') has issued a recommended determination on remedy and bonding in the above-captioned investigation. The Commission is soliciting submissions from the public on any public interest issues raised by the recommended relief. The ALJ recommended that a limited exclusion order issue against certain automated teller machines, ATM products, components thereof, and products containing the same, imported by respondents Nautilus Hyosung Inc. of Seoul, South Korea; Nautilus Hyosung America Inc. of Irving, Texas; and HS Global, Inc. of Brea, California (collectively, ''Nautilus''). The ALJ also recommended that cease and desist orders be directed to Nautilus. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation, including the complaint and the public record, can be accessed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov,* and are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server

(*https://www.usitc.gov*). Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that if the Commission finds a violation it shall exclude the articles concerned from the United States:

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease-and-desist orders. 19 U.S.C. 1337(f)(1).

The Commission is interested in further development of the record on the public interest in these investigations. Accordingly, members of the public are invited to file, pursuant to 19 CFR 210.50(a)(4), submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the administrative law judge's recommended determination on remedy and bonding issued in this investigation on November 30, 2016. Comments should address whether issuance of the limited exclusion order and the cease and desist orders (''the recommended remedial orders'') in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the recommended remedial orders within a commercially reasonable time; and

(v) explain how the recommended remedial orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on January 5, 2017.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 972'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary ((202) 205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes (all contract personnel will sign appropriate nondisclosure agreements). All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 13, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30298 Filed 12–15–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–550 and 731–TA–1304–1305 (Final)]

Certain Iron Mechanical Transfer Drive Components From Canada and China; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded by reason of imports of certain iron mechanical transfer drive components from Canada and China, provided for in subheadings 8483.30.80, 8483.50.60, 8483.50.90, 8483.90.30, and 8483.90.80 of the Harmonized Tariff Schedule of the United States,[2] that have been found by the Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV''), and that have been found by Commerce to be subsidized by the government of China.[3]

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations effective October 28, 2015, following receipt of petitions filed with the Commission and Commerce by TB Wood's Incorporated, Chambersburg, Pennsylvania. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of certain iron mechanical transfer drive components from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and imports of certain iron mechanical transfer drive components from Canada and China were dumped within the meaning of 733(b) of the Act

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Covered merchandise may also enter under the following HTSUS subheadings: 7325.10.00, 7325.99.10, 7326.19.00, 8431.31.00, 8431.39.00, and 8483.50.40.

[3] All six Commissioners voted in the negative.

(19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 24, 2016 (81 FR 41348). The hearing was held in Washington, DC, on October 18, 2016, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on December 12, 2016. The views of the Commission are contained in USITC Publication 4652 (December 2016), entitled *Certain Iron Mechanical Transfer Drive Components from Canada and China: Investigation Nos. 701–TA–550 and 731–TA–1304–1305 (Final).*

By order of the Commission.

Issued: December 12, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30244 Filed 12–15–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–549 and 731–TA–1299, 1300, 1302 and 1303 (Final)]

Circular Welded Carbon-Quality Steel Pipe From Oman, Pakistan, the United Arab Emirates, and Vietnam; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of circular welded carbon-quality steel pipe (''CWP'') from Oman, Pakistan, and the United Arab Emirates provided for in subheadings 7306.19.10, 7306.19.51, 7306.30.10, 7306.30.50, 7306.50.10, and 7306.50.50 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV'').[2] The Commission further determines that imports of CWP from Vietnam that have been found by Commerce to be sold in the United States at LTFV and imports of CWP from Pakistan that are subsidized by the government of Pakistan are negligible pursuant to section 771(24) of the Act (19 U.S.C. 1677(24)), and its investigations with regard to these imports are thereby terminated pursuant to sections 705(b) and 735(b) of the Act.

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations effective October 28, 2015, following receipt of a petition filed with the Commission and Commerce by Bull Moose Tube Company (Chesterfield, Missouri), EXLTUBE (N. Kansas City, Missouri), Wheatland Tube (Chicago, Illinois), and Western Tube and Conduit (Long Beach, California). The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce regarding the subsidization of imports of CWP from Pakistan within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and sales at LTFV of imports of CWP from Oman, Pakistan, the United Arab Emirates, and Vietnam within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 27, 2016 (81 FR 41592). The hearing was held in Washington, DC, on October 13, 2016, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on December 12, 2016. The views of the Commission are contained in USITC Publication 4651 (December 2016), entitled *Circular Welded Carbon-Quality Steel Pipe from Oman, Pakistan, the United Arab Emirates, and Vietnam: Investigation Nos. 701–TA–549 and 731–TA–1299–1300 and 1302–1303 (Final).*

By order of the Commission.

Issued: December 12, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30250 Filed 12–15–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–847 and 849 (Third Review)]

Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Japan and Romania Institution of Five-Year Reviews; Notice of Commission Determination To Conduct Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to the Tariff Act of 1930 to determine whether revocation of the antidumping duty orders on carbon and alloy seamless standard, line, and pressure pipe from Japan and Romania would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date.

DATES: Effective December 5, 2016.

FOR FURTHER INFORMATION CONTACT: Justin Enck (202–205–3363), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

SUPPLEMENTARY INFORMATION: On December 5, 2016, the Commission

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioners Dean A. Pinkert, Meredith M. Broadbent, and F. Scott Kieff dissenting with respect to LTFV imports from Pakistan.

determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)). With respect to the order on subject merchandise from Romania, the Commission found that both the domestic and respondent interested party group responses to its notice of institution (81 FR 60383, September 1, 2016) were adequate and determined to proceed to a full review. With respect to the order on subject merchandise from Japan, the Commission found that the domestic interested party group response was adequate and the respondent interested party group was inadequate, but that circumstances warranted conducting a full review. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 12, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–30226 Filed 12–15–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Virtual Public Meeting of the Advisory Committee on Apprenticeship (ACA)

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice of a virtual public meeting.

SUMMARY: Pursuant to Section 10 of the Federal Advisory Committee Act (FACA), notice is hereby given to announce an open meeting of the Advisory Committee on Apprenticeship (ACA) on Wednesday, January 18, 2017. All meetings of the ACA are open to the public.

DATES: The meeting will begin at approximately 1:00 p.m. Eastern Standard Time on Wednesday, January 18, 2017, at *https://dol.webex.com/dol,* and adjourn at approximately 4:30 p.m. Any updates to the agenda and meeting logistics will be posted on the Office of Apprenticeship's homepage: *http://www.dol.gov/apprenticeship.*

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer, Mr. Daniel Villao, Deputy Administrator for National Office Policy, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room C–5321, Washington, DC 20210, Telephone: (202) 693–2796 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The ACA is a discretionary committee established by the Secretary of Labor, in accordance with FACA (5 U.S.C. App. 2 § 10), as amended in 5 U.S.C. App. 2, and its implementing regulations (41 CFR 101–6 and 102–3). In order to promote openness, and increase public participation, webinar and audio conference technology will be used to convene the meeting. Webinar and audio instructions will be posted prominently on the Office of Apprenticeship homepage: *http://www.dol.gov/apprenticeship.*

Notice of Intent To Attend the Meeting

All meeting participants are being asked to submit a notice of intent to attend by Wednesday, January 11, 2017, via email to Mr. Daniel Villao at: *oa.administrator@dol.gov,* with the subject line ''January 2017 ACA Meeting.''

1. If individuals have special needs and/or disabilities that will require special accommodations, please contact Kenya Huckaby on (202) 693–3795 or via email at *huckaby.kenya@dol.gov* no later than Wednesday, January 11, 2017.

2. Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. Daniel Villao via email at *oa.administrator@dol.gov,* subject line ''January 2017 ACA Meeting,'' or to the Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, Room C–5321, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions will be included in the record for the meeting if received by Wednesday, January 11, 2017.

3. See below regarding members of the public wishing to speak at the ACA meeting.

Purpose of the Meeting and Topics To Be Discussed

The purpose of the January meeting is to focus on expanding opportunities for youth and discuss priority issues for apprenticeship in the upcoming year.

The Agenda Will Cover the Following Topics

- Expanding Registered Apprenticeship Opportunities for Youth
- Priority Issues for the Upcoming Year
- Recommendations on Continued Apprenticeship Expansion
- Other Matters of Interest to the Apprenticeship Community
- Public Comment
- Adjourn

The agenda and meeting logistics may be updated should priority items come before the ACA between the time of this publication and the scheduled date of the ACA meeting. All meeting updates will be posted to the Office of Apprenticeship's homepage: *http://www.dol.gov/apprenticeship.* Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Officer, Mr. Daniel Villao, by Wednesday, January 11, 2017. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Portia Wu,

Assistant Secretary for the Employment and Training Administration.

[FR Doc. 2016–30205 Filed 12–15–16; 8:45 am]

BILLING CODE 4510–FR–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Joint Quarterly Narrative Progress Report Template

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), ETA is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Joint Quarterly Narrative Progress Report Template.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*

DATES: Consideration will be given to all written comments received by February 14, 2017.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of

response, and estimated total burden may be obtained free by contacting Jenn Smith by telephone at (202) 693–3597, TTY 1–877–889–5627, (these are not toll-free numbers) or by email at *smith.jenn@dol.gov*.

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Division of Youth Services, Room N–4508, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; by email: *smith.jenn@dol.gov;* or by Fax 202–693–3861.

FOR FURTHER INFORMATION CONTACT: Jenn Smith by telephone at (202) 693–3597 (this is not a toll-free number) or by email at *smith.jenn@dol.gov*.

SUPPLEMENTARY INFORMATION: The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure 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 can be properly assessed.

The Workforce Innovation and Opportunity Act (29 U.S.C. 3101) authorizes this information collection. President Barack Obama signed the Workforce Innovation and Opportunity Act (WIOA) into law on July 22, 2014. One of the many goals of WIOA is to develop more consistent instruments for collecting data related to the Department's job training programs. The Joint Quarterly Narrative Progress Report Template consolidates various instruments to collect qualitative data generated by several programs legislatively mandated by WIOA, as well as additional job training programs that are adopting the performance reporting provisions of WIOA to promote alignment across the workforce system. Qualitative data include a particular grantee's progress and milestones during a grant's period of performance and follow-up period, challenges to meeting a grant's expected outcomes, and tracking of grant management and performance indicators during the life of the grant.

The National Farmworkers Job Program and YouthBuild grants are authorized under the Workforce Innovation and Opportunity Act of 2014 (WIOA), which identified performance accountability requirements for these grants. The WIOA performance indicators and reporting requirements also apply to the Dislocated Worker Grants program. While H–1B and Reentry Employment Opportunities grants are not authorized under WIOA, these programs are also adopting the WIOA performance indicators and align with WIOA data element definitions and reporting templates to promote consistency across these DOL-funded programs. For this same reason, the Senior Community Service Employment Program, authorized under the Older Americans Act, as amended, is also adopting this Joint Quarterly Narrative Performance Report.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Number 1205–0NEW.

Submitted comments will also be a matter of public record for this ICR and posted on the Internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The 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 submission of responses.

Agency: DOL–ETA.

Type of Review: NEW.

Title of Collection: Joint Quarterly Narrative Progress Report Template.

Form: Quarterly Narrative Progress Report Template.

OMB Control Number: OMB 1205–0NEW.

Affected Public: State/local/tribal governments, Federal government, private sector (not-for-profit institutions).

Estimated Number of Respondents: 792.

Frequency: Quarterly.

Total Estimated Annual Responses: 3,008.

Estimated Average Time per Response: 10 hours.

Estimated Total Annual Burden Hours: 30,080 hours.

Total Estimated Annual Other Cost Burden: $480,076.80.

Authority: 44 U.S.C. 3506(c)(2)(A).

Portia Wu,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2016–30204 Filed 12–15–16; 8:45 am]

BILLING CODE 4510–FN–P 4510–FT–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2016–0022]

Bay Area Compliance Laboratories Corp.: Application for Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the application of Bay Area Compliance Laboratories Corp. for recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the Agency's preliminary finding to grant this recognition.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before January 17, 2017.

ADDRESSES: Submit comments by any of the following methods:

1. *Electronically:* Submit comments and attachments electronically at

http://www.regulations.gov, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

2. *Facsimile:* If submissions, including attachments, are not longer than 10 pages, commenters may fax them to the OSHA Docket Office at (202) 693–1648.

3. *Regular or express mail, hand delivery, or messenger (courier) service:* Submit comments, requests, and any attachments to the OSHA Docket Office, Docket No. OSHA–2016–0022, Technical Data Center, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3653, Washington, DC 20210; telephone: (202) 693–2350 (TTY number: (877) 889–5627). Note that security procedures may result in significant delays in receiving comments and other written materials by regular mail. Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express mail, hand delivery, or messenger service. The hours of operation for the OSHA Docket Office are 10:00 a.m.–3:00 p.m., e.t.

4. *Instructions:* All submissions must include the Agency name and the OSHA docket number (OSHA–2016–0022). OSHA places comments and other materials, including any personal information, in the public docket without revision, and these materials will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

5. *Docket:* To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

6. *Extension of comment period:* Submit requests for an extension of the comment period on or before January 17, 2017 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3647, Washington, DC 20210; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210; phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Many of OSHA's workplace standards require that an NRTL test and certify certain types of equipment as safe for use in the workplace. NRTLs are independent laboratories that meet OSHA's requirements for performing safety testing and certification of products used in the workplace. To obtain and retain OSHA recognition, NRTLs must meet the requirements in the NRTL Program regulations at 29 CFR 1910.7. More specifically, to be recognized by OSHA, an organization must: (1) Have the appropriate capability to test, evaluate, and approve products to assure their safe use in the workplace; (2) be completely independent of employers subject to the tested equipment requirements, and manufacturers and vendors of products for which OSHA requires certification; (3) have internal programs that ensure proper control of the testing and certification process; and (4) have effective reporting and complaint handling procedures. Recognition is an acknowledgement by OSHA that the NRTL has the capabilities to perform independent safety testing and certification of the specific products covered within the NRTL's scope of recognition, and is not a delegation or grant of government authority. Recognition of an NRTL by OSHA also allows employers to use products certified by that NRTL to meet those OSHA standards that require product testing and certification.

The Agency processes applications for initial recognition following requirements in Appendix A of 29 CFR 1910.7. This appendix requires OSHA to publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application, provides its preliminary finding, and solicits comments on its preliminary findings. In the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition.

II. Notice of the Application for Recognition

OSHA is providing notice that Bay Area Compliance Laboratories Corp. (BACL) is applying for recognition as an NRTL. According to its application, BACL was incorporated in 1996 to provide product compliance testing services to customers in the areas of Product Safety, Electromagnetic Compatibility and Telecommunications, testing for Emissions, Immunity, Radio, Radio Frequency (RF) Exposure and Telecommunications. The non-profit, third-party, non-governmental accreditation body A2LA accredited BACL for UL 60950–1, the standard for which BACL requests NRTL recognition. In its application, BACL lists the current address of its headquarters as: Bay Area Compliance Laboratories Corp., 1274 Anvilwood Avenue, Sunnyvale, California 94089.

OSHA recognizes each NRTL for a scope of recognition that includes the type of products the NRTL may test, with each type specified by its applicable test standard, and the recognized site(s) that have the technical capability to perform the product-testing and product-certification activities for the applicable test standards within the NRTL's scope of recognition. BACL applied for initial recognition as an NRTL on May 1, 2015, and revised its application on May 12, 2016. In its application and subsequent revision, BACL requested recognition for one test standard and one site (OSHA–2016–0022–0001 and 0002). The following sections set forth the requested scope of recognition included in BACL's application.

A. Standards Requested for Recognition

Table 1 below lists the appropriate test standard found in BACL's application for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED APPROPRIATE TEST STANDARD FOR INCLUSION IN BACL'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 60950–1	Information Technology Equipment-Safety-Part 1: General Requirement.

The test standard listed above may be approved as a U.S. test standard by the American National Standards Institute (ANSI). However, for convenience, the Agency may use the designation of the standards-developing organization for the test standard instead of the ANSI designation. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard.

B. Sites Requested for Recognition

The current address of BACL's site included in its application for recognition as an NRTL is:

1. Bay Area Compliance Laboratories Corp., 1274 Anvilwood Avenue, Sunnyvale, California 94089.

The NRTL Program requires that the recognized site listed above has the capability to conduct the product testing in accordance with the appropriate test standard for the equipment or material being tested and certified.

III. Preliminary Finding on the Application for Recognition as an NRTL

OSHA's NRTL Program recognition process involves a thorough analysis of an NRTL applicant's policies and procedures, and a comprehensive on-site review of the applicant's testing and certification activities to ensure that the applicant meets the requirements of 29 CFR 1910.7. OSHA staff performed a detailed analysis of BACL's application packet and reviewed other pertinent information. OSHA staff also performed a comprehensive on-site assessment of BACL's testing facility, located at 1274 Anvilwood Avenue, Sunnyvale, California 94089, on May 9–11, 2016. An overview of OSHA's assessment of the four requirements for recognition (*i.e.,* capability, control procedures, independence, and creditable reports and complaint handling) is provided below.

A. Capability

Section 1910.7(b)(1) states that, for each specified item of equipment or material to be listed, labeled, or accepted, the NRTL must have the capability (including proper testing equipment and facilities, trained staff, written testing procedures, and calibration and quality-control programs) to perform appropriate testing. OSHA staff performed a detailed analysis of BACL's application packet and reviewed other pertinent information to assess its capabilities to perform test and certification activities. OSHA determined that BACL has demonstrated these capabilities through the following:

- The BACL facility has adequate test areas, energy sources, and procedures for controlling incompatible activities.
- BACL provided a detailed list of its testing equipment. Review of the application shows that the equipment listed is available and adequate for the standards for which it seeks recognition.
- BACL has detailed procedures for conducting testing, review, and evaluation, and for capturing the test and other data required by the test standards for which it seeks recognition.
- BACL has detailed procedures addressing the maintenance and calibration of equipment, and the types of records maintained for, or supporting laboratory activities.
- BACL has sufficient qualified personnel to perform the proposed scope of testing based on their education, training, technical knowledge, and experience.
- BACL has an adequate quality-control system in place to conduct internal audits, as well as track and resolve nonconformances.

OSHA's on-site assessment of BACL's facility confirmed the capabilities described in its application packet.

B. Control Procedures

Section 1910.7(b)(2) requires that the NRTL provide controls and services, to the extent necessary, for the particular equipment or material to be listed, labeled, or accepted. These controls and services include procedures for identifying the listed or labeled equipment or materials, inspections of production runs at factories to assure conformance with test standards, and field inspections to monitor and assure the proper use of identifying marks or labels. OSHA staff performed a detailed analysis of BACL's application packet and reviewed other pertinent information to assess its control procedures. OSHA determined that BACL has demonstrated these control procedures through the following:

- BACL has a quality-control manual and detailed procedures to address the steps involved to list and certify products.
- BACL has a registered certification mark.
- BACL has certification procedures to address the authorization of certifications and audits of factory facilities. The audits apply to both the initial evaluations and the follow-up inspections of manufacturers' facilities.

OSHA's on-site assessment of BACL's facility confirmed the control procedures described in its application packet.

C. Independence

Section 1910.7(b)(3) requires that the NRTL be completely independent of employers that are subject to the testing requirements, and of any manufacturers or vendors of equipment or materials tested under the NRTL Program. OSHA has a policy for the independence of NRTLs that specifies the criteria used for determining whether an organization meets the above requirement (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph V). This policy contains a non-exhaustive list of relationships that would cause an organization to fail to meet the specified criteria. OSHA staff performed a detailed analysis of BACL's application packet and reviewed other pertinent information to assess its independence. OSHA determined that BACL has demonstrated independence through the following:

- BACL is a privately-owned organization, and OSHA found no information regarding ownership that would qualify as a conflict under OSHA's independence policy.
- BACL shows that it has none of the relationships described above or any other relationship that could subject it to undue influence when testing for product safety.

D. Credible Reports and Complaint Handling

Section 1910.7(b)(4) specifies that a NRTL must maintain effective procedures for producing credible findings and reports that are objective and free of bias. The NRTL must also have procedures for handling complaints and disputes under a fair and reasonable system. OSHA staff performed a detailed analysis of BACL's application packet and reviewed other pertinent information to assess its ability to produce credible results and handle complaints. OSHA determined that BACL has demonstrated these capabilities through the following.

- BACL has detailed procedures describing the content of the test reports, and other detailed procedures

describing the preparation and approval of these reports.

• BACL has procedures for recording, analyzing, and processing complaints from users, manufacturers, and other parties in a fair manner.

OSHA's on-site assessment of BACL's facility confirmed the credible reports and complaint handling described in its application packet.

OSHA's review of the application file and pertinent documentation, as well as the results of the on-site assessment, indicate that BACL can meet the requirements prescribed by 29 CFR 1910.7 for recognition as a Nationally Recognized Testing Laboratory for its site located in Sunnyvale, California. The OSHA staff, therefore, preliminarily recommended that the Assistant Secretary approve the application. This preliminary finding does not constitute an interim or temporary approval of BACL's application.

OSHA welcomes public comment as to whether BACL meets the requirements of 29 CFR 1910.7 for recognition as an NRTL. Comments should consist of pertinent written documents and exhibits. Commenters needing more time to comment must submit a request in writing, stating the reasons for the request. Commenters must submit the written request for an extension by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer period. OSHA may deny a request for an extension if it is not adequately justified. To obtain or review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Room N–3653, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. These materials also are available online at *http://www.regulations.gov* under Docket No. OSHA–2016–0022.

OSHA staff will review all comments submitted to the docket in a timely manner and, after addressing the issues raised by these comments, will recommend to the Assistant Secretary whether to grant BACL's application for recognition as an NRTL. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of this final decision in the **Federal Register.**

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on December 12, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–30288 Filed 12–15–16; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0039]

Intertek Testing Services NA, Inc.: Grant of Expansion of Recognition and Modification to the NRTL Program's List of Appropriate Test Standards

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces its final decision to expand the scope of recognition for Intertek Testing Services NA, Inc. as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3647, Washington, DC 20210; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov.* OSHA's Web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of Intertek Testing Services NA, Inc. (ITSNA), as an NRTL. ITSNA's expansion covers the addition of twenty-eight (28) test standards to its scope of recognition.

OSHA recognition of an NRTL signifies that the organization meets the requirements specified by 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition, and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification of the products.

The Agency processes applications by an NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational Web page for each NRTL that details its scope of recognition. These pages are available from the Agency's Web site at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

ITSNA submitted an application, received by OSHA on June 3, 2015, (OSHA–2007–0039–0020) to expand its recognition to include thirty (30) additional test standards. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information and determined that OSHA should grant the application to expand ITSNA's recognition to include 28 of the 30 requested standards. OSHA did not perform any on-site reviews in relation to this application.

OSHA published the preliminary notice announcing ITSNA's expansion application in the **Federal Register** on September 14, 2016 (81 FR 63229). The Agency requested comments by September 29, 2016, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of ITSNA's scope of recognition.

To obtain or review copies of all public documents pertaining to ITSNA's application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210. Docket No. OSHA–2007–0039 contains all materials in the record concerning ITSNA's recognition.

II. Final Decision and Order

OSHA staff examined ITSNA's expansion application, its capability to meet the requirements of the test standards, and other pertinent information. Based on its review of this evidence, OSHA finds that ITSNA meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the conditions listed below. OSHA, therefore, is proceeding with this final notice to grant ITSNA's scope of recognition. OSHA limits the expansion of ITSNA's recognition to testing and certification of products for demonstration of conformance to the test standards listed in Table 1 below.

Additionally, Table 2, below, lists the test standard new to the NRTL Program's List of Appropriate Test Standards. The Agency evaluated the standard to (1) verify it represents a product category for which OSHA requires certification by an NRTL, (2) verify the document represents end products and not components, and (3) verify the document defines safety test specifications (not installation or operational performance specifications). Based on this evaluation, OSHA finds that it is an appropriate test standard and will add it to the NRTL Program's List of Appropriate Test Standards.

TABLE 1—LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN ITSNA'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
ISA 60079–0	Explosive Atmospheres—Part 0: Equipment—General Requirements.
UL 60079–0	Explosive Atmospheres—Part 0: Equipment—General Requirements.
ISA 61241–0	Electrical Apparatus for Use in Zone 20, Zone 21, and Zone 22 Hazardous (Classified) Locations—General Requirements.
ISA 60079–1	Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures "d".
UL 60079–1	Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures "d".
ISA 60079–2	Explosive Atmospheres—Part 2: Equipment Protection by Pressurized Enclosures "p".
UL 60079–2	Explosive Atmospheres—Part 2: Equipment Protection by Pressurized Enclosures "p".
NFPA 496	Purged and Pressurized Enclosures for Electrical Equipment.
ISA 61241–2	Electrical Apparatus for Use in Zone 21 and Zone 22 Hazardous (Classified) Locations—Protection by Pressurization "pD".
ISA 60079–5	Explosive Atmospheres—Part 5: Equipment Protection by Powder Filling "q".
UL 60079–5	Explosive Atmospheres—Part 5: Equipment Protection by Powder Filling "q".
ISA 60079–6	Explosive Atmospheres—Part 6: Equipment Protection by Liquid Immersion "o".
UL 60079–6	Explosive Atmospheres—Part 6: Equipment Protection by Liquid Immersion "o".
ISA 60079–7	Explosive Atmospheres—Part 7: Equipment Protection by Increased Safety "e".
UL 60079–7	Explosive Atmospheres—Part 7: Equipment Protection by Increased Safety "e".
ISA 60079–11	Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety "i".
UL 60079–11	Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety "i".
ISA 60079–25*	Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems.
ISA 60079–28	Explosive Atmospheres—Part 28: Protection of Equipment and Transmission Systems Using Optical Radiation, Edition 1.1.
ISA 61241–11	Electrical Apparatus for Use in Zone 20, Zone 21, and Zone 22 Hazardous (Classified) Locations—Protection by Intrinsic Safety "iD".
ISA 60079–15	Explosive Atmospheres—Part 15: Equipment Protection by Type of Protection "n" (Edition 4).
UL 60079–15	Explosive Atmospheres—Part 15: Equipment Protection by Type of Protection "n".
ISA 60079–18	Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation "m".
UL 60079–18	Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation "m".
ISA 61241–18	Electrical Apparatus for Use in Zone 20, Zone 21, and Zone 22 Hazardous (Classified) Locations—Protection by Encapsulation "mD".
ISA 60079–26	Explosive Atmospheres—Part 26: Equipment for Use in Class I, Zone 0 Hazardous (Classified) Locations.
ISA 60079–31	Explosive Atmospheres—Part 31: Equipment Dust Ignition Protection by Enclosure "t".
ISA 61241–1	Electrical Apparatus for Use in Zone 21 and Zone 22 Hazardous (Classified) Locations—Protection by Enclosures "tD".

* Represents a new test standard to the NRTL Program's List of Appropriate Test Standards.

TABLE 2—TEST STANDARD OSHA IS ADDING TO THE NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS

Test standard	Test standard title
UL 60079–25	Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, an NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, we may use the designation of the standards-developing organization for the standard as opposed to the ANSI designation. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized

for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, ITSNA must abide by the following conditions of the recognition:

1. ITSNA must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as an NRTL, and provide details of the change(s);
2. ITSNA must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and
3. ITSNA must continue to meet the requirements for recognition, including all previously published conditions on ITSNA's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of ITSNA, subject to the limitation and conditions specified above.

III. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on December 12, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–30287 Filed 12–15–16; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

Notice: (16–085).

ACTION: Notice of information collection renewal, with change.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Frances Teel, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Frances Teel, NASA PRA Officer, NASA Headquarters, 300 E Street SW., JF0000, Washington, DC 20546, (202) 358–2225.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Aeronautics and Space Administration seeks to collect information from members of the public to plan, conduct, and register participants and volunteers for the NASA Human Exploration Rover Challenge, which supports science, technology, engineering, or mathematics (STEM) education. This engineering design challenge focuses on NASA's current plans to explore planets, moons, asteroids, and comets—all members of the solar system family. The challenge will focus on designing, constructing and testing technologies for mobility devices to perform in these different environments, and it will provide valuable experiences that engage students in the technologies and concepts that will be needed in future exploration missions. NASA collects the minimum information necessary from teams, participants, and volunteers to plan and conduct the event.

II. Method of Collection

Electronic and Fillable PDF.

III. Data

Title: NASA Human Exploration Rover Challenge.

OMB Number: 2700–0157.

Type of Review: Renewal, with change, of a currently approved information collection.

Affected Public: Individuals.

Estimated Number of Respondents: 960.

Estimated Total Annual Burden Hours: 78.

Estimated Total Annual Cost: $7,425.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) 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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Frances Teel,

NASA PRA Clearance Officer.

[FR Doc. 2016–30319 Filed 12–15–16; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0158]

Program-Specific Guidance About Possession Licenses for Production of Radioactive Material Using an Accelerator

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft NUREG; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is revising its licensing guidance for possession licenses for the production of radioactive material using an accelerator. The NRC is requesting public comment on draft NUREG–1556, Volume 21, Revision 1, ''Consolidated Guidance About Materials Licenses: Program-Specific Guidance about Possession Licenses for Production of Radioactive Material Using an Accelerator.'' The document has been updated from the original version to include information on safety culture and changes in regulatory policies and practices. This document is intended for use by applicants, licensees, and the NRC staff.

DATES: Submit comments by January 20, 2017. Comments received after this date will be considered if it is practicable to do so, but the NRC is only able to assure consideration of comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0158. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: OWFN–12–H8, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Robert MacDougall, Office of Nuclear Material Safety and Safeguards; U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5175; email: *Robert.MacDougall@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0158 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this action by the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0158.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.* The draft NUREG–1556, Volume 21, Revision 1, is available in ADAMS under Accession No. ML16336A536.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

The draft NUREG–1556, Volume 21, Revision 1, is also available on the NRC's public Web site on the: (1) ''Consolidated Guidance About Materials Licenses (NUREG–1556)'' page at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1556/;* and the (2) ''Draft NUREG-Series Publications for Comment'' page at *http://www.nrc.gov/public-involve/doc-comment.html#nuregs.*

B. Submitting Comments

Please include Docket ID NRC–2016–0158 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS, and the NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Further Information

This NUREG provides guidance to existing licensees that produce radioactive materials using an accelerator, and to applicants preparing license applications to possess such materials. This NUREG also provides NRC reviewers criteria for evaluating such a license application. The purpose of this notice is to provide the public an opportunity to review and comment on draft NUREG–1556, Volume 21, Revision 1, ''Consolidated Guidance About Materials Licenses: Program-Specific Guidance About Possession Licenses for the Production of Radioactive Material Using an Accelerator.'' These comments will be considered in the final version or subsequent revisions.

Dated at Rockville, Maryland, this 9th day of December, 2016.

For the U.S. Nuclear Regulatory Commission.

Daniel S. Collins,

Director, Division of Material Safety, State, Tribal and Rulemaking Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2016–30343 Filed 12–15–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0001]

Sunshine Act Meeting Notice

DATE: December 14, 2016.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

Week of December 12, 2016

Thursday, December 15, 2016

9:25 a.m. Affirmation Session (Public Meeting) (Tentative)

1. Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), Intervenor's Appeal of LBP–16–8 (Tentative)

2. Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), Mandatory Hearing Decision (Tentative)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

* * * * *

Additional Information

By a vote of 3–0 on December 14, 2016, the Commission determined pursuant to U.S.C. 552b(e) and 9.107(a) of the Commission's rules that the item in the above referenced Affirmation Session be held with less than one week notice to the public. The meeting is scheduled on December 15, 2016.

* * * * *

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.*

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the

public meetings in another format (*e.g.,* braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or email *Brenda.Akstulewicz@nrc.gov* or *Patricia.Jimenez@nrc.gov.*

Dated: December 14, 2016.

Glenn Ellmers,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2016–30494 Filed 12–14–16; 4:15 pm]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

OMB No. 3206–0144, More Information Needed for the Person Named Below, OPM Form RI 38–45

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revision of a currently approved information collection request (ICR) OMB No. 3206–0144, More Information Needed for the Person Named, OPM Form RI 38–45. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection.

DATES: Comments are encouraged and will be accepted until February 14, 2017. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the U.S. Office of Personnel Management, Retirement Services, 1900 E Street NW., Washington, DC 20415–0001, Attention: Alberta Butler, Room 2347–E, or sent by email to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW., Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent by email to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of OPM, including whether the information will have Practical utility;

2. Evaluate the accuracy of OPM's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including 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.

RI 38–45 is used by the Civil Service Retirement System and the Federal Employees Retirement System to identify the records of individuals with similar or the same names. It is also needed to report payments to the Internal Revenue Service.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: More Information Needed for the Person Named Below.

OMB Number: 3206–0144.

Frequency: On occasion.

Affected Public: Individual or Households.

Number of Respondents: 3,000.

Estimated Time per Respondent: 5 minutes.

Total Burden Hours: 250.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

[FR Doc. 2016–30316 Filed 12–15–16; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2015–82; MC2017–35 and CP2017–60; MC2017–36 and CP2017–61; MC2017–37 and CP2017–62; MC2017–38 and CP2017–63; MC2017–39 and CP2017–64; MC2017–40 and CP2017–65; MC2017–41 and CP2017–66; MC2017–42 and CP2017–67; MC2017–43 and CP2017–68; MC2017–44 and CP2017–69]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 19, 2016 (Comment due date applies to Docket No. CP2015–82; Docket Nos. MC2017–35 and CP2017–60; Docket Nos. MC2017–36 and CP2017–61; Docket Nos. MC2017–37 and CP2017–62; Docket Nos. MC2017–38 and CP2017–63); December 20, 2016 (Comment due date applies to Docket Nos. MC2017–39 and CP2017–64; Docket Nos. MC2017–40 and CP2017–65; Docket Nos. MC2017–41 and CP2017–66; Docket Nos. MC2017–42 and CP2017–67; MC2017–43 and CP2017–68); and December 21, 2016 (Comment due date applies to Docket Nos. MC2017–44 and CP2017–69).

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: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market

dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2015–82; *Filing Title:* Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Priority Mail Contract 125; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Nina Yeh; *Comments Due:* December 19, 2016.

2. *Docket No(s).:* MC2017–35 and CP2017–60; *Filing Title:* Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 38 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* December 19, 2016.

3. *Docket No(s).:* MC2017–36 and CP2017–61; *Filing Title:* Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 39 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* December 19, 2016.

4. *Docket No(s).:* MC2017–37 and CP2017–62; *Filing Title:* Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 40 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* December 19, 2016.

5. *Docket No(s).:* MC2017–38 and CP2017–63; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 38 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Jennaca D. Upperman; *Comments Due:* December 19, 2016.

6. *Docket No(s).:* MC2017–39 and CP2017–64; *Filing Title:* Request of the United States Postal Service to Add First-Class Package Service Contract 68 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* December 20, 2016.

7. *Docket No(s).:* MC2017–40 and CP2017–65; *Filing Title:* Request of the United States Postal Service to Add First-Class Package Service Contract 69 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* December 20, 2016.

8. *Docket No(s).:* MC2017–41 and CP2017–66; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 266 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Gregory Stanton; *Comments Due:* December 20, 2016.

9. *Docket No(s).:* MC2017–42 and CP2017–67; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 267 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Gregory Stanton; *Comments Due:* December 20, 2016.

10. *Docket No(s).:* MC2017–43 and CP2017–68; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 268 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* December 20, 2016.

11. *Docket No(s).:* MC2017–44 and CP2017–69; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 269 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 9, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* December 21, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–30239 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 38 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–38, CP2017–63.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30228 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 266 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–41, CP2017–66.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30237 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 269 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–44, CP2017–69.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30234 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 39 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–36, CP2017–61.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30232 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 68 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–39, CP2017–64.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30227 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 267 to Competitive Product List.* Documents are available at

www.prc.gov, Docket Nos. MC2017–42, CP2017–67.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30236 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 38 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–35, CP2017–60.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30233 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 268 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–43, CP2017–68.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30235 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 69 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–40, CP2017–65.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30238 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 40 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–37, CP2017–62.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–30231 Filed 12–15–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79527; File No. SR–IEX–2016–19]

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Require Listed Companies To Publicly Disclose Compensation or Other Payments by Third Parties to Any Nominee for Director or Sitting Director in Connection With Their Candidacy for or Service on the Companies' Board of Directors

December 12, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 5, 2016, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (''Act''),[4] and Rule 19b–4

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

thereunder,[5] Investors Exchange LLC (''IEX'' or ''Exchange'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to require listed companies to publicly disclose compensation or other payments by third parties to any nominee for director or sitting director in connection with their candidacy for or service on the companies' Board of Directors. The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b–4(f)(6)(iii) under the Act.[6]

The text of the proposed rule change is available at the Exchange's Web site at *www.iextrading.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statement may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 17, 2016 the Commission granted IEX's application for registration as a national securities exchange under Section 6 of the Act including approval of rules applicable to the qualification, listing and delisting of companies on the Exchange. The Exchange plans to begin a listing program in 2017 and is proposing additional rules applicable to companies listing on the Exchange in this proposed rule change.

IEX rules require listed companies to make public disclosure in several areas. For example, a listed company is required to publicly disclose material information that would reasonably be expected to affect the value of its securities or influence investors' decisions as well as when non-independent directors serve on a committee that generally requires only independent directors, such as for a controlled company or under exceptional and limited circumstances.[7] A listed company is also required to file required periodic reports with the Commission.[8] A principal purpose of these disclosure requirements is to protect investors and ensure these investors have necessary information to make informed investment and voting decisions.

However, based on press reports and information from market participants, IEX understands there is one area where investors may not have complete or timely information. This is when third parties compensate directors in connection with their candidacy for and/or service on company Board of Directors. This third-party compensation, which may not be publicly disclosed, arises when a shareholder privately offers to compensate nominee directors in connection with those nominees' candidacy or service as directors. These arrangements vary but may include compensating directors based on achieving benchmarks such as an increase in share price over a fixed term.[9]

IEX believes these undisclosed compensation arrangements potentially raise several concerns, including that they may lead to conflicts of interest among directors and call into question the directors' ability to satisfy their fiduciary duties. These arrangements may also tend to promote a focus on short-term results at the expense of long-term value creation. IEX believes that enhancing transparency around third-party board compensation would help address these concerns and would benefit investors by making available information potentially relevant to investment and voting decisions. IEX further believes that the proposed disclosure would not create meaningful burdens on directors or those making these payments nor on the companies required to make the disclosure.[10]

Accordingly, IEX is proposing to adopt Rule 14.207(b)(3) to require listed companies to publicly disclose on or through the companies' Web site or proxy statement or information statement for any shareholders' meeting at which directors are elected (or, if they do not file proxy or information statements, in Form 10–K or Form 20–F),[11] the material terms of all agreements and arrangements between any director or nominee and any person or entity other than the company (the ''Third Party'') relating to compensation or other payment in connection with that person's candidacy or service as a director.[12] [13] A company may make this disclosure through its Web site by hyperlinking to another Web site, which must be continuously accessible. If that Web site subsequently becomes inaccessible or that hyperlink inoperable, the company must promptly restore it or make other disclosure in accordance with this proposed rule.

Consistent with other exemptions afforded certain types of companies, the Exchange is also proposing to amend Rule 14.407(a)(3) to provide that a foreign private issuer may follow home country practice in lieu of the requirements of the proposed rule. A Foreign Private Issuer may follow its home country practice in lieu of the requirements of Rule 14.207(b)(3) by utilizing the process described in Rule 14.407(a)(3), including but not limited to the requirement to submit to IEX a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws.

Companies listed at the time this proposed rule becomes effective or initially listed thereafter must disclose all agreements and arrangements in accordance with this proposed rule by no later than the date on which the Company files or furnishes a proxy or information statement subject to Regulation 14A or 14C under the Act in connection with the Company's next shareholders' meeting at which directors are elected (or, if they do not file proxy or information statements, no later than when the Company files next Form 10–K or Form 20–F). Thereafter, a listed company must make this disclosure at least annually until the earlier of the resignation of the director or one year following the termination of

[5] 17 CFR 240.19b–4.

[6] 17 CFR 240.19b–4(f)(6)(iii).

[7] *See* Rules 14.207(b)(1), 14.407(c)(2), 14.405(c)(2)(B), 14.405(d)(2)(B) and 14.405(e)(3).

[8] *See* Rule 14.207(c).

[9] *See,* discussion generally in Securities Exchange Act Release No. 78223 (July 1, 2016), 81 FR 44400 (July 7, 2016) (Order Granting Approval of SR–NASDAQ–2016–13).

[10] *See,* note 9.

[11] This disclosure method is consistent with the method under Rule 14.405(d)(2)(B) for disclosure of the appointment of a non-independent compensation committee member under exceptional and limited circumstances.

[12] The proposal is intended to apply to agreements and arrangements whether or not the right to nominate a director legally belongs to a third party. See Supplementary Material .07 to Rule 14.405 (Independent Director Oversight of Director Nominations).

[13] If the Company provides disclosure in a proxy or information statement, including to satisfy the SEC's proxy disclosure requirements, sufficient to comply with this rule, its obligation to satisfy this rule is fulfilled regardless of the reason for which such disclosure was made.

the agreement or arrangement.[14] The proposed rule does not separately require the initial disclosure of newly entered into agreements or arrangements, provided that disclosure is made pursuant to this rule for the next shareholder meeting at which directors are elected.

If a Company discovers an agreement or arrangement that should have been disclosed pursuant to subparagraph (A) of the proposed rule but was not, the Company must promptly make the required disclosure in accordance with this proposed rule.[15] In addition, for agreements and arrangements not required to be disclosed in accordance with subparagraph (A)(ii) of the proposed rule, such as employment with a third party that existed prior to the nominee's candidacy and is otherwise disclosed, but where the director or nominee's remuneration is thereafter materially increased specifically in connection with such person's candidacy or service as a director of the company, only the difference between the new and previous level of compensation or other payment obligation need be disclosed.

The terms ''compensation'' and ''other payment'' as used in this proposed rule are intended to be construed broadly and apply to agreements and arrangements that provide for non-cash compensation and other payment obligations, such as health insurance premiums or indemnification, made in connection with a person's candidacy or service as a director. Further, at a minimum, the disclosure should identify the parties to and the material terms of the agreement or arrangement relating to compensation.

In recognition of circumstances that do not raise the concerns noted above or where such disclosure may be duplicative, the proposed rule would not apply to agreements and arrangements that existed before the nominee's candidacy and the nominee's relationship with the Third Party has been otherwise publicly disclosed, for example, pursuant to Items 402(a)(2) of Regulation S–K or in a director's biographical summary included in periodic reports filed with the Commission. An example of an agreement or arrangement falling under this exception is a director or a nominee for director being employed by a private equity or venture capital firm, or a fund established by such firm, where employees are expected to and routinely serve on the boards of the fund's portfolio companies and their remuneration is not materially affected by such service. If such a director a [sic] nominee's remuneration is materially increased in connection with such person's candidacy or service as a director of the company, only the difference between the new and previous level of compensation needs to be disclosed under the proposed rule.

Additionally, the proposed rule would not apply to agreements and arrangements that relate only to reimbursement of expenses incurred in connection with candidacy as a director, whether or not such reimbursement arrangement has been publicly disclosed. Further, Commission Rule 14a–12(c) subjects persons soliciting proxies in opposition to companies' proxy solicitation to certain disclosure requirements of Schedule 14A of the Act. The proposed rule relieves the company from the disclosure requirements of the proposed Rule 14.207(b)(3)(A) where an agreement or arrangement for a director or a nominee has been disclosed under Item 5(b) of Schedule 14A of the Act in the current fiscal year. However, such an agreement or arrangement is subject to the continuous disclosure requirements of the proposed Rule 14.207(b)(3)(B) on an annual basis. Similarly, a Company that provides disclosure in the current fiscal year pursuant to the requirement in Item 5.02(d)(2) of Form 8–K requiring ''a brief description of any arrangement or understanding between the new director and any other persons, naming such persons, pursuant to which such director was selected as a director''—would not have to make a separate disclosure under the proposed Rule 14.207(b)(3)(A). Such disclosure under Commission rules, however, shall not relieve a company of its ongoing obligation under the proposed Rule 14.207(b)(3)(B) to make annual disclosure.

In recognition that a company, despite reasonable efforts, may not be able to identify all such agreements and arrangements, the proposed rule provides that a company shall not be deficient with the proposed disclosure requirements if it has undertaken reasonable efforts to identify all such agreements and arrangements, including by asking each director or nominee in a manner designed to allow timely disclosure, and upon discovery of a non-disclosed arrangement, promptly makes the required disclosure by filing a Form 8–K or 6–K, where required by Commission rules, or by issuing a press release. However, such remedial disclosure, regardless of its timing, does not satisfy the ongoing annual disclosure requirements under subparagraph (B).

In cases where a company is considered deficient, the company must provide a plan to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,[16] IEX proposes to allow companies deficient under the proposed rule 45 calendar days to submit a plan sufficient to satisfy IEX staff that the company has adopted processes and procedures designed to identify and disclose relevant agreements and arrangements in the future. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 14.502.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with Section 6(b)[17] of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposal accomplishes these objectives by enhancing transparency around third party compensation and payments made in connection with board service. The Exchange believes such disclosure has several benefits: It would provide information to investors to help them make meaningful investing and voting decisions. It would also address potential concerns that undisclosed third party compensation arrangements may lead to conflicts of interest among

[14] A Company posting the requisite disclosure on or through its Web site must make it publicly available no later than the date on which the Company files a proxy or information statement in connection with a shareholders' meeting at which directors are elected (or, if they do not file proxy or information statements, no later than when the Company files its next Form 10–K or Form 20–F).

[15] *See infra* discussion on remedial disclosure.

[16] Pursuant to Rule 14.501(c)(2)(A), a company is provided 45 days to submit a plan to regain compliance with Rules 14.408(c) (Quorum), 14.411 (Review of Related Party Transactions, 14.412 (Shareholder Approval), 14.207(c)(3) (Auditor Registration), 14.208(a) (Direct Registration Program), 14.406 (Code of Conduct), 14.407(a)(4)(E) (Quorum of Limited Partnerships), 14.407(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 14.413 (Voting Rights). A company is generally provided 60 days to submit a plan to regain compliance with the requirements to timely file periodic reports contained in Rule 14.207(c)(1).

[17] 15 U.S.C. 78f.

[18] 15 U.S.C. 78f(b)(5).

directors and call into question their ability to satisfy fiduciary duties.

The Exchange believes that it is consistent with the protection of investors and the public interest, and not unfairly discriminatory, to permit foreign private issuers to comply with home country practice in lieu of the requirements of the proposed rule. This approach is consistent with an existing structure for foreign private issuers whereby such companies may follow home country practice in lieu of certain listing rules, subject to an established process which includes disclosure obligations and submission to IEX of a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws.

Further, the Exchange notes that a substantially identical proposed rule change by the Nasdaq Stock Market LLC (''Nasdaq'') was recently approved by the Commission, pursuant to which the Commission found that the Nasdaq proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[19] In particular, the Commission found that the Nasdaq proposed rule change is ''consistent with the requirements of Section 6(b)(5) of the Act, which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.'' Accordingly, the Exchange believes that the same considerations apply to this proposed rule change since the proposed changes are substantially identical to the Nasdaq rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule to require listed companies to disclose third party compensation and payments in connection with board service is intended to provide meaningful information to investors and to address potential concerns with undisclosed compensation arrangements without creating unnecessary burdens on directors or those making the payments.

Further, the proposed rule change is intended to promote transparency and protect investors. To the extent that a competitor marketplace believes that the proposed rule change places it at a competitive disadvantage, it of course may file with the Commission a proposed rule change to adopt the same or similar rule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[20] and Rule 19b–4(f)(6) thereunder.[21] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[22] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–IEX–2016–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–IEX–2016–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–IEX–2016–19, and should be submitted on or before January 6, 2017.

[19] See Securities Exchange Act Release No. 78223 (July 1, 2016), 81 FR 44400 (July 7, 2016).

[20] 15 U.S.C. 78s(b)(3)(A)(iii).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–30255 Filed 12–15–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32389; 812–14663]

Alpha Architect ETF Trust, et al.; Notice of Application

December 12, 2016

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) index-based series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; (d) certain affiliated persons of a fund to deposit securities into, and receive securities from, the fund in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the funds (''Funds of Funds'') to acquire Shares of the Funds.

APPLICANTS: Alpha Architect ETF Trust (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, Empowered Funds, LLC (the ''Adviser''), a Pennsylvania limited liability company registered as an investment adviser under the Investment Advisers Act of 1940, and Quasar Distributors, LLC (the ''Initial Distributor''), a Delaware limited liability company and broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act'').

FILING DATES: The application was filed on June 15, 2016, and amended on October 7, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 6, 2017, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: Alpha Architect ETF Trust and Empowered Funds, LLC, 213 Foxcroft Road, Broomall, PA 19008; Quasar Distributors, LLC, 615 East Michigan Street, 4th Floor, Milwaukee, Wisconsin 53202.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Senior Counsel at (202) 551–6868, or Daniele Marchesani, Assistant Chief Counsel, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow funds to operate as index exchange traded funds (''ETFs'').[1] Fund Shares will be purchased and redeemed at their NAV in Creation Units only. All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant'', which will have signed a participant agreement with a broker-dealer registered under the Securities Exchange Act of 1943 (''Exchange Act'') (the Initial Distributor, together with any future distributor, the ''Distributor''). Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will hold investment positions selected to correspond generally to the performance of an Underlying Index. In the case of self-indexing Funds, an affiliated person, as defined in section 2(a)(3) of the Act (''Affiliated Person''), or an affiliated person of an Affiliated Person (''Second-Tier Affiliate''), of the Trust or a Fund, of the Adviser, of any sub-adviser to or promoter of a Fund, or of the Distributor will compile, create, sponsor or maintain the Underlying Index.[2]

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because Shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue Shares that are redeemable in Creation Units only.

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as

[1] Applicants request that the order apply to the initial series of the Trust and any additional series of the Trust, and any other open-end management investment companies or series thereof that may be created in the future (each, included in the term ''Fund''), each of which will operate as an ETF and will track a specified index comprised of domestic and/or foreign equity securities or domestic and/or foreign fixed income securities (each, an ''Underlying Index''). Any Fund will (a) be advised by the Adviser or an entity controlling, controlled by, or under common control with the Adviser (included in the term ''Adviser'') and (b) comply with the terms and conditions of the application.

[2] Each self-indexing fund (''Self-Indexing Fund'') will post on its Web site the identities and quantities of the investment positions that will form the basis for the Fund's calculation of its NAV at the end of the day. Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will help address, together with other protections, conflicts of interest with respect to such Funds.

secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in Shares does not involve a Fund as a party and will not result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent Shares from trading at a material discount or premium from NAV.

6. With respect to Funds that effect creations and redemptions of Creation Units in-kind and that are based on certain Underlying Indexes that include foreign securities, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund Shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell Shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are Affiliated Persons, or Second Tier Affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instruments and Redemption Instruments will be valued in the same manner as those investment positions currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its Shares to and redeem its Shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[3] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2016–30251 Filed 12–15–16; 8:45 am]

BILLING CODE 8011–01–P

[3] The requested relief would apply to direct sales of Shares in Creation Units by a Fund to a Fund of Funds and redemptions of those Shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79532; File No. SR–NASDAQ–2016–166]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Chapter XV, Section 2

December 12, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Chapter XV, Section 2, entitled ''NASDAQ Options Market—Fees and Rebates,'' which governs pricing for Nasdaq members using the NASDAQ Options Market (''NOM''), Nasdaq's facility for executing and routing standardized equity and index options. Nasdaq proposes to implement a new rebate for adding liquidity for Customer and Professional orders in Penny and Non-Penny Pilot Options as described further below.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to create an alternative method for earning a rebate for adding liquidity for both Customers [3] and Professionals [4] in Penny Pilot [5] and Non-Penny Pilot Options. For Customers and Professionals transacting in Penny Pilot Options, the Exchange currently pays a volume-based tiered rebate to add liquidity. That rebate consists of 8 tiers, ranging from $0.20 per contract to $0.48 per contract, with the volume requirements increasing with each tier. Thus, a NOM Participant would qualify for a rebate of $0.20 per contract in Tier 1 for Customers and Professionals if it added Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of up to 0.10% of total industry customer equity and ETF option average daily volume (''ADV'') contracts per day in a month. In comparison, a Participant would qualify for a rebate of $0.48 in Tier 8 for Customers and Professionals if it adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.75% or more of total industry customer equity and ETF option ADV contracts per day in a month, or if the Participant adds: (1) Customer and/or Professional liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 0.25% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS.[6]

Currently, Customers and Professionals transacting in Non-Penny Pilot Options on NOM receive a $0.80 per contract Rebate to Add Liquidity. In addition, a Participant that qualifies for a Customer or Professional Penny Pilot Options Rebate to Add Liquidity in Tiers 2, 3, 4, 5 or 6 in a month will receive an additional $0.10 per contract Non-Penny Pilot Options Rebate to Add Liquidity for each transaction which adds liquidity in Non-Penny Pilot Options in that month. Furthermore, a Participant that qualifies for a Customer or Professional Penny Pilot Options Rebate to Add Liquidity in Tiers 7 or 8 in a month will receive an additional $0.20 per contract Non-Penny Pilot Options Rebate to Add Liquidity for each transaction which adds liquidity in Non-Penny Pilot Options in that month.

The Exchange now proposes to add an additional rebate to Customers and Professionals for adding liquidity in both Penny Pilot and Non-Penny Pilot Options. Specifically, a NOM Participant will receive a $0.53 per contract Rebate to Add Liquidity in Penny Pilot Options as a Customer or Professional, and $1.00 per contract Rebate to Add Liquidity in Non-Penny Pilot Options as a Customer or Professional, if that NOM Participant transacts on the NASDAQ Stock Market through one or more of its Nasdaq Market Center MPIDs in the same month, and such transactions in all securities on the NASDAQ Stock Market that month through all of its Nasdaq Market Center MPIDs represent 3.00% or more of Consolidated Volume.[7] Participants that qualify for this rebate would not be eligible for any other rebates in Tiers 1–8 or other rebate incentives on NOM for Customer and Professional order flow in Chapter XV, Section 2(1).

For purposes of calculating the NOM Participant's total volume, the Exchange will add the NOM Participant's total volume transacted on the NASDAQ Stock Market in a given month across its Nasdaq Market Center MPIDs, and will divide this number by the total industry Consolidated Volume.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [11] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[12] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.''[13]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker

[3] The term ''Customer'' or (''C'') applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Chapter I, Section 1(a)(48)).

[4] The term ''Professional'' or (''P'') means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

[5] The Penny Pilot was established in March 2008. *See* Securities Exchange Act Release No. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot). Since that date, the Penny Pilot has been expanded and is currently extended through December 31, 2016 or the date of permanent approval, if earlier. *See* Securities Exchange Act Release No. 78037 (June 10, 2016), 81 FR 39299 (June 16, 2016) (SR–NASDAQ–2016–052).

[6] MARS refers to the Market Access and Routing Subsidy, which is set forth in Chapter XV, Section 6 [sic]. The MARS payment comprises four volume-based tiers, and is paid to NOM Participants that route eligible contracts to NOM through a participating NOM Participant's System. The MARS Payment will be paid on all executed Eligible Contracts that add liquidity. *See* Chapter XV, Section 6 [sic].

[7] Consolidated Volume would be determined as set forth in Nasdaq Rule 7018(a).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[11] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[12] *See NetCoalition,* at 534–535.

[13] *Id.* at 537.

dealers'. . . .'' [14] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange notes that the purpose of the proposed rebates is to incentivize NOM Participants to transact greater volume on the NASDAQ Stock Market in order to qualify for a higher rebate on NOM. The Exchange believes that the amount of the rebate ($0.53 per contract for Penny Pilot Options and $1.00 per contract for Non-Penny Pilot Options) and the volume threshold for qualifying for the rebate (3.00% or more of Consolidated Volume) are reasonable. With respect to the rebate for Penny Pilot Options, the Exchange notes that the proposed $0.53 per contract rebate is the same as the highest rebate currently available to Customers and Professionals for adding liquidity in Penny Pilot Options.[15] The Exchange believes the proposed rebate of $0.53 per contract is reasonable when compared to the highest rebate currently available to Customers and Professionals for adding liquidity in Penny Pilot Options, as the proposed rebate imposes comparable requirements on NOM Participants in order to qualify for that rebate. Similarly, the Exchange believes the proposed $1.00 rebate per contract for Non-Penny Pilot Options is reasonable because it is comparable to the rebates that a NOM Participant currently receives for adding liquidity in Non-Penny Pilot Options as a Customer or Professional, which range from $0.80 per contract to $1.00 per contract.

The Exchange believes that the requirement that a NOM Participant transact 3.00% or more in Consolidated Volume on the NASDAQ Stock Market is reasonable because this requirement, while more stringent than other volume-based requirements that currently apply to NOM Participants that transact as Customers or Professionals in Penny Pilot and Non-Penny Pilot Options, reflects the fact that NOM Participants that qualify for this rebate would generally receive a larger rebate (for Penny Pilot Options, $0.53 per contract versus $0.20–$0.53 per contract and, for Non-Penny Pilot Options, $1.00 per contract versus $0.80–$1.00 per contract) than they would currently receive for transactions as Customer or Professionals in Penny Pilot and Non-Penny Pilot Options.

The Exchange believes it is reasonable to make this rebate exclusive of any other rebates in Tiers 1–8 or other rebate incentives on NOM for Customer and Professional order flow in Chapter XV, Section 2(1). As noted above, the proposed rebates are generally higher, and in some cases significantly higher, than the rebates that a NOM Participant may currently receive for adding liquidity in Penny Pilot and Non-Penny Pilot Options as a Customer or Professional. Given the size of the proposed rebates, the Exchange believes it is reasonable to make these rebates exclusive of other rebates on NOM for Customer and Professional order flow.

The Exchange also believes the other aspects of this proposal are also reasonable, equitable and not unfairly discriminatory. First, the Exchange notes that the proposed rebates apply to both transactions in Penny Pilot and Non-Penny Pilot Options.

Second, the Exchange believes that linking rebates on NOM to activity on the NASDAQ Stock Market is reasonable, equitable, and not unfairly discriminatory. The Exchange notes that previous and current rebates offered by NOM relate to activity on the NASDAQ Stock Market.[16] Similarly, the NASDAQ Stock Market offers reduced transaction fees that are based on activity on NOM.[17] Moreover, the Exchange notes that any NOM Options Participant may trade equities on the NASDAQ Stock Market because they are approved members.[18]

Third, while the requirements for qualifying for the proposed rebates may be more stringent than other requirements for qualifying for other rebates currently offered by NOM, the Exchange believes that these requirements are proportionate to the amount of the proposed rebates and equitably reflect the purpose of the proposed rebates, which is to incentivize NOM Participants to transact greater volume on the NASDAQ Stock Market. Moreover, all similarly-situated NOM Participants, *e.g.,* those that add liquidity in either Penny Pilot

[14] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] As noted above, a NOM Participant will receive a rebate of $0.48 per contract for adding liquidity as a Customer or Professional in Penny Pilot Options if it qualifies for Tier 8. In addition, as noted in footnote c of Chapter XV, Section 2, a NOM Participant may receive an additional rebate of up to $0.05 per contract in Penny Pilot Options, for a total rebate of $0.53 per contract. Specifically, Participants that: (1) Add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.15% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional $0.02 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month; or (2) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.30% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional $0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month; or (3)(a) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.80% of total industry customer equity and ETF option ADV contracts per day in a month, (b) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Non-Penny Pilot Options above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month, and (c) execute greater than 0.04% of Consolidated Volume (''CV'') via Market-on-Close/Limit-on-Close (''MOC/LOC'') volume within the NASDAQ Stock Market Closing Cross within a month will receive an additional $0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in a month. Consolidated Volume shall mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of an equity member's trading activity, expressed as a percentage of or ratio to Consolidated Volume, the date of the annual reconstitution of the Russell Investments Indexes shall be excluded from both total Consolidated Volume and the member's trading activity.

[16] For example, in SR–NASDAQ–2015–047, the Exchange proposed to make NOM Participants that added liquidity in Penny Pilot Stocks [sic] as a Customer or Professional eligible for the Tier 8 rebate if, among other things, the Participant has certified for the Investor Support Program set forth in Rule 7014, or if the Participant qualified for rebates under the Qualified Market Maker (''QMM'') Program set forth in Rule 7014. *See* Securities Exchange Act Release No. 74931 (May 12, 2015), 80 FR 28308 (May 18, 2015) (SR–NASDAQ–2015–047).

Currently, footnote c of the NOM fee schedule provides that Participants that (1) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.80% of total industry customer equity and ETF option ADV contracts per day in a month, (2) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Non-Penny Pilot Options above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month, and (3) execute greater than 0.04% of Consolidated Volume (''CV'') via Market-on-Close/Limit-on-Close (''MOC/LOC'') volume within the NASDAQ Stock Market Closing Cross within a month will receive an additional $0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in a month.

[17] For example, Nasdaq charges a reduced transaction fee of $0.00295 if the member adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.15% or more of total industry ADV in the customer clearing range for Equity and ETF option contracts per day in a month on NOM. *See* Nasdaq Rule 7018.

[18] Although a NOM Participant may incur additional labor and/or costs to establish connectivity to the NASDAQ Stock Market, there are no additional membership fees for NOM Participants that want to transact on the NASDAQ Stock Market.

or Non-Penny Pilot Options as either Customers or Professionals and also transact on the NASDAQ Stock Market, are equally capable of qualifying for the proposed rebates, and the same rebates will be paid to all NOM Participants that qualify for them.

Fourth, the Exchange believes that it is reasonable, equitable and not unfairly discriminatory to offer this rebate to NOM Participants that add liquidity as Customers or Professionals, and not to offer this rebate to NOM Participants that add liquidity as Firms,[19] NOM Market Makers,[20] non-NOM Market Makers, or Broker-Dealers.[21] Nasdaq notes that Customer liquidity offers unique benefits to the market which benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes that encouraging Participants to add Professional liquidity is similarly beneficial, as the rebates may cause market participants to select NOM as a venue to send Professional order flow, increasing competition among the exchanges. As with Customer liquidity, the Exchange believes that increased Professional additional order flow should benefit other market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The Exchange does not believe that the proposed rebates will impose any burden on competition that is not necessary or appropriate. The Exchange notes that the purpose of the proposed rebate is to incentivize NOM Participants to transact on the NASDAQ Stock Market. All similarly-situated NOM Participants, *e.g.,* those that add liquidity in either Penny Pilot or Non-Penny Pilot Options as either Customers or Professionals and also transact the requisite volumes on the NASDAQ Stock Market, are equally capable of qualifying for the proposed rebates. Additionally, the Exchange will pay the same rebates to all NOM Participants that qualify for them. The Exchange believes that Customer and Professional order flow provides unique benefits to all participants on the Exchange and may even facilitate inter-market competition, and is therefore offering the proposed rebates to NOM Participants that add liquidity as either a Customer or a Professional accordingly. With respect to linking the proposed rebates to a participant's activity on the NASDAQ Stock Market, NOM currently offers rebates that are based on activity on the NASDAQ Stock Market. Similarly, the NASDAQ Stock Market currently offers reduced transaction fees that are based on activity on NOM. Finally, because they are approved members, any NOM Options Participant may trade equities on the NASDAQ Stock Market and therefore attempt to qualify for the proposed rebates.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–166 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–166. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public

[19] The term ''Firm'' or (''F'') applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC.

[20] The term ''NOM Market Maker'' or (''M'') is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

[21] The term ''Broker-Dealer'' or (''B'') applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–166 and should be submitted on or before January 6, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–30259 Filed 12–15–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79524; File No. SR–NYSEArca–2016–156]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Commentary .02 to Rule 6.72

December 12, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 28, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .02 to Rule 6.72 in order to extend the Penny Pilot in options classes in certain issues (''Pilot Program'' or ''Pilot'') previously approved by the Securities and Exchange Commission (''Commission'') through June 30, 2017. The Pilot Program is currently scheduled to expire on December 31, 2016. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the Pilot Program,[4] which is currently scheduled to expire on December 31, 2016, until June 30, 2017.[5] The Exchange believes that extending the Pilot would allow for further analysis of the Pilot Program and a determination of how the Pilot Program should be structured in the future.

During this extension of the Pilot, as is the case today, the Exchange may replace any option class that is currently included in the Pilot Program and that has been delisted with the next most actively traded, multiply listed option class that is not yet participating in the Pilot Program (''replacement class''). In light of the extension, the Exchange also proposes that any replacement class would be determined based on national average daily volume in the preceding six months, and would be added on the second trading day following January 1, 2017.[6]

This filing does not propose any substantive changes to the Pilot Program: All classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[7] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

In particular, the proposed rule change, which extends the Penny Pilot Program for six months, allows the Exchange to continue to participate in a program that has been viewed as beneficial to traders, investors and public customers and viewed as successful by the other options exchanges participating in it. Accordingly, the Exchange believes that the proposal is consistent with the Act because it would allow the Exchange to extend the Pilot Program prior to its expiration on December 31, 2016. The Exchange notes that this proposal does not propose any new policies or provisions that are unique or unproven, but instead relates to the continuation of an existing program that operates on a pilot basis.

The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options to the benefit of all market participants.

The proposal to extend the Pilot Program is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 34–55156 (January 23, 2007), 72 FR 4759 (February 1, 2007) (SR–NYSEArca–2006–73) (original approval of Pilot). The Pilot has been extended several times since the original approval, the most recent extension was obtained in earlier this year. *See* Securities Exchange Act Release No. 78174 (June 28, 2016), 81 FR 43332 (July 1, 2016) (SR–NYSEArca–2016–88) (most recent extension of the Pilot until December 31, 2016).

[5] *See* proposed Commentary .02 to Rule 6.72.

[6] *See id.* The month immediately preceding a replacement class's addition to the Pilot Program (*i.e.,* December) would not be used for purposes of the analysis for determining the replacement class. Thus, a replacement class to be added on the second trading day following January 1, 2017 would be identified based on The Option Clearing Corporation's trading volume data from June 1, 2016 through November 30, 2016. The Exchange will announce the replacement issues to the Exchange's membership through a Trader Update.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanisms of a free and open market and a national market system, by allowing the Exchange and the Commission additional time to analyze the impact of the Pilot Program while also allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot Program.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that, by extending the expiration of the Pilot Program, the proposed rule change would allow for further analysis of the Pilot Program and a determination of how the Program should be structured in the future. In doing so, the proposed rule change would also serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection. The Pilot Program is an industry-wide initiative supported by all other option exchanges. The Exchange believes that extending the Pilot Program would allow for continued competition between Exchange market participants trading similar products as their counterparts on other exchanges, while at the same time allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot Program.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–156 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–156. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–156 and should be submitted on or before January 6, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Assistant Secretary.

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[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this pre-filing requirement.

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79530; File No. SR–ISE–2016–29]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change To Amend ISE Rule 723 and To Make Pilot Program Permanent

December 12, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2016, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE Rule 723, concerning its Price

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Improvement Mechanism (''PIM''). Certain aspects of PIM are currently operating on a pilot basis (''Pilot''), which was initially approved by the Commission in 2004,[3] and which is set to expire on January 18, 2017.[4] The Pilot concerns (i) the termination of the exposure period by unrelated orders; and (ii) no minimum size requirement of orders eligible for PIM. ISE seeks to make the Pilot permanent, and also proposes to change the requirements for providing price improvement for Agency Orders of less than 50 option contracts.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to make permanent certain pilots within Rule 723, relating to PIM. Paragraph .03 of the Supplementary Material to Rule 723 provides that there is no minimum size requirement for orders to be eligible for PIM. Paragraph .05 concerns the termination of the exposure period by unrelated orders. In addition, ISE proposes to modify the requirements for PIM auctions involving less than 50 contracts (other than auctions involving Complex Orders) where the National Best Bid and Offer (''NBBO'') is only $0.01 wide.

Background

The Exchange adopted PIM in 2004 as a price-improvement mechanism on the Exchange.[5] The PIM is a process that allows Electronic Access Members (''EAM'') to provide price improvement opportunities for a transaction wherein the Member seeks to execute an agency order as principal or execute an agency order against a solicited order (a ''Crossing Transaction''). A Crossing Transaction is comprised of the order the EAM represents as agent (the ''Agency Order'') and a counter-side order for the full size of the Agency Order (the ''Counter-Side Order''). The Counter-Side Order may represent interest for the Member's own account, or interest the Member has solicited from one or more other parties, or a combination of both.

Rule 723 sets forth the criteria pursuant to which the PIM is initiated. Specifically, a Crossing Transaction must be entered only at a price that is equal to or better than the national best bid or offer (''NBBO'') and better than the limit order or quote on the ISE order book on the same side of the Agency Order. The Crossing Transaction may be priced in one-cent increments. The Crossing Transaction may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period.

Rule 723 also sets forth requirements relating to the exposure of orders in PIM and the termination of the exposure period. Upon entry of a Crossing Transaction into the Price Improvement Mechanism, a broadcast message that includes the series, price and size of the Agency Order, and whether it is to buy or sell, will be sent to all Members. This broadcast message will not be included in the ISE disseminated best bid or offer and will not be disseminated through OPRA. Members will be given 500 milliseconds to indicate the size and price at which they want to participate in the execution of the Agency Order (''Improvement Orders''). Improvement Orders may be entered by all Members for their own account or for the account of a Public Customer in one-cent increments at the same price as the Crossing Transaction or at an improved price for the Agency Order, and for any size up to the size of the Agency Order. During the exposure period, Improvement Orders may not be canceled, but may be modified to (1) increase the size at the same price, or (2) improve the price of the Improvement Order for any size up to the size of the Agency Order. During the exposure period, responses (including the Counter Side Order, Improvement Orders, and any changes to either) submitted by Members shall not be visible to other auction participants. The exposure period will automatically terminate (i) at the end of the 500 millisecond period, (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange.

Rule 723 also describes how orders will be executed at the end of the exposure period. Specifically, at the end of the exposure period, the Agency Order will be executed in full at the best prices available, taking into consideration orders and quotes in the Exchange market, Improvement Orders, and the Counter-Side Order. The Agency Order will receive executions at multiple price levels if there is insufficient size to execute the entire order at the best price. At a given price, Priority Customer interest is executed in full before Professional Orders and any other interest of Members (*i.e.,* proprietary interest from Electronic Access Members and Exchange market makers).

After Priority Customer interest at a given price, Professional Orders and Members' interest will participate in the execution of the Agency Order based upon the percentage of the total number of contracts available at the price that is represented by the size of the Members' interest.

In the case where the Counter-Side Order is at the same price as Members' interest (after Priority Customer interest at a given price), the Counter-Side order will be allocated the greater of one (1) contract or forty percent (40%) of the initial size of the Agency Order before other Member interest is executed. Upon entry of Counter-Side orders, Members can elect to automatically match the price and size of orders, quotes and responses received during the exposure period up to a specified

[3] *See* Securities Exchange Act Release No. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (SR–ISE–2003–06) (''PIM Approval Order'').

[4] *See* Securities Exchange Act Release No. 78344 (July 15, 2016), 81 FR 47459 (July 21, 2016) (SR–ISE–2016–17).

[5] In addition to the PIM Approval Order and the most recent extension cited above, the following proposed rule changes have been submitted in connection with PIM. *See* Securities Exchange Act Release Nos. 52027 (July 13, 2005), 70 FR 41804 (July 20, 2005) (SR–ISE–2005–30); 54146 (July 14, 2006), 71 FR 41490 (July 21, 2006) (SR–ISE–2006–39); 56106 (July 19, 2007), 72 FR 40914 (July 25, 2007) (SR–ISE–2007–62); 56156 (July 27, 2007), 72 FR 43305 (August 3, 2007) (SR–ISE–2007–66); 58197 (July 18, 2008), 73 FR 43810 (July 28, 2008) (SR–ISE–2008–60); 60333 (July 17, 2009), 74 FR 36792 (July 24, 2009) (SR–ISE–2009–52); 62513 (July 16, 2010), 75 FR 43221 (July 23, 2010) (SR–ISE–2010–75); 64931 (July 20, 2011), 76 FR 44642 (July 26, 2011) (SR–ISE–2011–41); 67202 (June 14, 2012), 77 FR 36589 (June 19, 2012) (SR–ISE–2012–54); 69853 (June 25, 2013), 78 FR 39390 (July 1, 2013) (SR–ISE–2013–41); 72467 (June 25, 2014), 79 FR 37377 (July 1, 2014) (SRISE–2014–33); 75482 (July 17, 2015), 80 FR 43807 (July 23, 2015) (SR–ISE–2015–23).

limit price or without specifying a limit price. In this case, the Counter-Side order will be allocated its full size at each price point, or at each price point within its limit price if a limit is specified, until a price point is reached where the balance of the order can be fully executed. At such price point, the Counter-Side order shall be allocated the greater of one contract or forty percent (40%) of the original size of the Agency Order, but only after Priority Customer Orders at such price point are executed in full. Thereafter, all other orders, Responses, and quotes at the price point will participate in the execution of the Agency Order based upon the percentage of the total number of contracts available at the price that is represented by the size of the order, Response or quote. An election to automatically match better prices cannot be cancelled or altered during the exposure period.

When a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Transactions will be rounded, when necessary, to the $0.01 increment that favors the Agency Order.

The Pilot

As described above, two components of PIM are currently operating on a pilot basis: (i) The termination of the exposure period by unrelated orders; and (ii) no minimum size requirement of orders entered into PIM. The pilot has been extended until January 18, 2017.[6]

As described in greater detail below, during the pilot period the Exchange has been required to submit, and has been submitting, certain data periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange both within PIM and outside of the Auction mechanism. The Exchange has also analyzed the impact of certain aspects of the Pilot; for example, situation in which PIM is terminated prematurely by an unrelated order.

The Exchange now seeks to have the Pilot approved on a permanent basis. In addition, the Exchange proposes to modify the scope of PIM so that, with respect to PIM orders for less than 50 option contracts, members will be required to receive price improvement of at least one minimum price improvement increment over the NBBO if the NBBO is only $0.01 wide. For orders of 50 contracts or more, or if the difference in the NBBO is greater than $0.01, and for Complex Orders, the requirements for price improvement remain the same.

Price Improvement for Orders Under 50 Contracts

Currently, the PIM may be initiated if all of the following conditions are met. A Crossing Transaction must be entered only at a price that is equal to or better than the NBBO and better than the limit order or quote on the ISE order book on the same side of the Agency Order. The Crossing Transaction may be priced in one-cent increments. The Crossing Transaction may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period.

ISE proposes to amend Rule 723(b) to require Electronic Access Members to provide at least $0.01 price improvement for an Agency Order if that order is for less than 50 contracts and if the difference between the NBBO is $0.01. For the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than July 15, 2017, ISE will adopt a member conduct standard to implement this requirement.[7] Under this provision, ISE is proposing to amend the Auction Eligibility Requirements to require that, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is $0.01, an Electronic Access Member shall not enter a Crossing Transaction unless such Crossing Transaction is entered at a price that is one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, and better than any limit order on the limit order book on the same side of the market as the Agency Order. This requirement will apply regardless of whether the Agency Order is for the account of a public customer, or where the Agency Order is for the account of a broker dealer or any other person or entity that is not a Public Customer.

To enforce this requirement, ISE also proposes to amend Rule 1614 (Imposition of Fines for Minor Rule Violations). Specifically, ISE will add Rule 1614(d)(4), which will provide that any Member who enters an order into PIM for less than 50 contracts, while the National Best Bid or Offer spread is $0.01, must provide price improvement of at least one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, which increment may not be smaller than $0.01. Failure to provide such price improvement will result in members being subject to the following fines: $500 for the second offense, $1,000 for the third offense, and $2,500 for the fourth offense. Subsequent offenses will subject the member to formal disciplinary action. The Exchange will review violations on a monthly cycle to assess these violations. This provision shall also be in effect for the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than until September 15, 2017.[8]

The Exchange will conduct electronic surveillance of PIM to ensure that members comply with the proposed price improvement requirements for option orders of less than 50 contracts. Specifically, using an electronic surveillance system that produces alerts of potentially unlawful PIM orders, the Exchange will perform a frequent review of member firm activity to identify instances of apparent violations. Upon discovery of an apparent violation, the Exchange will attempt to contact the appropriate member firm to communicate the specifics of the apparent violation with the intent to assist the member firm in

[6] *See* note 4 above.

[7] The Exchange notes that its indirect parent company, U.S. Exchange Holdings, Inc. has been acquired by Nasdaq, Inc. *See* Securities Exchange Act Release No. 78119 (June 21, 2016), 81 FR 41611 (June 27, 2016) (SR–ISE–2016–11). Pursuant to this acquisition, ISE platforms are migrating to Nasdaq platforms, including the platform that operates PIM. ISE intends to retain the proposed member conduct standard requiring price improvement for options orders of under 50 contracts where the difference between the NBBO is $0.01 until the ISE platforms and the corresponding symbols are migrated to the platforms operated by Nasdaq, Inc.

[8] As noted above, ISE will be eliminating the member conduct standard requiring price improvement for options orders of under 50 contracts, where the difference between the NBBO is $0.01, by July 15, 2017. However, ISE Mercury, LLC (''ISE Mercury'') is filing a rule change that adopts a similar member conduct standard, and that references proposed ISE Rule 1614(d)(4) as the means for enforcing its member conduct standard. ISE Mercury is proposing that its member conduct standard shall be in effect until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than September 15, 2017. Accordingly, ISE is proposing that the date for eliminating Rule 1614(d)(4) shall be specified by the Exchange in a Regulatory Information Circular, which date shall be no later than until September 15, 2017.

preventing submission of subsequent problematic orders. The Exchange will review the alerts monthly and determine the applicability of the MRVP and appropriate penalty. The Exchange is not limited to the application of the MRVP, and may at its discretion, choose to escalate a matter for processing through the Exchange's disciplinary program.

The Exchange is also proposing a systems-based mechanism to implement this price improvement requirement, which shall be effective following the migration of a symbol to INET, the platform operated by Nasdaq, Inc. that will also operate the PIM. Under this provision, if the Agency Order is for less than 50 option contracts, and if the difference between the National Best Bid and National Best Offer (''NBBO'') is $0.01, the Crossing Transaction must be entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order and better than the limit order or quote on the ISE order book on the same side of the Agency Order.

The Exchange believes that these changes to PIM may provide additional opportunities for Agency Orders of under 50 option contracts to receive price improvement over the NBBO where the difference in the NBBO is $0.01. ISE notes that the statistics for the current pilot, which include, among other things, price improvement for orders of less than 50 option contracts under the current auction eligibility requirements, show relatively small amounts of price improvement for such orders. ISE believes that the proposed requirements will therefore increase the price improvement that orders of under 50 option contracts may receive in PIM.

The Exchange will retain the current requirements for auction eligibility where the Agency Order is for 50 option contracts or more, or if the difference between the NBBO is greater than $0.01. Accordingly, the Exchange is amending the Auction Eligibility Requirements to state that, if the PIM Order is for 50 option contracts or more or if the difference between the NBBO is greater than $0.01, the Crossing Transaction must be entered only at a price that is equal to or better than the NBBO and better than the limit order or quote on the ISE order book on the same side as the Agency Order.

No Minimum Size Requirement

Supplemental Material .03 to Rule 723 provides that, as part of the current Pilot, there will be no minimum size requirement for orders to be eligible for the Auction.[9] The Exchange proposed the no-minimum size requirement for the PIM because it believed that this would provide small customer orders with the opportunity to participate in the PIM and to receive corresponding price improvement. In initially approving the PIM, the Commission noted that the no minimum size requirement provided an opportunity for more market participants to participate in the auction. The Commission also stated that it would evaluate PIM during the Pilot Period to determine whether it would be beneficial to customers and to the options market as a whole to approve any proposal requesting permanent approval to permit orders of fewer than 50 contracts to be submitted to the PIM.[10]

As noted above, throughout the Pilot, the Exchange has been required to submit certain data periodically to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange both within PIM and outside of the Auction mechanism.

The Exchange believes that the data gathered since the approval of the Pilot establishes that there is liquidity and competition both within PIM and outside of PIM, and that there are opportunities for significant price improvement within PIM.[11]

In the period between January and June 2016, the PIM executed a total of 7.12 million contracts, which represented 2.86% of total ISE contract volume and 0.35% of industry volume. The percent of ISE volume traded in PIM ranged from 2.24% in June 2016 to 3.59% in February 2016. For complex orders, in January 2016, 25,854 complex orders of greater than 50 contracts were entered into PIM, which represents 0.18% of total ISE volume.

The Exchange compiled price improvement data in simple PIM orders from January through June 2016 that divides the data into the following groups: (1) Orders of over 50 contracts where the Agency Order was on behalf of a Public Customer and ISE was at the NBBO; (2) orders of over 50 contracts where the Agency Order was on behalf of a Public Customer and ISE was not at the NBBO; (3) orders of over 50 contracts where the Agency Order was on behalf of a non-customer and ISE was at the NBBO; (4) orders of over 50 contracts where the Agency Order was on behalf of a non-customer and ISE was not at the NBBO; (5) orders of 50 contracts or less where the Agency Order was on behalf of a Public Customer and ISE was at the NBBO; (6) orders of 50 contracts or less where the Agency Order was on behalf of a Public Customer and ISE was not at the NBBO; (7) orders of 50 contracts or less where the Agency Order was on behalf of a non-customer and ISE was at the NBBO; and (8) orders of 50 contracts or less where the Agency Order was on behalf of a non-customer and ISE was not at the NBBO.

For January 2016, where the order was on behalf of a Public Customer, the order was for 50 contracts or less, and ISE was at the NBBO, the most contracts traded (194,249) occurred when the spread was between $0.05 and $0.10.[12] Of these, the greatest number of contracts (43,888) received no price improvement. There was an average number of five participants when the spread was between $0.05 and $0.10. When the spread was $0.01 for this same category, a total of 17,202 contracts traded; 16,032 contracts received no price improvement, and 1,170 received $0.01 price improvement. There was an average number of three participants when the spread was $0.01.

In comparison, in January 2016, where the order was on behalf of a Public Customer, and the order was for greater than 50 contracts, and ISE was at the NBBO, the most contracts traded (14,078) occurred where the spread was between $0.10 and $0.20. Of those contracts, the greatest number of

[9] The provision relating to the no minimum size requirement also requires the Exchange to submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the PIM, that there is significant price improvement for all orders executed through the PIM, and that there is an active and liquid market functioning on the Exchange outside of the PIM. Any raw data which is submitted to the Commission will be provided on a confidential basis.

[10] *See* PIM Approval Order, *supra* note 3.

[11] Specifically, the Exchange gathered and reported nine separate data fields relating to simple PIM orders of fewer than 50 contracts, including (1) the number of orders of fewer than 50 contracts entered into the PIM; (2) the percentage of all orders of fewer than 50 contracts sent to ISE that are entered into the PIM; (3) the spread in the option, at the time an order of fewer than 50 contracts is submitted to the PIM; and (4) of PIM trades, the percentage done at the NBBO plus $.01, plus $.02, plus $.03, etc. *See* PIM Approval Order, *supra* note 3.

[12] This discussion of January 2016 data is intended to be illustrative of data that was gathered between January 2016 and July 2016. The complete underlying data for January 2016 through June 2016 for these eight categories is attached as Exhibit 3a for simple orders entered in PIM, and Exhibit 3b for complex orders entered in PIM.

contracts (6,254) received price improvement of $0.05 to $0.10, and 44 contracts received no price improvement. There was an average number of 6 participants where the spread was between $0.10 and $0.20.

In January 2016, where the order was on behalf of a Public Customer, the order was for 50 contracts or less, and ISE was not at the NBBO, the most contracts traded (76,326) occurred when the spread was between $0.05 and $0.10. Of these contracts, the greatest number of contracts (18,008) received no price improvement. There was an average number of four participants when the spread was between $0.05 and $0.10. In comparison, when the spread was $0.01 in this same category, a total of 17,687 contracts traded; 17,270 of those contracts received no price improvement, and 417 of those contracts received $0.01 price improvement. There was an average number of three participants when the spread was $0.01.

In comparison, in January 2016, where the order was on behalf of a Public Customer, the order was for greater than 50 contracts, and ISE was not at the NBBO, the most contracts traded (10,541) occurred when the spread was between $0.10 and $0.20. Of these contracts, the greatest number (3,738) received price improvement of $0.05 to $0.10. There was an average number of 6 participants where the spread was between $0.10 and $0.20.

In January 2016, the greatest number of complex orders traded (2,139) traded when the spread was at $0.05. Of those orders, 181 represented orders of 50 or fewer contracts. During that period, the highest percentage (29.30%) of orders of greater than 50 contracts received $0.01 price improvement, and the highest percentage (20.4%) received no price improvement. For orders of greater than 50 contracts, the greatest number of orders (436) executed where there were no participants (besides the Electronic Access Member that entered the order). For orders of less than 50 contracts, the greatest number of orders (15) executed when there were no participants.

ISE believes that the data gathered during the Pilot period indicates that there is meaningful competition in PIM auctions for all size orders, there is an active and liquid market functioning on the Exchange outside of the auction mechanism, and that, coupled with the proposed requirements for price improvement for options orders of under 50 contracts, there are opportunities for significant price improvement for orders executed through PIM. The Exchange therefore believes that it is appropriate to approve the no-minimum size requirement on a permanent basis.

Early Conclusion of the PIM Auction

Supplemental Material .05 to Rule 723 provides that Rule 723(c)(5) and Rule 723(d)(4), which relate to the termination of the exposure period by unrelated orders shall be part of the current Pilot. Rule 723(c)(5) provides that the exposure period will automatically terminate (i) at the end of the 500 millisecond period,[13] (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange. Rule 723(d)(4) provides that, when a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement. Transactions will be rounded, when necessary, to the $.01 increment that favors the Agency Order.[14]

As with the no minimum size requirement, the Exchange has gathered data on these three conditions to assess the effect of early PIM Auction conclusions on the Pilot.[15]

For the period from January 2016 through June 2016, there were a total of 673 early terminated auctions. The number of orders in early terminated PIM auctions constituted 0.15% of total PIM orders. There were a total of 9,595 contracts that traded through early terminated auctions. The number of contracts in early terminated PIM auctions represented 0.13% of total PIM contracts. Of the early terminated auctions, 49.93% of those auctions

[13] As initially approved, this provision of Rule 723(c)(5) provided that the exposure period would automatically terminate at the end of the three second period. *See* Securities Exchange Act Release No. 49323 (February 26, 2004), 69 FR 10087 (March 3, 2004) (Notice of filing for SR–ISE–2003–06). This exposure period was subsequently reduced to one second, and then to the current 500 milliseconds. *See* Securities Exchange Act Release Nos. 58224 (July 25, 2008), 73 FR 44303 (July 30, 2008) (SR–ISE–2007–94); 68849 (February 6, 2013), 78 FR 9973 (February 12, 2013) (SR–ISE–2012–100). The Exchange notes that it is proposing to further modify the exposure period to a time period of no less than 100 milliseconds and no more than one second. *See* Securities Exchange Act Release No. 79352 (November 18, 2016), 81 FR 85277 (November 25, 2016) (SR–ISE–2016–26).

[14] When the Pilot was initially approved, there were two sections of Rule 723(d) that were approved on a pilot basis. Rule 723(d)(5) was approved on a pilot basis, which was subsequently re-numbered as current Rule 723(d)(4). *See* Securities Exchange Act Release No. 72554 (July 8, 2014), 79 FR 40830 (July 14, 2014) (SR–ISE–2014–35). Rule 723(d)(6) was also approved on a pilot basis, but was subsequently deleted as that functionality was no longer offered on the Exchange. *See* Securities Exchange Act Release No. 68570 (January 3, 2013) (SR–ISE–2012–82).

[15] The Exchange agreed to gather and submit the following data on this part of the Pilot: (1) The number of times that a market or marketable limit order in the same series on the same side of the market as the Agency Order prematurely ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (2) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the same side of the market that occurred within a ½ second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and ½ second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and ½ seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; (3) the number of times that a market or marketable limit order in the same series on the opposite side of the market as the Agency Order prematurely ended the PIM auction and at what time the unrelated order ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (4) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the opposite side of the market that occurred within a ½ second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and ½ second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and ½ seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; (5) the number of times that a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange prematurely ended the PIM auction and at what time the unrelated order ended the PIM auction, and the number of times such orders were entered by the same (or affiliated) firm that initiated the PIM that was terminated; (6) the percentage of PIM early terminations due to the receipt of a market or marketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange that occurred within a ½ second of the start of the PIM auction; the percentage that occurred within one second of the start of the PIM auction; the percentage that occurred within one and ½ second of the start of the PIM auction; the percentage that occurred within 2 seconds of the start of the PIM auction; the percentage that occurred within 2 and ½ seconds of the PIM auction; and the average amount of price improvement provided to the Agency Order where the PIM is terminated early at each of these time periods; and (7) the average amount of price improvement provided to the Agency Order when the PIM auction is not terminated early (*i.e.,* runs the full three seconds). *See* PIM Approval Order, *supra* note 3.

received price improvement, and 37.31% of contracts that traded in an early-terminated auction received price improvement. Of the PIM auctions that terminated early and received price improvement from January 2016 through June 2016, the total amount of price improvement received was $185.11.

For complex orders, in January 2016, one order terminated early, and the PIM period upon termination was greater than or equal to 0.5 seconds. That order received $0.005 price improvement.

Based on the data gathered during the pilot, the Exchange does not anticipate that any of these conditions will occur with significant frequency in either simple or complex orders, or will otherwise significantly affect the functioning of the PIM. The Exchange also notes 49.93% of auctions in simple orders that terminated early received price improvement, and that, for simple orders, 37.31% of the contracts in auctions that terminated early received price improvement, with a total price improvement of $185.11. The Exchange therefore believes it is appropriate to approve this aspect of the Pilot on a permanent basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[16] in general and with Section 6(b)(5) of the Act,[17] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act [18] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Specifically, the Exchange believes that PIM, including the rules to which the Pilot applies, results in increased liquidity available at improved prices, with competitive final pricing out of the complete control of the Electronic Access Member that initiated the auction. The Exchange believes that PIM promotes and fosters competition and affords the opportunity for price improvement to more options contracts. The Exchange believes that the changes to the PIM requiring price improvement of at least one minimum price improvement increment over the NBBO for Agency Orders of less than 50 option contracts where the difference in the NBBO is $0.01 will provide further price improvement for those orders, and thereby encourage additional submission of those orders into PIM. The Exchange believes that the proposal, which subjects members to the Minor Rule Violation Plan for failing to provide the required price improvement, coupled with the Exchange's surveillance efforts, are designed to facilitate members' compliance with the proposed requirement.

The Exchange believes that approving the Pilot on a permanent basis is also consistent with the Act. With respect to the no minimum size requirement, the Exchange believes that the data gathered during the Pilot period indicates that there is meaningful competition in the PIM for all size orders, there is an active and liquid market functioning on the Exchange outside of the auction mechanism, and that there are opportunities for significant price improvement for orders executed through PIM, including for small customer orders.

With respect to the early termination of the PIM, the Exchange believes that it is appropriate to terminate an auction (i) at the end of the 500 millisecond period, (ii) upon the receipt of a market or marketable limit order on the Exchange in the same series, or (iii) upon the receipt of a nonmarketable limit order in the same series on the same side of the market as the Agency Order that would cause the price of the Crossing Transaction to be outside of the best bid or offer on the Exchange. Based on the data gathered during the pilot, the Exchange does not anticipate that any of these conditions will occur with significant frequency for either simple or complex orders, or will otherwise disrupt the functioning of the PIM. The Exchange also notes that a significant percentage of contracts in auctions that terminated early received price improvement. The Exchange also believes that it is consistent with the Act to require that, when a market order or marketable limit order on the opposite side of the market from the Agency Order ends the exposure period, it will participate in the execution of the Agency Order at the price that is mid-way between the best counter-side interest and the NBBO, so that both the market or marketable limit order and the Agency Order receive price improvement.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposal will apply to all Exchange members, and participation in the PIM process is completely voluntary. Based on the data collected by the Exchange during the Pilot, the Exchange believes that there is meaningful competition in the PIM for all size orders, there are opportunities for significant price improvement for orders executed through PIM, and that there is an active and liquid market functioning on the Exchange outside of the PIM. The Exchange believes that requiring increased price improvement for Agency Orders may encourage competition by attracting additional orders to participate in the PIM. The Exchange believes that approving the Pilot on a permanent basis will not significantly impact competition, as the Exchange is proposing no other change to the Pilot beyond implementing it on a permanent basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[16] 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2016–29 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2016–29. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2016–29 and should be submitted on or before January 6, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–30257 Filed 12–15–16; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79531; File No. SR–BOX–2016–58]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing of Proposed Rule Change To Amend Interpretive Material to Rule 7150 (Price Improvement Period "PIP") and Interpretive Material to Rule 7245 (Complex Order Price Improvement Period "COPIP") To Make Permanent the Pilot Programs That Permit the Exchange To Have No Minimum Size Requirement for Orders Entered Into the PIP ("PIP Pilot Program") and COPIP ("COPIP Pilot Program")

December 12, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2016, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Interpretive Material to Rule 7150 (Price Improvement Period ''PIP'') and Interpretive Material to Rule 7245 (Complex Order Price Improvement Period ''COPIP'') to make permanent the pilot programs that permit the Exchange to have no minimum size requirement for orders entered into the PIP (''PIP Pilot Program'') and COPIP (''COPIP Pilot Program''). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the BOX Rules to make permanent the pilot programs that permit the Exchange to have no minimum size requirement for orders entered into the PIP (''PIP Pilot Program'') and COPIP (''COPIP Pilot Program''), collectively known as the (''Programs''). In addition, BOX proposes to modify the requirements for the PIP where the National Best Bid and Offer (''NBBO'') is only $0.01 wide.

Background

The PIP Pilot Program was approved on a pilot basis with the establishment of BOX and the PIP in January 2004 [3] and the COPIP Pilot Program was approved on a pilot basis with introduction of the COPIP in December 2013.[4] Both Programs are scheduled to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR–BSE–2003–04) (''Order Granting Approval to Proposed Rule Change and Amendment No. 3 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 4 Thereto by the Boston Stock Exchange, Inc. Establishing Trading Rules for the Boston Options Exchange Facility''); 66871 (April 27, 2012) 77 FR 26323 (May 3, 2012) (File No. 10–206, In the Matter of the Application of BOX Options Exchange LLC for Registration as a National Securities Exchange Findings, Opinion, and Order of the Commission), 67255 (June 26, 2012) 77 FR 39315 (July 2, 2013) (SR–BOX–2012–009) (Notice of Filing and Immediate Effectiveness of a Proposal To Extend a Pilot Program That Permits BOX to Have No Minimum Size Requirement for Orders Entered Into the Price Improvement Period), 69846 (June 25, 2013) 78 FR 39365 (July 1, 2013) (SR–BOX–2013–33) (Notice of Filing and Immediate Effectiveness of a Proposal To Extend a Pilot Program That Permits BOX to Have No Minimum Size Requirement for Orders Entered Into the Price Improvement Period), 72545 (July 7, 2014), 79 FR 40182 (July 11, 2014) (SR–BOX–2014–19) (Notice of Filing and Immediate Effectiveness of a Proposal To Extend a Pilot Program That Permits BOX to Have No Minimum Size Requirement for Orders Entered Into the Price Improvement Period and Complex Order Price Improvement Period), 75480 (July 17, 2015), 80 FR 43803 (July 23, 2015) (SR–BOX–2015–27) (Notice of Filing and Immediate Effectiveness of a Proposal To Extend a Pilot Program That Permits BOX to Have No Minimum Size Requirement for Orders Entered Into the Price Improvement Period and Complex Order Price Improvement Period).

[4] *See* Securities Exchange Act Release No. 71148 (December 19, 2013) 78 FR 78437 (December 26, 2013) (Notice of Filing of Amendment Nos. 1 and

Continued

expire on January 18, 2017.[5] The Exchange believes that both the PIP and COPIP Pilot Programs have been successful and well-received by Participants and the investing public.

The PIP and COPIP Pilot Programs guarantee Participants the right to trade with their customer orders that are less than 50 contracts. In particular, any order entered into the PIP is guaranteed an execution at the end of the auction at a price at least equal to the NBBO. Any order entered into the COPIP is guaranteed an execution at the end of the auction at a price at least equal to or better than the cNBBO,[6] cBBO[7] and BBO on the Complex Order Book for the Strategy at the time of commencement.

BOX first introduced the PIP auction process for obtaining customer price improvement to the options market place when it launched in 2004. As part of BOX's commitment to price improvement, the Exchange sought to provide small customer orders with benefits not available under the rules of the other exchanges by having no minimum size requirements for orders entered into the PIP. After concerns were raised that this lack of size requirement would promote internalization and inferior price improvement within the PIP and also lead to reduced order flow and market quality on the regular BOX Book,[8] BOX began the PIP Pilot Program.

In June of 2005 concerns were also raised when BOX introduced Market Orders[9] to the Exchange and detailed how these orders, as well BOX-Top Orders,[10] would be treated when entered while a PIP is in progress. Specifically, submission to BOX of a Market Order or BOX-Top Order on the same side as a PIP Order prematurely terminates the PIP when, at the time of submission of the Market Order or BOX-Top Order, the best Improvement Order is equal to or better than the NBBO on the same side of the market as the best Improvement Order. The Commission was concerned that this premature termination of the PIP could result in a PIP Order being disadvantaged by the early conclusion of a PIP, in that the PIP Order would not have received the full exposure period in which to receive price improvement. BOX then agreed to include in its monthly reports additional information with respect to situations in which the PIP is terminated prematurely or a Market Order or BOX-Top Order interacts with a PIP Order before the PIP's conclusion.[11]

The Exchange then established the COPIP in January 2014 to further BOX's commitment to price improvement.[12] The COPIP mechanism allows Complex Orders to be submitted to the COPIP in substantially the same manner as orders for single options series instruments currently are submitted to the PIP. Because of the similarities between the PIP and COPIP, the Exchange proposed a COPIP Pilot Program and agreed to provide certain information, periodically as required by the Commission, to support that, among other things, there is meaningful competition for all size COPIP orders, that there is significant price improvement for all orders executed through the COPIP and that an active and liquid market is functioning on BOX outside of the COPIP mechanism.

PIP Pilot Program

The Exchange believes that the data submitted to the Commission on a monthly and confidential basis for the PIP Pilot Program, as well as the data reference [sic] below covering January through June 2015 establishes that it has not placed an undue burden on competition; lessened the amount of price improvement in the PIP; nor reduced order flow and liquidity to the BOX Book. The Exchange therefore believes that it appropriate to approve the no minimum size requirement on a permanent basis. In fact, since the launch of the PIP customers have received over $841 million in savings through better executions on BOX, including $12.6 million in October 2016. Order flow and liquidity on BOX has also remained strong through this entire period, with an average daily volume of approximately 434,000 contracts for the first six ten months of 2016. Further, many of the exchanges which first raised concerns have recognized the benefits of price improvement auctions, and have adopted similar mechanisms with no minimum order size since 2004.[13] Approving the PIP Pilot Program on a permanent basis will allow the PIP to continue to offer meaningful price improvement and will not have an adverse effect on the market functioning on the Exchange outside of the PIP.

The Exchange provided the Commission with a summary report, included herein as Exhibit 3, which demonstrates the price improvement benefits of the PIP. Specifically, the Report contains eight categories of non-customer and customer auction data, as well as three categories of summary auction data, during the period January 2015 through June 2015. Each of the eight categories is divided into subcategories based on the spread of the NBBO at the time an auction was initiated. The data is further divided into the number of orders that were

2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Permit Complex Orders to Participate in Price Improvement Periods).

[5] *See* Securities Exchange Act Release No. 78353 (July 18, 2016), 81 FR 47843 (July 22, 2016) (SR–BOX–2016–32).

[6] As defined in BOX Rule 7240(a)(3), the term ''cNBBO'' means the best net bid and offer price for a Complex Order Strategy based on the NBBO for the individual options components of such Strategy.

[7] As defined in BOX Rule 7240(a)(1), the term ''cBBO'' means the best net bid and offer price for a Complex Order Strategy based on the BBO on the BOX Book for the individual options components of such Strategy.

[8] *See* September 12, 2003 Letter from Michael J. Simon, Vice President and Secretary, ISE, to Jonathan Katz, Secretary, Commission regarding SR–BSE–2002–15; and *see generally* letters to Jonathan Katz, Secretary, Commission regarding SR–BSE–2002–15, February 28, 2003 Letter from Philip DeFeo, Chairman and Chief Executive Officer, PCX; February 14, 2003 Letter from William Brodsky, Chairman and Chief Executive Officer, CBOE; February 14, 2003 Letter from Michael Ryan, General Counsel, AMEX; February 12, 2003 Letter from Michael J. Simon, Secretary, ISE; February 12, 2003 Letter from Meyer S. Frucher, Chairman and Chief Executive Officer, PHLX.

[9] *See* Securities Exchange Act Release No. 51821 (June 10, 2005), 70 FR 35143 (June 16, 2005) (Order Approving SR–BSE–2004–51).

[10] BOX-Top Orders have since been removed from the BOX Rulebook. *See* Securities Exchange Act Release No. 71374 (January 23, 2014), 79 FR 4783 (January 29, 2014) (Notice of Filing and Immediate Effectiveness of SR–BOX–2014–05).

[11] *See supra,* note 9.

[12] *See* Securities Exchange Act Release No. 71148 (December 19, 2013), 78 FR 78437 (December 26, 2013) (Order Approving SR–BOX–2013–43).

[13] *See* Securities Exchange Act Release Nos. 53222 (February 3, 2006), 71 FR 7089 (February 10, 2006) (SR–CBOE–2005–60) (Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 to the Proposed Rule Change Relating to an Automated Improvement Mechanism); 63238 (November 3, 2010), 75 FR 68844 (November 9, 2010) (SR–C2–2010–008) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Update Rules Based on Chicago Board Options Exchange, Inc. Rules and Recent Chicago Board Options Exchange, Inc. Rule Filings); 72009 (April 23, 2014), 79 FR 24032 (April 29, 2014) (SR–MIAX–2014–09) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt the MIAX PRIME Price Improvement Mechanism and the MIAX PRIME Solicitation Mechanism); 63027 (October 1, 2010), 75 FR 62160 (October 7, 2010) (SR–Phlx–2010–108) (Order Granting Approval to a Proposed Rule Change Relating to a Proposed Price Improvement System, Price Improvement XL); 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (SR–ISE–2003–06) (Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 2 and 3 Thereto by the International Securities Exchange, Inc. To Establish Rules Implementing a Price Improvement Mechanism); and 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (Order Granting the Application of Topaz Exchange, LLC for Registration as a National Securities Exchange).

auctioned within each particular subcategory. Finally, for each subcategory, Exchange identified the per contract price improvement that occurred at each NBBO spread; the average number of participants responding to the auctions plus the initiator; the total volume the initiator received; the average percentage of orders the initiator received; and the percentage of contracts received by the auction initiator.

The various categories contained in the Report include:

(1) Non-Public Customer Auction/Under 50 Contracts/BOX not at NBBO
(2) Non-Customer Auction/Under 50 Contracts/BOX at NBBO
(3) Non-Customer Auction/50 Contracts and over/BOX not at NBBO
(4) Non-Customer Auction/50 Contracts and over/BOX at NBBO
(5) Customer Auction/Under 50 Contracts/BOX not at NBBO
(6) Customer Auction/Under 50 Contracts/BOX at NBBO
(7) Customer Auction/50 Contracts and over/BOX not at NBBO
(8) Customer Auction/50 Contracts and over/BOX at NBBO
(9) Summary of all Non-Customer Auctions for the Period
(10) Summary of all Customer Auctions for the Period
(11) Summary of all Auctions for the Period

BOX believes that the data gathered demonstrates there is an active and liquid market functioning on the Exchange outside of the auction mechanism. In the period between January and June 2015, 30.5 million contracts were executed through the BOX PIP, approximately 64% of BOX total contract volume. While during this period average daily contract volume traded through the PIP fell from 339,088 contracts per day in January 2015 to 255,150 contracts per day in June 2015, overall contract volume outside of the PIP also fell during that period. Additionally, with an average number of 4.0 participants in each auction, the data shows there is meaningful competition in PIP auctions for all size orders.

The Exchange also believes there is significant price improvement and significant opportunity for price improvement in the PIP with one modification. Currently, a PIP Order may be submitted to BOX with a matching contra order (''Primary Improvement Order'') that is equal to the full size of the PIP Order and at a price equal to or better than that of the NBBO at the time of the commencement of the PIP (the ''PIP Start Price''), at any NBBO spread. BOX proposes to amend the PIP auction to reject any auction where the quoted NBBO spread [14] is less than or equal to $0.01.[15] While the Exchange believes that opportunities remain for price improvement where the NBBO spread is less than or equal to $0.01, the Exchange notes that the data for the current pilot shows small amounts of price improvement in these orders.[16]

The Exchange does believe, however, that based on the data there is significant price improvement and significant opportunity for price improvement when the NBBO spread is greater than $0.01. During the period, there was an average price improvement of $0.05 per contract for contracts executed through the PIP when BOX was at the NBBO, and $0.01 per contract for contracts executed through the PIP when BOX was not at the NBOO regardless of size.

The Exchange has also gathered data on the premature terminations in the PIP to determine if these could result in a PIP Order being disadvantaged by the early conclusion of a PIP. Between January and June 2015, the number of auctions that terminated early was less than 0.05% of all PIP auctions.

COPIP

The Exchange believes that the data submitted to the Commission on a monthly and confidential basis for the COPIP Pilot Program establishes that it has not placed an undue burden on competition; lessened the amount of price improvement in the COPIP; nor reduced order flow and liquidity to the Complex Order Book.[17] From January 2015 through June 2015 COPIP volume accounted for 41% of all Complex Order volume on BOX. Further, the average price improvement amount (when improved) was $0.11 for this same period. The Exchange believes the COPIP Pilot program does not place an undue burden on competition. In fact, the average number of responders is higher for COPIP Orders of 50 contracts and under (0.23) when compared to COPIP Orders greater than 50 contracts (0.01). While the average numbers of responders in the COPIP is lower than that of the PIP, the Exchange believes that as volume in the COPIP increases, the overall average number of responders will also increase.

The Exchange has also gathered data on the premature terminations in the COPIP to determine if these could result in a COPIP Order being disadvantaged by the early conclusion of or COPIP. Between January and June 2015, the number of auctions that terminated early was less than 0.09% of all COPIP auctions.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[18] in general, and Section 6(b)(5) of the Act,[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

In particular, the proposed change will allow the Exchange to continue the Programs free of any pilot conditions which the Exchange believes are no longer necessary. The Programs were put in place to determine the full impact that the lack of minimum size requirement would have on competitiveness and price improvement in the PIP and COPIP. The PIP Pilot Program has been in place for over ten years,[20] and the COPIP PIP Program has been in place for over two years. During these time periods there has been no evidence to suggest that the Programs have had the negative effects predicted in the comment letters.[21] As such, removal of the pilot restrictions is the logical next step.

The Exchange believes that the change to the PIP auction which will reject any auction where the quoted NBBO spread is less than or equal to $0.01 will further price improvement for PIP Orders overall. The Exchange notes that statistics for the current pilot show relatively small amounts of price improvement for these orders. The Exchange believes the proposed change will therefore increase the price improvement that orders may receive in the PIP overall.

[14] The NBBO spread is the difference between the NBBO Bid and the NBBO Ask.

[15] All PIP Auctions where the NBBO spread is more than $0.01 will continue to be allowed.

[16] During the six month time period, .05% of auctions where the NBBO spread was less than or equal to $0.01 received price improvement.

[17] The Exchange notes that the COPIP has been in place for significantly less time than the PIP and therefore has generated significantly less data. Given the similarities between the two mechanisms, the Exchange expects the COPIP, if operated on a pilot basis over a longer period of time, would generate data that is comparable to the PIP.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] *See supra,* note 3.

[21] *See supra,* note 8.

Permanent approval of the Pilot Programs would continue to provide investors with real and significant price improvement regardless of the size of the order. The Exchange believes that allowing price improvement to any size order removes impediments to a free and open market and national market system, therefore creating more competition for the best execution of all orders. The Exchange also believes that making the Pilot Programs permanent does not raise any unique regulatory concerns.

Lastly, the Exchange also believes that the proposed rule change, which provides all market participants, including public investors, with opportunity to trade with small customer orders of less than 50 contracts in the PIP and COPIP, is appropriate in the public interest and for the protection of investors

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition either among BOX Participants, or among the various options exchanges, which is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the PIP and COPIP mechanisms are offered to all BOX Participants and making the Pilot Programs permanent will not impose a competitive burden on any participant. Additionally, the Exchange believes that the proposed change will not have impact on intermarket competition, as noted above many other exchanges have similar pilot programs in place in their auction mechanisms and are free to file to make these permanent as well.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2016–58 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2016–58. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2016–58 and should be submitted on or before January 6, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–30258 Filed 12–15–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79525; File No. SR–NYSEMKT–2016–111]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Commentary .02 to Rule 960NY in Order To Extend the Penny Pilot in Options Classes in Certain Issues

December 12, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 28, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .02 to Rule 960NY in order to extend the Penny Pilot in options classes in certain issues (''Pilot Program'' or ''Pilot'') previously approved by the Securities and Exchange Commission (''Commission'') through June 30, 2017. The Pilot Program is currently scheduled to expire on December 31, 2016. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s (b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the Pilot Program,[4] which is currently scheduled to expire on December 31, 2016, until June 30, 2017.[5] The Exchange believes that extending the Pilot would allow for further analysis of the Pilot Program and a determination of how the Pilot Program should be structured in the future.

During this extension of the Pilot, as is the case today, the Exchange may replace any option class that is currently included in the Pilot Program and that has been delisted with the next most actively traded, multiply listed option class that is not yet participating in the Pilot Program (''replacement class''). In light of the extension, the Exchange also proposes that any replacement class would be determined based on national average daily volume in the preceding six months, and would be added on the second trading day following January 1, 2017.[6]

This filing does not propose any substantive changes to the Pilot Program: All classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[7] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

In particular, the proposed rule change, which extends the Penny Pilot Program for six months, allows the Exchange to continue to participate in a program that has been viewed as beneficial to traders, investors and public customers and viewed as successful by the other options exchanges participating in it. Accordingly, the Exchange believes that the proposal is consistent with the Act because it would allow the Exchange to extend the Pilot Program prior to its expiration on December 31, 2016. The Exchange notes that this proposal does not propose any new policies or provisions that are unique or unproven, but instead relates to the continuation of an existing program that operates on a pilot basis.

The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options to the benefit of all market participants.

The proposal to extend the Pilot Program is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, by allowing the Exchange and the Commission additional time to analyze the impact of the Pilot Program while also allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot Program.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that, by extending the expiration of the Pilot Program, the proposed rule change would allow for further analysis of the Pilot Program and a determination of how the Program should be structured in the future. In doing so, the proposed rule change would also serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection. The Pilot Program is an industry-wide initiative supported by all other option exchanges. The Exchange believes that extending the Pilot Program would allow for continued competition between Exchange market participants trading similar products as their counterparts on other exchanges, while at the same time allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot Program.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

[4] *See* Securities Exchange Act Release No. 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (original approval of Pilot). The Pilot has been extended several times since the original approval, the most recent extension was obtained in earlier this year. *See* Securities Exchange Act Release No. 78176 (June 28, 2016), 81 FR 43320 (July 1, 2016) (SR–NYSEMKT–2016–61) (most recent extension of the Pilot until December 31, 2016).

[5] *See* proposed Commentary .02 to Rule 960NY.

[6] *See id.* The month immediately preceding a replacement class's addition to the Pilot Program (*i.e.,* December) would not be used for purposes of the analysis for determining the replacement class. Thus, a replacement class to be added on the second trading day following January 1, 2017 would be identified based on The Option Clearing Corporation's trading volume data from June 1, 2016 through November 30, 2016. The Exchange will announce the replacement issues to the Exchange's membership through a Trader Update.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date

Continued

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–111 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–111. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–111 and should be submitted on or before January 6, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Assistant Secretary.

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of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this pre-filing requirement.

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79528; File Nos. SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003]

Self-Regulatory Organizations; The Depository Trust Company; Fixed Income Clearing Corporation; National Securities Clearing Corporation; Notice of Filing of Amendments No. 1 and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments No. 1, Relating to Clearing Agency Investment Policy

December 12, 2016.

On August 25, 2016, The Depository Trust Company (''DTC''), Fixed Income Clearing Corporation (''FICC''), and National Securities Clearing Corporation (''NSCC,'' and together with DTC and FICC, the ''Clearing Agencies'') filed with the Securities and Exchange Commission (''Commission'') proposed rule changes SR–DTC–2016–007, SR–FICC–2016–005, and SR–NSCC–2016–003 (''Proposed Rule Changes'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] to adopt the Clearing Agency Investment Policy, which governs the investment of funds of the Clearing Agencies.

The Proposed Rule Changes were published for comment in the **Federal Register** on September 13, 2016.[3] The Commission did not receive any comments on the Proposed Rule Changes. Pursuant to Section 19(b)(2) of the Act,[4] on October 26, 2016, the Commission designated a longer period within which to approve the Proposed Rule Changes, disapprove the Proposed Rule Changes, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Changes.[5] On December 7, 2016, DTC, FICC, and NSCC each filed Amendment No. 1 to their respective Proposed Rule Changes (''Amendments No. 1''), as discussed below. The Commission is publishing this notice to solicit comments on Amendments No. 1 from interested persons and is approving on an accelerated basis the Proposed Rule Changes, as modified by Amendments No. 1.[6]

I. Description of the Proposed Rule Changes and Notice of Filing of Amendments No. 1

As described by the Clearing Agencies, the Proposed Rule Changes, as modified by Amendments No. 1, would adopt the Clearing Agency Investment Policy, which would govern the management, custody, and investment of cash deposited to the respective NSCC and FICC Clearing Funds and the DTC Participants Fund,[7] the proprietary liquid net assets (cash and cash equivalents) of the Clearing Agencies, and other funds held by the Clearing Agencies pursuant to their respective rules. Investment of these funds was previously governed by the investment policy of The Depository Trust & Clearing Corporation (''DTCC''), which is the parent company of the Clearing Agencies.

The Clearing Agency Investment Policy would include, generally, a glossary of key terms, the roles and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78778 (September 7, 2016), 81 FR 62963 (September 13, 2016) (SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003).

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 79165 (October 26, 2016), 81 FR 75865 (November 1, 2016). The Commission designated December 12, 2016, as the date by which it should approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Changes.

[6] Capitalized terms not defined herein are defined in the NSCC's Rules & Procedures (''NSCC Rules''), DTC's Rules, By-laws and Organizational Certificate (''DTC Rules''), FICC's Mortgage-Backed Securities Division Clearing Rules (''MBSD Rules''), or FICC's Government Securities Division Rulebook (''GSD Rules''), as applicable, *available at http://dtcc.com/legal/rules-and-procedures.*

[7] The NSCC and FICC Clearing Funds, and the DTC Participants Fund are described further in the rules of each of the Clearing Agencies. *See* Rule 4 (Clearing Fund) of the NSCC Rules, Rule 4 (Participants Fund and Participants Investment) of the DTC Rules, Rule 4 (Clearing Fund and Loss Allocation) of the GSD Rules and Rule 4 (Clearing Fund and Loss Allocation) of the MBSD Rules. *Supra,* note 6.

responsibilities of DTCC staff in administering the Clearing Agency Investment Policy, guiding principles for investments, sources of investable funds, allowable investments of those funds, limitations on such investments, authority required for those investments, and authority required to exceed established investment limits.

The Clearing Agency Investment Policy would be co-owned by DTCC's Treasury group (''Treasury'')[8] and the Counterparty Credit Risk team (''CCR'') within DTCC's Financial Risk Management group.[9] Additionally, the Clearing Agency Investment Policy would be reviewed annually and material changes would be required to be approved by the Board of Directors of each of NSCC, DTC, and FICC (''Boards''), or such other committee to which such authority may be delegated by the Boards from time to time. Future changes to the Clearing Agency Investment Policy would be subject to a subsequent rule filing and approval by the Commission.

Treasury would be responsible for identifying potential counterparties to investment transactions, establishing and managing investment relationships with approved investment counterparties, and making and monitoring all investment transactions with respect to the Clearing Agencies. Additionally, Treasury would be responsible for managing, monitoring, and internal reporting of investment capacity utilization relative to established aggregate investment limits.[10] Requests to exceed counterparty limits would be capped at a certain percent of the respective limits, as set forth in the Clearing Agency Investment Policy.

CCR would be responsible for conducting a credit review of any potential counterparty, updating those reviews on a quarterly basis, and establishing the investment limit for each counterparty approved by CCR. In conducting a credit review, CCR would evaluate the creditworthiness of counterparties based on a number of factors, including the credit ratings provided by external credit rating agencies. Counterparties generally would be required to meet a minimum external credit rating set forth in the Clearing Agency Investment Policy; however, CCR would be permitted to grant an exception to the minimum external credit rating requirement for a particular counterparty where CCR concludes that approving exposures to that counterparty would serve a valid business or investment purpose of the Clearing Agencies and the risk of loss or default to the Clearing Agencies is assessed as minimal. CCR could grant such an exception based on an assessment of the counterparty's capitalization levels, liquidity resources, earnings trends, and any other relevant information. The exception would be approved by a Managing Director in DTCC's Financial Risk Management group in accordance with the Clearing Agency Investment Policy.

Funds invested pursuant to the Clearing Agency Investment Policy would include (i) cash deposits to the respective NSCC and FICC Clearing Funds and the DTC Participants Fund, (ii) general corporate funds of each of the Clearing Agencies, (iii) NSCC's prefunded default liquidity funds raised from the private placement of unsecured debt,[11] (iv) amounts deposited with NSCC by its participants to meet Rule 15c3–3, promulgated under the Act as part of its fully-paid-for service,[12] (v) corporate action payments or principal and interest payments on Securities credited to the Accounts of DTC Participants that are received by DTC too late in the day or missing information needed for same-day allocation,[13] (vi) funds collected from DTC Participants through net funds settlement and held by DTC to cover 130 percent of the market value of ''short positions,''[14] and (vii) cash debited from Netting Members of FICC's Government Securities Division to satisfy such members' mark-to-market deficits on forward settling transactions.[15]

The Clearing Agency Investment Policy would set forth guiding principles for the investment of funds, which include adherence to a conservative investment philosophy that places the highest priority on maximizing liquidity and avoiding risk. The guiding principles would also mandate the segregation and separation of deposits to the respective NSCC and FICC Clearing Funds and the DTC Participants Fund, so that such amounts are not commingled with each other or with other funds held by the Clearing Agencies. The guiding principles would also address the process for evaluating the credit ratings of counterparties and setting investment limits, which would be evaluated, reviewed, and approved quarterly by CCR. Finally, the guiding principles would make clear that risk of investment loss is addressed by the rules of each of the Clearing Agencies.

The Clearing Agency Investment Policy would identify permitted investments and the parameters of, and limitations on, each type of investment. In general, assets would be required to be held by regulated and creditworthy financial institution counterparties and invested in specified types of financial instruments. Permitted financial investments may include, for example, deposits with banks, including the Federal Reserve Bank of New York, collateralized reverse-repurchase agreements, direct obligations of the U.S. government, money-market mutual funds, and high-grade corporate debt.[16] Additionally, the Clearing Agencies would, pursuant to the Clearing Agency Investment Policy, be permitted to use general corporate funds, and only such funds, to enter into hedge transactions to manage certain corporate exposures, such as interest rate or foreign currency risk; hedge transactions would not be permitted to be engaged in for speculative purposes.

Investments in collateralized reverse repurchase agreements would be secured by debt obligations of the U.S. Government or Agencies guaranteed by the U.S. Government, or by mortgage pass-through obligations issued by the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal National Mortgage Association. Collateral posted by a counterparty to a reverse repurchase agreement (whether securities or a combination of securities and cash) would be required to have a market value equal to 102 percent or greater of the cash invested. Investments

[8] Treasury is a part of the DTCC Finance Department and is responsible for the safeguarding, investment, and disbursement of funds on behalf of the Clearing Agencies and in accordance with the principles outlined in the Clearing Agency Investment Policy.

[9] Among other responsibilities, DTCC's Financial Risk Management group (formerly known as DTCC's Enterprise Risk Management group) is generally responsible for the systems and processes designed to identify and manage credit, market, and liquidity risks to the Clearing Agencies.

[10] All investments are subject to limits set by type of allowable investment and by counterparty. Investment limits are set at an aggregate DTCC-wide level and would apply to investments made by any of DTCC and each of its subsidiaries, including each of the Clearing Agencies.

[11] *See* Securities Exchange Act Release No. 75730 (August 19, 2015), 80 FR 51638 (August 25, 2015) (SR–NSCC–2015–802).

[12] 17 CFR 240.15c3–3; *see supra,* note 6.

[13] *See supra,* note 6.

[14] In this context, ''short positions'' refer to Securities that have been deposited by, and credited to the Account of, a DTC Participant, pending re-registration into the name of Cede & Co., the DTC nominee, which are nevertheless permitted to be delivered to another DTC Participant; this 130 percent charge is held by DTC until the Securities are re-registered. *See supra,* note 6.

[15] *See supra,* note 6.

[16] Only general corporate funds of a Clearing Agency would be permitted to be invested in high-grade corporate debt.

would also be permitted in money market mutual funds that have a credit rating from one or more recognized rating agencies. All permitted investments would be short-term and readily accessible for liquidity, should the need arise, minimizing market risk.

Notice of Filing of Amendments No. 1

In Amendments No. 1, the Clearing Agencies make a technical correction to the proposed Clearing Agency Investment Policy. The originally filed Clearing Agency Investment Policy referenced a pending request for no action relief with the Commission regarding how NSCC would invest funds in its Fully-Paid-For Account. On December 1, 2016, the Division of Trading and Markets staff (''Division'') took a no-action position regarding how NSCC could invest funds in its Fully-Paid-For Account.[17] As such, Amendments No. 1 would amend the Clearing Agency Investment Policy to reflect that the Division took a no action position.

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act[18] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. The Commission believes the Proposed Rule Changes, as modified by Amendments No. 1, are consistent with Section 17A(b)(3)(F) of the Act and Rule 17Ad–22(d)(3),[19] as described below.

A. Consistency With Section 17A(b)(3)(F)

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds which are in the custody or control of the Clearing Agency or for which it is responsible, and, in general, to protect investors and the public interest.[20]

As described above, the investment guidelines and governance procedures set forth in the Clearing Agency Investment Policy would adhere to a conservative investment philosophy that places the highest priority on maximizing liquidity and avoiding risk to the funds in the custody of the Clearing Agencies. The Clearing Agency Investment Policy would require the segregation of funds of each Clearing Agency, including by fund type, to help ensure that the funds of one Clearing Agency would be protected from the risk of default of another Clearing Agency. Further, the Clearing Agency Investment Policy would require that each Clearing Agency invest its funds in instruments with minimal credit, market, and liquidity risks. For instance, excluding the general corporate funds of the Clearing Agencies, funds could only be invested in collateralized reverse-repurchase agreements, U.S. government debt, certain money market mutual funds, or deposited at a bank, such as the Federal Reserve Bank of New York. Additionally, the Clearing Agency Investment Policy also would require that the Clearing Agencies evaluate the credit risk of investment counterparties to help mitigate exposure of the funds to an investment counterparty default. Similarly, the Clearing Fund Investment Policy would establish investment limits by counterparty, as well as investment type, which would also help limit the Clearing Agencies' exposure to any single investment counterparty and, thus, limit potential losses of investments if a counterparty would default.

Because the Clearing Fund Investment Policy would adhere to a conservative investment philosophy that places a premium on maximizing liquidity and avoiding risk, the invested funds should be readily available to promptly facilitate end-of-day settlement, including in the event of a default by a member of a Clearing Agency. Therefore, the Clearing Agency Investment Policy would help assure the safeguarding of securities and funds in the custody and control of the Clearing Agencies, which, in turn, helps promote the prompt and accurate clearance and settlement of securities transactions by the Clearing Agencies. Likewise, the safeguarding of securities and funds in the Clearing Agencies control would further the protection of investors and the public interest by ensuring that trades are settled even in the event of a default by a member of a Clearing Agency, consistent with Section 17A(b)(3)(F) of the Act.[21]

B. Consistency With Rule 17Ad–22(d)(3)

Rule 17Ad–22(d)(3), promulgated under the Act, requires a clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a manner that minimizes risk of loss or delay in its access to them and to invest assets in instruments with minimal credit, market and liquidity risks.[22] As stated above, the Clearing Agency Investment Policy would follow a conservative investment philosophy, placing the highest priority on maximizing liquidity and avoiding risk of loss. The Clearing Agency Investment Policy would require the segregation of funds of each Clearing Agency, necessitate the use of external credit ratings in the evaluation of counterparties where non-general corporate funds are invested, and establish investment limits by counterparty as well as investment type. Further, the Clearing Agency Investment Policy would require that each Clearing Agency invest its funds in instruments with minimal credit, market, and liquidity risks. As such, the Clearing Agency Investment Policy is consistent with the requirements of Rule 17Ad–22(d)(3), promulgated under the Act.[23]

III. Solicitation of Comments on Amendments No. 1

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 1 to File Numbers SR–DTC–2016–007, SR–FICC–2016–005, and SR–NSCC–2016–003, including whether Amendments No. 1 are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–DTC–2016–005, SR–FICC–2016–005, or SR–NSCC–2016–003 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2016–007, SR–FICC–2016–005, or SR–NSCC–2016–003. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use

[17] *See* NSCC, SEC No-Action Letter (December 1, 2016), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/2016/national-securities-clearing-corporation-120116.pdf.*

[18] 15 U.S.C. 78s(b)(2)(C).

[19] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(d)(3).

[20] 15 U.S.C. 78q–1(b)(3)(F).

[21] *Id.*

[22] 17 CFR 240.17Ad–22(d)(3).

[23] *Id.*

only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Changes that are filed with the Commission, and all written communications relating to the Proposed Rule Changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filings also will be available for inspection and copying at the principal office of DTCC and on DTCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2016–007, SR–FICC–2016–005, or SR–NSCC–2016–003 and should be submitted on or before January 3, 2017.

IV. Accelerated Approval of the Proposed Rule Changes, as Modified by Amendments No. 1

The Commission, pursuant to Section 19(b)(2) of the Act,[24] finds good cause to approve the Proposed Rule Changes, as modified by Amendments No. 1, prior to the thirtieth day after the date of publication of Amendments No. 1 in the **Federal Register**. In Amendments No. 1, the Clearing Agencies make a technical correction to the Clearing Agency Investment Policy. The originally filed Clearing Agency Investment Policy referenced a pending request for no action relief with the Commission regarding how NSCC would invest funds in its Fully-Paid-For Account. On December 1, 2016, the Division took a no-action position regarding how NSCC could invest funds in its Fully-Paid-For Account.[25] As such, Amendments No. 1 would amend the Clearing Agency Investment Policy to reflect the Division's position.

As discussed more fully above, the Commission finds that the Proposed Rule Changes, as modified by Amendments No. 1, will establish a Clearing Agency Investment Policy that adheres to a conservative investment philosophy that places the highest priority on maximizing liquidity and avoiding risk to the funds in the custody of the Clearing Agencies, thereby promoting the prompt and accurate clearance and settlement of securities, consistent with Section 17A(b)(3)(F) of the Act, cited above. The Commission also finds, as discussed above, that via the Proposed Rule Changes, as modified by Amendments No. 1, NSCC will hold the described funds in a manner that minimizes the risk of loss or delay in access to them and will invest the funds in instruments with minimal credit, market and liquidity risks, consistent with Rule 17Ad–22(d)(3) of the Act, cited above. Additionally, the Commission finds that Amendments No. 1 only made a technical, non-substantive change to the Investment Policy as originally proposed. Accordingly, the Commission finds good cause for approving the Proposed Rule Changes, as modified by Amendments No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[26]

V. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Changes, as modified by Amendments No. 1, are consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[27] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that proposed rule changes SR–DTC–2016–007, SR–FICC–2016–005, and SR–NSCC–2016–003, as modified by Amendments No. 1, be, and hereby are, *approved* on an accelerated basis.[28]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–30256 Filed 12–15–16; 8:45 am]

BILLING CODE 8011–01–P

[24] 15 U.S.C. 78s(b)(2).

[25] *See* NSCC, SEC No-Action Letter (December 1, 2016), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/2016/national-securities-clearing-corporation-120116.pdf.*

[26] 15 U.S.C. 78s(b)(2).

[27] 15 U.S.C. 78q–1.

[28] In approving the Proposed Rule Changes, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79526; File No. SR–BatsEDGX–2016–71]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rule 21.5 of Bats EDGX Exchange, Inc. To Extend Through June 30, 2017, the Penny Pilot Program in Options Classes in Certain Issues

December 12, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2016, Bats EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to extend through June 30, 2017, the Penny Pilot Program (''Penny Pilot'') in options classes in certain issues (''Pilot Program'') previously approved by the Commission.[5]

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] The rules of EDGX Options, including rules applicable to EDGX Options' participation in the Penny Pilot, were approved on August 7, 2015. *See* Securities Exchange Act Release No. 75650 (August 7, 2015), 80 FR 48600 (August 13, 2015) (SR–EDGX–2015–18). EDGX Options commenced operations on November 2, 2015. The Penny Pilot was extended for EDGX Options through December 31, 2016. *See* Securities Exchange Act Release No. 78052 (June 13, 2016), 81 FR 39731 (June 17, 2016) (SR–BatsEDGX–2016–22).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the Penny Pilot, which was previously approved by the Commission, through June 30, 2017, and to provide revised dates for adding replacement issues to the Pilot Program. The Exchange proposes that any Pilot Program issues that have been delisted may be replaced on the second trading day following January 1, 2017. The replacement issues will be selected based on trading activity for the most recent six month period excluding the month immediately preceding the replacement (*i.e.,* beginning June 1, 2016, and ending November 30, 2016).

The Exchange represents that the Exchange has the necessary system capacity to continue to support operation of the Penny Pilot. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[6] In particular, the proposal is consistent with Section 6(b)(5) of the Act[7] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options. Accordingly, the Exchange believes that the proposal is consistent with the Act because it will allow the Exchange to extend the Pilot Program prior to its expiration on December 31, 2016. The Exchange notes that this proposal does not propose any new policies or provisions that are unique or unproven, but instead relates to the continuation of an existing program that operates on a pilot basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In this regard, the Exchange notes that the rule change is being proposed in order to continue the Pilot Program, which is a competitive response to analogous programs offered by other options exchanges. The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (A) Significantly affect the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) by its terms, become operative for 30 days from the date on which it was filed or such shorter time as the Commission may designate it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and paragraph (f)(6) of Rule 19b–4 thereunder,[9] the Exchange has designated this rule filing as non-controversial. The Exchange has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsEDGX–2016–71 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–BatsEDGX–2016–71. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4.

received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BatsEDGX–2016–71 and should be submitted on or before January 6, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–30254 Filed 12–15–16; 8:45 am]

BILLING CODE 8011–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 767X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Perry County, Ky.

CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 3.3-mile rail line on CSXT's Northern Region, Louisville Division, EK Subdivision, between milepost 0WV 242.0 and milepost 0WV 245.3 in Hazard, Perry County, Ky. (the Line). The Line traverses United States Postal Service Zip Codes 41701 and 41722. There is one station on the Line, Sigmon, located at milepost 0VD 245 (FSAC 42845/OPSL 17202).[1]

CSXT has certified that: (1) No local traffic has moved over the Line for at least two years; (2) because the Line is not a through route, no overhead traffic has operated, and, therefore, none needs to be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line is pending either with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will be effective on January 17, 2017, unless stayed pending reconsideration.[2] Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2)[3] must be filed by December 23, 2016.[4] Petitions to reopen must be filed by January 5, 2017, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available on our Web site at ''*WWW.STB.GOV.*''

Decided: December 13, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–30275 Filed 12–15–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 730 (Sub-No. 1)]

Revisions to Arbitration Procedures

By decision served on September 30, 2016, as corrected on October 11, 2016, the Board adopted rules to modify its arbitration procedures so that its regulations, set forth at 49 CFR 1108 and 1115.8, conform to the requirements of the Surface Transportation Reauthorization Act of 2015, Public Law 114–110 (2015). Under Section 13 of that Act (codified at 49 U.S.C. 11708), the Board must ''promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints'' that are subject to the Board's jurisdiction. Section 11708(f) provides that, unless parties otherwise agree, an arbitrator or panel of arbitrators shall be selected from a roster maintained by the Board. Accordingly, the Board's rules establish a process for creating and maintaining a roster of arbitrators. *See Revisions to Arbitration Procedures,* EP 730, slip op. at 3–4 (STB served Oct. 11, 2016).

To establish the initial roster of arbitrators, the Board now seeks applications from all interested persons who wish to be included on the roster. Each applicant should describe his or her experience with rail transportation and economic regulation, as well as professional or business experience, including agriculture, in the private sector. Further, each applicant should describe his or her training in dispute resolution and/or experience in arbitration or other forms of dispute resolution, including the number of years of experience. Lastly, the applicant should provide his or her contact information and fees.

Applications should be submitted by January 17, 2017.[1] The Board will assess each applicant's qualifications to determine which individuals can ably serve as arbitrators based on the criteria established under 49 CFR 1108.6(b). The Board will then establish the initial roster of arbitrators by no-objection vote. The Board's roster will include a brief biographical sketch of each arbitrator, including information such as background, area(s) of expertise, arbitration experience, and geographical location, as well as contact information and fees, based on the information supplied by the arbitrator. The roster will be published on the Board's Web site, pursuant to 49 CFR 1108.6(b). The roster will be updated every year and may be modified by the Board at any time through a no-objection vote.

It is ordered:

1. Applications to be included on the Board's roster of arbitrators are due by January 17, 2017.

2. This decision is effective on the day of service.

[10] 17 CFR 200.30–3(a)(12).

[1] CSXT states that the Sigmon station can be closed.

[2] Although CSXT states in its verified notice that the proposed consummation date of this transaction is January 16, 2017, this transaction cannot be consummated until January 17, 2017 (50 days from its filing date). 49 CFR 1152.50(d)(2).

[3] Each OFA must be accompanied by the filing fee, which is currently set at $1,700. *See* 49 CFR 1002.2(f)(25).

[4] Because this is a discontinue proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require an environmental review.

[1] Persons who have informally indicated an interest in being included on the arbitrator roster (*e.g.,* correspondence to Board members) should submit an application pursuant to this decision.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Raina S. Contee,

Clearance Clerk.

[FR Doc. 2016–30249 Filed 12–15–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Release From Quitclaim Deed and Grant Assurance Obligations at Reno Stead Airport, Reno, Washoe County, Nevada

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of a land release.

SUMMARY: The Federal Aviation Administration (FAA) proposes to rule and invites public comment on the application for a land release of approximately 0.58 acres of airport property and associated 15-foot-wide access easement owned by Reno Stead Airport, Reno, Washoe County, Nevada from the airport use provisions of the Grant Agreement Assurances since the land is not needed for airport purposes. The subject property is located approximately 0.5 miles from the Reno Stead Airport and has no identified airport-related purpose. The airport will be compensated for the fair market value of the released property. Reuse of the property will not interfere with the airport or its operation, thereby protecting the interests of civil aviation.

DATES: Comments must be received on or before January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Comments on the request may be mailed or delivered to the FAA at the following address: Mike N. Williams, Manager, Airports District Office, **Federal Register** Comment, Federal Aviation Administration, Phoenix Airports District Office, 3800 N. Central Avenue, Suite 1025, Phoenix, Arizona 85012. In addition, one copy of the comment submitted to the FAA must be mailed or delivered to Ms. Lissa Butterfield, Senior Airport Planner, Reno-Tahoe Airport Authority, P.O. Box 12490, Reno, NV 89510.

SUPPLEMENTARY INFORMATION: In accordance with the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), Public Law 106–181 (Apr. 5, 2000; 114 Stat. 61), this notice must be published in the **Federal Register** 30 days before the DOT Secretary may waive any condition imposed on a federally obligated airport by surplus property conveyance deeds or grant agreements.

The following is a brief overview of the request:

The Reno-Tahoe Airport Authority (RTAA) requested a release from the provisions of the Grant Agreement Assurances to permit the disposal of approximately 0.58 acres of land near Reno Stead Airport, Reno, Washoe County, Nevada to permit Artisan Communities to incorporate the 0.58-acre property into their approximately 47-acre community development. The property is located in an area zoned residential and the release will eliminate RTAA's future liability for the property since the property cannot be redeveloped for a commercial or airport purpose. The airport will be compensated for the fair market value of the released property. The RTAA supports disposal of the parcel, which has no identified airport-related purpose or future use, especially since it is 0.5 miles from the airport. Reuse of the property will not interfere with the airport or its operation, thereby protecting the interests of civil aviation. Based on the benefits of fair compensation in exchange for the land, the interests of civil aviation will be properly served.

Issued in Hawthorne, California, on December 8, 2016.

Brian Q. Armstrong,

Manager, Safety and Standards Branch, Airports Division, Western-Pacific Region.

[FR Doc. 2016–30210 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0175]

Qualification of Drivers; Exemption Applications; Implantable Cardioverter Defibrillators

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of denials of exemption applications.

SUMMARY: FMCSA announces its decision to deny applications from 11 individuals seeking exemptions from the Federal cardiovascular standard applicable to interstate truck and bus drivers and discusses the reasons for the denials. The Agency reviewed the medical information of each of the individuals who applied for an implantable cardioverter defibrillator (ICD) exemption. Based on a review of the applications and following an opportunity for public comment, FMCSA has concluded that the 11 individuals in the notice did not demonstrate they could achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation.

DATES: Denial letters were sent to each of the individuals listed in this notice on October 11, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief Medical Programs Division, 202–366–4001, U.S. Department of Transportation, FMCSA, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for up to five years if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' FMCSA can renew exemptions for up to an additional five years at the end of each five-year period.[1]

On August 8, 2016, FMCSA published for public notice and comment, FMCSA 2016–0175, listing 11 individuals seeking exemptions for ICDs. Accordingly, the Agency has evaluated each applicant's request to determine whether granting an exemption will achieve the required level of safety mandated by statute.

Evaluation Criteria—Cardiovascular Medical Standard and Advisory Criteria

The individuals included in this notice have requested an exemption from the provisions of 49 CFR 391.41(b)(4), which applies to drivers who operate CMVs in interstate commerce, as defined in 49 CFR 390.5. Section 391.41(b)(4) states that:

> A person is physically qualified to drive a commercial motor vehicle if—
>
> * * * * *
>
> that person has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope [a temporary loss of consciousness due to a sudden decline in blood flow to the brain], dyspnea [shortness of breath], collapse, or congestive cardiac failure.

[1] 49 U.S.C. 31315(b), as amended by section 5206(a) of the FAST Act, Public Law 114–94, div. A, title V, 129 Stat. 1537 (Dec. 4, 2015).

The FMCSA provides medical advisory criteria as recommendations for use by medical examiners in determining whether drivers with certain medical conditions and drivers who have undergone certain procedures and/or treatments should be certified to operate CMVs in interstate commerce in accordance with the various physical qualification standards in 49 CFR part 391, subpart E. The advisory criteria are currently set out in Appendix A to 49 CFR part 391. The advisory criteria for section 391.41(b)(4) provide, in part, that:

The term ''has no current clinical diagnosis of'' is specifically designed to encompass: ''a clinical diagnosis of'' (1) a current cardiovascular condition, or (2) a cardiovascular condition which has not fully stabilized regardless of the time limit. The term ''known to be accompanied by'' is designed to include a clinical diagnosis of a cardiovascular disease (1) which is accompanied by symptoms of syncope, dyspnea, collapse or congestive cardiac failure; and/or (2) which is likely to cause syncope, dyspnea, collapse, or congestive cardiac failure.

It is the intent of the Federal Motor Carrier Safety Regulations to render unqualified, a driver who has a current cardiovascular disease which is accompanied by and/or likely to cause symptoms of syncope, dyspnea, collapse, or congestive cardiac failure. However, the subjective decision of whether the nature and severity of an individual's condition will likely cause symptoms of cardiovascular insufficiency is on an individual basis and qualification rests with the medical examiner and the motor carrier.

In the case of persons with ICDs, the underlying condition for which the ICD was implanted places the individual at high risk for syncope (a transient loss of consciousness) or other unpredictable events known to result in gradual or sudden incapacitation. ICDs may discharge, which could result in loss of ability to safely control a CMV. See the Evidence Report on ''Cardiovascular Disease and Commercial Motor Vehicle Driver Safety,'' April 2007.[2] A focused research report entitled ''Implantable Cardioverter Defibrillators and the Impact of a Shock on a Patient When Deployed,'' completed for the FMCSA in December 2014, indicates that the available scientific data on persons with ICDs and CMV driving does not support that persons with ICDs who operate CMVs are able to meet an equal or greater level of safety and upholds the findings of the April 2007 report. Copies of the April 2007 report and the December 2014 report are included in the docket for this notice.

[2] Now available at *http://ntl.bts.gov/lib/30000/30100/30123/Final_CVD_Evidence_Report_v2.pdf.*

Discussion of Public Comments

On August 8, 2016, FMCSA published in a **Federal Register** Notice the names of 11 individuals seeking ICD exemption and requested public comment. The public comment period closed on September 7, 2016. A total of 29 commenters responded to the notice. Each of the comments was favorable towards the applicants continuing to drive CMV's with ICD's. Many commenters believed that the individuals seeking exemptions were safe drivers with safe professional work histories, and that their exemption request should be considered on an individual case basis based on merit. Several commenters expressed that individual driving records and experience should be factors in allowing persons with ICD's to operate CMVs.

FMCSA's Response

FMCSA acknowledges the commenters' concerns. The Agency reviews and considers each applicant's request individually. Based on the available medical literature cited above, however, FMCSA believes that a driver with an ICD is at risk for incapacitation if the device discharges. This risk is combined with the risks associated with the underlying cardiovascular condition for which the ICD has been implanted as a primary or secondary preventive measure.

Conclusion

FMCSA evaluated the 11 individual exemption requests on their merits, available data from Evidence Reports and Medical Expert Panel opinions on the impact of ICDs on Commercial Motor Vehicle driving, and the public comments received. The Agency has determined that the available medical literature and data does not support a conclusion that granting these exemptions would achieve a level of safety equivalent to or greater than the level of safety maintained without the exemptions. Each applicant has, prior to this notice, received a letter of final disposition on his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final Agency action. The list published today summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4).

The following 11 applicants are denied exemptions from the cardiovascular standard.

Charles R. Allen (MI)
William Blake (NH)
Roosevelt Tyrone Brown (SC)
Kevin Coulter (CA)
John Dudar (CT)
Timothy Godwin (NC)
James Goslee (MD)
Richard Hacker (MD)
Kathryn Kosse (AZ)
Joseph Skrzyniarz (MI)
Wylanne Deon Sanders (IL)

Issued on: December 8, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30283 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2002–11714; FMCSA–2002–12844; FMCSA–2003–16564; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2005–23099; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2008–0021; FMCSA–2009–0011; FMCSA–2009–0303; FMCSA–2009–0321; FMCSA–2010–0050; FMCSA–2011–0142; FMCSA–2011–0299; FMCSA–2011–0366; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0039; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 131 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: Each group of renewed exemptions was effective from the dates stated in the discussions below. Comments must be received on or before January 17, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2002–11714; FMCSA–2002–12844; FMCSA–

2003–16564; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2005–23099; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2008–0021; FMCSA–2009–0011; FMCSA–2009–0303; FMCSA–2009–0321; FMCSA–2010–0050; FMCSA–2011–0142; FMCSA–2011–0299; FMCSA–2011–0366; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0039; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004], using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 131 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 131 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. The following group(s) of drivers will receive renewed exemptions effective in the month of May and are discussed below.

As of May 7, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 11 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (69 FR 64806; 70 FR 2705; 71 FR 6826; 71 FR 19602; 72 FR 1054; 73 FR 11989; 74 FR 26464; 74 FR 60022; 75 FR 4623; 75 FR 13653; 76 FR 49528; 76 FR 61143; 76 FR 70212; 77 FR 543; 77 FR 5874; 77 FR 17107; 77 FR 17117; 78 FR 76707; 78 FR 77782; 79 FR 1908; 79 FR 10611; 79 FR 13085; 79 FR 14331; 79 FR 14333; 79 FR 14571; 79 FR 18391; 79 FR 18392; 79 FR 22003; 79 FR 28588; 79 FR 29498):

Stephan P. Adamczyk (ME)
Otto J. Ammer, Jr. (PA)
Alphonso A. Barco (SC)
Teddy S. Bioni (PA)
Darrell Canupp (MI)
John A. Carroll, Jr. (AL)
James A. Champion (WA)
Larry Chinn (WI)
Michael Gargano (FL)
Ronald L. Walker (FL)
Charles G. Warshun, Jr. (NY)

The drivers were included in one of the following dockets: Docket Nos. FMCSA–2003–16241; FMCSA–2007–28695; FMCSA–2004–19477; FMCSA–2006–23773; FMCSA–2009–0303; FMCSA–2011–0142; FMCSA–2011–0366; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004. Their exemptions are effective as of May 7, 2016 and will expire on May 7, 2018.

As of May 11, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 10 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (77 FR 15184; 77 FR 27850; 79 FR 21996):

Robert L. Brauns (IA)
Bobby R. Brooks (GA)
Clifford W. Doran, Jr. (NC)
Ryan C. Dugan (NY)
Glenn C. Grimm (NJ)
Charles J. Kennedy (OH)
Richard A. Pucker (WI)
John M. Riley (AL)
Jeffery A. Sheets (AR)

Randy L. Stevens (GA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2001–0299; FMCSA–2011–0379; FMCSA–2011–0380. Their exemptions are effective as of May 11, 2016 and will expire on May 11, 2018.

As of May 12, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 14 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (67 FR 68719; 68 FR 2629; 68 FR 74699; 69 FR 10503; 69 FR 71100; 70 FR 71884; 71 FR 4632; 71 FR 6826; 71 FR 6829; 71 FR 19602; 73 FR 5259; 73 FR 11989; 73 FR 15567; 73 FR 27015; 73 FR 76440; 75 FR 9480; 75 FR 13653; 75 FR 19674; 75 FR 22176; 77 FR 17109; 77 FR 23797; 77 FR 27845; 79 FR 23797):

Leo G. Becker (KS)
Stanley W. Davis (TX)
Ray L. Emert (PA)
John W. Forgy (ID)
Julian R. Hall (TX)
Neil W. Jennings (MO)
Mark Meacham (NC)
David A. Miller (NE)
Paul D. Schnautz (TX)
William T. Smiley (MD)
Richard M. Smith (CO)
Aaron S. Taylor (WI)
William B. Thomas (SC)
Michael J. Tisher (AK)

The drivers were included in one of the following dockets: Docket No. FMCSA–2002–12844; FMCSA–2003–16564; FMCSA–2005–22727; FMCSA–2006–23773; FMCSA–2008–0021; FMCSA–2011–0380. Their exemptions are effective as of May 12, 2016 and will expire on May 12, 2018.

As of May 16, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 36 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (79 FR 14571; 79 FR 28588):

Luis A. Agudo (MN)
Dmitriy D. Bayda (WA)
Marvin J. Bensend, Jr. (MS)
Cody W. Christian (OK)
Michael T. Deaton (WI)
Billy D. Devine (WA)
James G. Donze (MO)
Jeffrey D. Duncan (IN)
Charles R. Early (IN)
Dennis A. Feather (SC)
Nicholas C. Georgen (IA)
Robert E. Johnston, Jr. (WA)
Gregory J. Kuhn (NE)
David W. Leach (IL)
Kerry M. Leeper (WA)
Jason S. Logue (GA)
David F. Martin (NJ)
Martin L. Mayes (GA)
Daniel A. McNabb, Jr. (KS)
Phillip L. Mello (CA)
Roberto C. Mendez (TX)
Robert L. Murray (IL)
Barry L. Pylant (GA)
Steve W. Quenzer (SD)
Bradley W. Reed (AL)
Erik M. Rice (TX)
Ricky D. Rostad (MN)
Tatum R. Schmidt (IA)
Harry J. Scholl (PA)
Jacob A. Shaffer (PA)
Thomas G. Smedema (WI)
James S. Smith (AR)
Thomas W. Smith (PA)
Richard H. Solum (MN)
Scott R. Sorensen (CA)
Elston L. Taylor (VA)

The drivers were included on the following docket: Docket No. FMCSA–2014–0003. Their exemptions are effective as of May 16, 2016 and will expire on May 16, 2018.

As of May 21, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 8 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (70 FR 48797; 70 FR 61493; 73 FR 6246; 75 FR 9480; 75 FR 14656; 75 FR 19674; 75 FR 22176; 75 FR 28684; 77 FR 15184; 77 FR 23797; 77 FR 23800; 77 FR 27850; 79 FR 22000):

David A. Brannon (FL)
Steven R. Felks (TX)
Herbert C. Hirsch (MO)
Michael D. Kilgore (TX)
Douglas L. Norman (NC)
Carroll R. Rogers (CA)
Wayne J. Savage (VA)
Marion Tutt, Jr. (GA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2005–21711; FMCSA–2009–0011; FMCSA–2010–0050; FMCSA–2011–0379. Their exemptions are effective as of May 21, 2016 and will expire on May 21, 2018.

As of May 22, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 28 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (79 FR 18392; 79 FR 29498):

Britton J. Anderson (KS)
James E. Baker (OH)
Aaron D. Barnett (IA)
Stanley R. Cap (SD)
Michael T. Craddock (CA)
Eric C. Dettrey (NJ)
Timothy C. Dotson (MO)
Roger L. Frazier (NC)
Danny J. Goss (MO)
James P. Griffin (WA)
Dennis P. Hart (OR)
Kyle C. Holschlag (IA)
Michael T. Huso (MN)
James D. Kessler (SD)
Robin D. Kurtz (CT)
Sherell J. Landry (TX)
Ronald N. Lindgren (MN)
Robert P. Malarkey, Sr. (NY)
Michael L. Manning (MO)
Rodney J. McMorran (IA)
John L. Meese (MO)
Thomas G. Ohlson (NY)
Robert D. Reeder (MI)
Craig Robinson (FL)
Michael E. Schlachter (WY)
Kenneth W. Sigl (WI)
Elmer F. Winters (NC)
Eugene T. Wolf (IA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2014–0004. Their exemptions are effective as of May 22, 2016 and will expire on May 22, 2018.

As of May 25, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 18 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (64 FR 68195; 65 FR 20251; 67 FR 10471; 67 FR 17102; 67 FR 19798; 69 FR 17267; 69 FR 19611; 71 FR 4194; 71 FR 13450; 71 FR 14566; 71 FR 16410; 71 FR 19604; 71 FR 30227; 73 FR 27014; 75 FR 1835; 75 FR 9480; 75 FR 9482; 75 FR 22176; 75 FR 27622; 77 FR 10604; 77 FR 17108; 77 FR 20879; 77 FR 26816; 77 FR 31427):

Dwight A. Bennett (MD)
Juan Castanon (NM)
Ronald Flanery (KY)
Joshua G. Hansen (ID)
Daniel W. Henderson (TN)
Edward W. Hosier (MO)
Craig T. Jorgensen (WI)
Jose A. Lopez (CT)
Earl E. Martin (VA)
Brian E. Monaghan (IL)
Joseph C. Powell (VA)
Albert L. Remsburg, 3rd (MD)
David L. Schachle (PA)
Dennis R. Schneider (NM)
Michael See (NY)
Steven Simone (KS)
Mark Sobczyk (WI)
Frankie A. Wilborn (GA)

The drivers were included in one of the following dockets: Docket No. FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2005–23099; FMCSA–2006–24015; FMCSA–2009–0011; FMCSA–2009–0321; FMCSA–2012–0039. Their exemptions are effective as of May 25, 2016 and will expire on May 25, 2018.

As of May 30, 2016,, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 6 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (67 FR 15662; 67 FR 37907; 69 FR 26206; 71 FR 26602; 73 FR 27017; 75 FR 27621; 77 FR 27849):

Joe W. Brewer (SC)
James W. Ellis, 4th (NJ)
David A. Inman (IN)
Lawrence C. Moody (NJ)
Stanley W. Nunn (TN)
Kevin R. Stoner (PA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2002–11714. Their exemptions are effective as of May 30, 2016 and will expire on May 30, 2018.

Each of the 131 applicants listed in the groups above has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 17, 2017.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 131 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket numbers FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2002–11714; FMCSA–2002–12844; FMCSA–2003–16564; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2005–23099; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2008–0021; FMCSA–2009–0011; FMCSA–2009–0303; FMCSA–2009–0321; FMCSA–2010–0050; FMCSA–2011–0142; FMCSA–2011–0299; FMCSA–2011–0366; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0039; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period. FMCSA may issue a final rule at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–1999–6480; FMCSA–2001–11426; FMCSA–2002–11714; FMCSA–2002–12844; FMCSA–2003–16564; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2005–23099; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2008–0021; FMCSA–2009–0011; FMCSA–2009–0303; FMCSA–2009–0321; FMCSA–2010–0050; FMCSA–2011–0142; FMCSA–2011–0299; FMCSA–2011–0366; FMCSA–2011–0379; FMCSA–2011–0380; FMCSA–2012–0039; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 2, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30286 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–24210; FMCSA–2010–0162; FMCSA–2012–0162; FMCSA–2012–0163; FMCSA–2014–0018]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions of 125 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. FMCSA has statutory authority to exempt individuals from this rule if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: Each group of renewed exemptions are effective from the dates

stated in the discussions below. Comments must be received on or before January 17, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. FMCSA–2006–24210; FMCSA–2010–0162; FMCSA–2012–0162; FMCSA–2012–0163; FMCSA–2014–0018, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008, (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the Federal Motor Carrier Safety Regulations 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 125 individuals listed in this notice have recently become eligible for a renewed exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. The drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

Exemption Decision

This notice addresses 125 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. These 125 drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. Therefore, FMCSA has decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are renewed subject to the following conditions: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual submit an annual ophthalmologist's or optometrist's report; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. The following groups of drivers received renewed exemptions in the month of August and are discussed below.

As of August 6, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 10 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 36333; 77 FR 46791):

Bruce R. Bennett (MN)
Stephen W. Best (PA)
Steven D. Hancock (IN)
Michael A. Hendrickson (OR)
James B. Hills (KS)
Charles Keegan, Jr. (NJ)
Londell W. Luther (MD)
Darrell L. Meadows (TX)
Allyn E. Smith (SD)
Jason R. Zeorian (NE)

The drivers were included in Docket No. FMCSA–2012–0162. Their exemptions are effective as of August 6, 2016 and will expire on August 6, 2018.

As of August 8, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 26 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (71 FR 32177; 71 FR 45097):

Scott R. Anderson (WI)
Robert R. Chase (NE)
Todd A. Dean (WV)
Dale R. Gansz (IL)
Donald W. Havourd, Sr. (CT)
Jeffrey M. King (OR)
Milton A. Klise (OH)
Jeffrey S. Knight (WA)
Edward V. Kruse (IA)
Lee P. Lembke (WI)
Dominick T. Mastroni (KS)
Ronald S. Mavilla (PA)
Derril W. Nunnally (GA)
Robert L. Pfugler, Jr. (PA)
Ronald B. Purdum (IL)
Wilbert C. Rasely, Jr. (PA)
Ron R. Rawson (AZ)
Duance C. Rieger (ND)
Gregory A. Rigg (MI)

Vernon L. Small (CO)
Walter D. Stowman (NJ)
Antonino S. Vita (NY)
Henry B. Walker-Waltz (OR)
Arthur C. Webber (PA)
Scott A. Wertz (ND)
Danny R. Wood (MO)

The drivers were included in Docket No. FMCSA–2006–24210. Their exemptions are effective as of August 8, 2016, and will expire on August 8, 2018.

As of August 17, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 9 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (75 FR 36775; 75 FR 50797):

Gary L. Alexander (MO)
Daniel E. Bergstresser (NY)
Stephen F. Clendenin (NY)
Donald P. Dean (MI)
Pradip B. Desai (PA)
Howard M. Galton (IL)
Steve Gumienny (CA)
Brian M. Katayama (CA)
Hubert S. Paxton (KY)

The drivers were included in Docket No. FMCSA–2010–0162. Their exemptions are effective as of August 17, 2016, and will expire on August 17, 2018.

As of August 19, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 67 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (79 FR 41723; 79 FR 56105):

Charles Ackerman Jr. (NJ)
William J. Applebee (WI)
Benjamin L. Baxter (MI)
Stephen M. Berggren (MN)
Robert A. Boyle (ID)
Patrick J. Burns (MN)
Robert L. Caudill (OH)
Charles R. Cran (WI)
John W. Crook Jr. (IA)
Kevin W. Elder (NC)
Michael J. Eldridge, Sr. (IA)
Johnathon C. Ely (IN)
Kevin D. Erickson (WI)
Joby E. Foshee, IV (MS)
Lawrence H. Fox (NH)
Troy C. Frank (NE)
Robert T. Frankfurter (CO)
Dale A. Godejohn (ND)
Robert R. Gonzales (CA)
Norman D. Groves (MO)
Kenneth F. Gwaltney (IN)
Mathew R. Hale (KS)
Donald K. Hamilton (FL)
John L. Holtzclaw (MO)
Christopher H. Horn (NH)
Jared E. Hubbard (TX)
Roger C. Hulce (VT)
Kip J. Kauffman (WI)
Christopher J. Kittoe (WI)
Joshua L. Kroetch (MN)
Wesley S. Langham (IL)
Andrew K. Lofton (AL)
Salvador Lopez (AZ)
Joseph M. Macias (NM)
Robert J. Marino (NJ)
David J. McCoy (UT)
William E. Medlin (MN)
Anthony J. Miller (MN)
Carlos A. Napoles, Jr. (NJ)
Kathryn J. Nelms (KS)
Antonio C. Oliveira (PA)
Christopher P. Overton (IL)
Ronald E. Patrick (IN)
Stephen J. Pelton (PA)
Bryant S. Perry (NC)
Kenneth R. Perschon (IL)
Joseph R. Polhamus (LA)
Brian K. Rajkovich (CA)
Joseph E. Resetar (NJ)
Rodney B. Roberts (MS)
Arlan M. Roesler (WI)
Mark J. Rone (IL)
Barry J. Sanderson (MT)
John J. Steigauf (MN)
Berton W. Stroup (PA)
Ronnie P. Thomas (TN)
William L. Thompson (MN)
Juan A. Villanueva (TX)
Robert D. Watts (TX)
Cindy L. Wells (NY)
Charles W. White (IN)
Herman D. Whitehurst (AR)
Michael G. Worl (MT)
Tommy W. Wornick (TX)
Robert T. Yeftich (IN)
Alan C. Yeomans (CT)
Chad C. Yerkey (PA)

The drivers were included in Docket No. FMCSA–2014–0018. Their exemptions are effective as of August 19, 2016, and will expire on August 19, 2018.

As of August 27, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 40941; 77 FR 51845):

Randall W. Amtower (WV)
Steven Brickey (CO)
Ronald K. Coleman (KY)
Randall L. Corrick (ND)
Raymond G. Gravesandy (NY)
John T. Green (TX)
Gregory M. Harris (TX)
Kelly M. Keller (ND)
Joseph L. Miska (MN)
Susan L. Mosel (WI)
Jacob D. Oxford (ID)
Robert D. Regavich (NJ)
Ramon I. Zamora-Ortiz (WA)

The drivers were included in Docket No. FMCSA–2012–0163. Their exemptions are effective as of August 27, 2016, and will expire on August 27, 2018.

Each of the 125 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of the 125 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2006–24210; FMCSA–2010–0162; FMCSA–2012–0162; FMCSA–2012–0163; FMCSA–2014–0018.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 17, 2017.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 125 individuals from rule prohibiting persons with ITDM from operating CMVs in interstate commerce in 49 CFR 391.41(b)(3). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the medical condition of each applicant for an exemption from rule prohibiting persons with ITDM from operating CMVs in interstate commerce. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these

drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket numbers FMCSA–2006–24210; FMCSA–2010–0162; FMCSA–2012–0162; FMCSA–2012–0163; FMCSA–2014–0018 and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period. FMCSA may issue a final determination at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2006–24210; FMCSA–2010–0162; FMCSA–2012–0162; FMCSA–2012–0163; FMCSA–2014–0018 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 2, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–30281 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2016–0117]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with part 235 of Title 49 of the Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated November 28, 2016, CSX Transportation (CSX) petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition Docket Number FRA–2016–0117.

Applicant: CSX Transportation, Mr. Jody Cox, Chief Engineer, Communications & Signals, 500 Water Street, Speed Code J—350, Jacksonville, FL 32202.

CSX seeks approval of the discontinuance of the signal system between Milepost (MP) DC32.7 end of track (EOT), and MP DC37.1, Madison Street, on the Altenheim Subdivision, Chicago Division, Chicago, IL.

Presently, CSX current of traffic (COT) 509 Rules and yard limit-signaled (YL–S) 508 Rules are in effect between Madison Street MP-DC37.1 and EOT near MP–DC–30.0 on all tracks. It is proposed to retire COT 509 and YL–S 508 Rules on all tracks and operate under Main Track Yard Limits YL 507 Rules.

The reason given for the proposed discontinuance is that the signal system, COT 509 Rules, and YL–S 508 Rules are no longer needed for present day operation.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U. S. Department of Transportation's Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, US Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 30, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016–30141 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2016–0122]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel OUTRIDER; Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: 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 January 17, 2017.

ADDRESSES: Comments should refer to docket number MARAD–2016–0122. 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 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel OUTRIDER is:

—INTENDED COMMERCIAL USE OF VESSEL: Carry no more than 6 passengers for hire on an occasional basis

—GEOGRAPHIC REGION: ''Hawaii''

The complete application is given in DOT docket MARAD–2016–0122 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

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.

By Order of the Maritime Administrator.
Dated: December 8, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30198 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2016–0124]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel FOUR CAPTAINS; Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: 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 January 17, 2017.

ADDRESSES: Comments should refer to docket number MARAD 2016–0124. 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 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel FOUR CAPTAINS is:

—INTENDED COMMERCIAL USE OF VESSEL: ''Private charter service''

—GEOGRAPHIC REGION: ''Washington State''

The complete application is given in DOT docket MARAD 2016–0124 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

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully

considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

By Order of the Maritime Administrator.

Dated: December 6, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30196 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2016–0123]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel TIGRESS; Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: 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 January 17, 2017.

ADDRESSES: Comments should refer to docket number MARAD–2016–0123. 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 10:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel TIGRESS is:

—INTENDED COMMERCIAL USE OF VESSEL: Private sailing charters

—GEOGRAPHIC REGION: ''Massachusetts''

The complete application is given in DOT docket MARAD–2016–0123 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

In accordance with 5 U.S.C. 553(c), DOT/MARAD solicits comments from the public to better inform its rulemaking process. DOT/MARAD posts these comments, without edit, to *www.regulations.gov*, as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

By Order of the Maritime Administrator.

Dated: December 6, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30197 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

[Docket No. MARAD 2016- 0125]

Agency Requests for Renewal of a Previously Approved Information Collection(s): Requirements for Establishing U.S. Citizenship

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: The Department of Transportation (DOT) invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted by February 14, 2017.

ADDRESSES: You may submit comments identified by Docket No. MARAD–2016–0125 through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.
- *Fax:* 1–202–493–2251

FOR FURTHER INFORMATION CONTACT: Michael Pucci, 202–366–5167, Office of Maritime Program, Maritime Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, Email: *Michael.Pucci@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2133–0012.

Title: Requirements for Establishing U.S. Citizenship—46 CFR 355.

Form Numbers:

Type of Review: Renewal of an information collection.

Background: Maritime Administration implementing regulations at 46 CFR parts 355 and 356 set forth requirements for establishing U.S. citizenship in accordance with MARAD statutory authority. Those receiving benefits under 46 U.S.C. Chapters 531, 535, and 537 (formerly the Merchant Marine Act, 1936, as amended), or applicants seeking a fishery endorsement eligibility approval pursuant to the American Fisheries Act must be citizens of the United States within the meaning of 46 U.S.C. 50501, (formerly Section 2 of the Shipping Act, 1916, as amended). In either case, whether seeking program benefits or fishery endorsement eligibility, Section 50501 sets forth the statutory requirements for determining whether an applicant, be it a corporation, partnership, or association is a U.S. citizen. 46 CFR part 356 is distinguished from 46 CFR part 355 in that Part 356 establishes requirements

for U.S. citizenship exclusively in accordance with the AFA while Part 355 is applied for purposes of establishing citizenship across multiple MARAD programs arising under other statutory authority. Most program participants are required to submit to MARAD on an annual basis the form of affidavit prescribed by Part 355 or Part 356.

Number of Respondents: 500.

Frequency: Once annually.

Estimated Average Burden per Response: 5 hours.

Total Annual Burden: 2500.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

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) or you may visit *http://www.regulations.gov.*

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93.

By Order of the Maritime Administrator.

Dated: December 6, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–30200 Filed 12–15–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 12, 2016.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before January 17, 2017 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimates, or any other aspect of the information collections, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8142, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained by emailing *PRA@treasury.gov,* calling (202) 622–0934, or viewing the entire information collection request at *www.reginfo.gov.*

Internal Revenue Service (IRS)

OMB Control Number: 1545–1714.

Type of Review: Extension without change of a currently approved collection.

Title: Tip Reporting Alternative Commitment (TRAC) for most industries.

Abstract: Information is required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with section 6053(a), which requires employees to report all their tips monthly to their employers.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 4,877.

OMB Control Number: 1545–1716.

Type of Review: Extension without change of a currently approved collection.

Title: Employer-Designed Tip Reporting Program for the Food and Beverage Industry (EmTRAC)—Notice 2001–1.

Abstract: Information is required by the Internal Revenue Service in its compliance efforts to assist employers and their employees in understanding and complying with section 6053(a), which requires employees to report all their tips monthly to their employers.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 870.

OMB Control Number: 1545–1730.

Type of Review: Extension without change of a currently approved collection.

Title: Manner of making election to terminate tax-exempt bond financing.

Abstract: Section 142(f)(4) of the Internal Revenue Code of 1986 permits a person engaged in the local furnishing of electric energy or gas that uses facilities financed with exempt facility bonds under section 142(a)(8) and that expands it service area in a manner inconsistent with the requirements of sections 142(a)(8) and 142(f) to make an election to ensure that those bonds will continue to be treated as tax-exempt bonds. The final regulations (1.142(f)–1) set forth the required time and manner of making this statutory election.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 15.

OMB Control Number: 1545–1735.

Type of Review: Extension without change of a currently approved collection.

Title: Voluntary Compliance on Alien Withholding Program (''VCAP'')—Revenue Procedure 2001–20.

Abstract: The revenue procedure will improve voluntary compliance of colleges and universities in connection with their obligations to report, withhold and pay taxes due on compensation paid to foreign students and scholars (nonresident aliens). The revenue procedure provides an optional opportunity for colleges and universities which have not fully complied with their tax obligations concerning nonresident aliens to self-audit and come into compliance with applicable reporting and payment requirements.

Affected Public: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 346,500.

OMB Control Number: 1545–1862.

Type of Review: Revision of a currently approved collection.

Title: Information Regarding Request for Refund of Social Security Tax Erroneously Withheld on Wages Received by a Nonresident Alien on an F, J, or M Type Visa.

Form: Form 8316.

Abstract: Certain foreign students and other nonresident visitors are exempt from FICA tax for services performed as specified in the Immigration and Naturalization Act. Applicants for refund of this FICA tax withheld by their employer must complete Form 8316 to verify that they are entitled to a refund of the FICA, that the employer has not paid back any part of the tax withheld and that the taxpayer has attempted to secure a refund from his/her employer.

Affected Public: Individuals or Households.

Estimated Total Annual Burden Hours: 5,625.

OMB Control Number: 1545–1872.

Type of Review: Extension without change of a currently approved collection.

Title: Request for Transcript of Tax Return.

Form: 4506–T.

Abstract: Internal Revenue Code section 7513 allows taxpayers to request a copy of a tax return or related products. Form 4506–T is used to request all products except copies of returns. The information provided will be used to search the taxpayers account and provide the requested information and to ensure that the requestor is the taxpayer or someone authorized by the taxpayer to obtain the documents requested.

Affected Public: Individuals or Households.

Estimated Total Annual Burden Hours: 555,600.

OMB Control Number: 1545–1873.

Type of Review: Extension without change of a currently approved collection.

Title: Waivers of Minimum Funding Standards—Revenue Procedure 2004–15.

Abstract: This revenue procedure describes the process for obtaining a waiver from the minimum funding standards set forth in section 412 of the Code.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 4,730.

OMB Control Number: 1545–2040.

Type of Review: Extension without change of a currently approved collection.

Title: Automatic Consent to change certain elections relating to the apportionment of interest expense and research and experimental expenditures (RP 2006–42).

Abstract: This revenue procedure sets forth the administrative procedures for taxpayers to obtain automatic approval to change certain elections relating to the apportionment of interest expense under §§ 1.861–8T(c)(2) and 1.861–9(i)(2) and research and experimental expenditures (R&E) under § 1.861–17(e). A taxpayer complying with this revenue procedure will be deemed to have obtained the approval of the Commissioner of the Internal Revenue Service to change those elections.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 100.

OMB Control Number: 1545–2194.

Type of Review: Extension without change of a currently approved collection.

Title: Rules for Certain Rental Real Estate Activities.

Abstract: This Revenue Procedure grants relief under Section 1.469–9(g) for certain taxpayers to make late elections to treat all interests in rental real estate as a single rental real estate activity.

Affected Public: Individuals or Households.

Estimated Total Annual Burden Hours: 1,000.

Bob Faber,

Acting Treasury PRA Clearance Officer.

Note: This is the second Federal Register's Notice sent on December 12, 2016 for the Internal Revenue Service.

[FR Doc. 2016–30260 Filed 12–15–16; 8:45 am]

BILLING CODE 4810–01–P

DEPARTMENT OF VETERANS AFFAIRS

Health Services Research and Development Service, Scientific Merit Review Board; Notice of Meetings

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Health Services Research and Development Service Scientific Merit Review Board will conduct in-person and teleconference meetings of its seven Health Services Research (HSR) subcommittees on the dates below from 8:00 a.m. to approximately 5:00 p.m. (unless otherwise listed) at the Hilton Crystal City, 2399 Jefferson Davis Highway, Crystal City, VA, 22202 (unless otherwise listed):

- HSR 1—Health Care and Clinical Management on March 7–8, 2017;
- HSR 2—Behavioral, Social, and Cultural Determinants of Health and Care on March 7–8, 2017;
- HSR 3—Healthcare Informatics on March 7–8, 2017;
- HSR 4—Mental and Behavioral Health on March 7–8, 2017;
- HSR 5—Health Care System Organization and Delivery on March 8–9, 2017;
- HSR 6—Post-acute and Long-term Care on March 9, 2017;
- HSR 8—Randomized Program Evaluations on March 8, 2017;
- CDA—Career Development Award Meeting on March 9–10, 2017; and
- NRI—Nursing Research Initiative from 1:00 p.m. to 5:00 p.m. on March 10, 2017.

The purpose of the Board is to review health services research and development applications involving: the measurement and evaluation of health care services; the testing of new methods of health care delivery and management; and nursing research. Applications are reviewed for scientific and technical merit, mission relevance, and the protection of human and animal subjects. Recommendations regarding funding are submitted to the Chief Research and Development Officer.

Each subcommittee meeting of the Board will be open to the public the first day for approximately one half-hour at the start of the meeting on March 7–8 (HSR 1, 2, 3, 4), March 8 (HSR 8), March 8–9 (HSR 5), March 9 (HSR 6), March 9–10 (CDA), and March 10 (NRI) to cover administrative matters and to discuss the general status of the program. Members of the public who wish to attend the open portion of the subcommittee meetings may dial 1 (800) 767–1750, participant code 10443#.

The remaining portion of each subcommittee meeting will be closed for the discussion, examination, reference to, and oral review of the intramural research proposals and critiques. During the closed portion of each subcommittee meeting, discussion and recommendations will include qualifications of the personnel conducting the studies (the disclosure of which would constitute a clearly unwarranted invasion of personal privacy), as well as research information (the premature disclosure of which would likely compromise significantly the implementation of proposed agency action regarding such research projects). As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the meeting is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

No oral or written comments will be accepted from the public for either portion of the meetings. Those who plan to participate during the open portion of a subcommittee meeting should contact Ms. Liza Catucci, Administrative Officer, Department of Veterans Affairs, Health Services Research and Development Service (10P9H), 810 Vermont Avenue NW., Washington, DC, 20420, or by email at *Liza.Catucci@va.gov.* For further information, please call Ms. Catucci at (202) 443–5797.

Dated: December 13, 2016.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2016–30334 Filed 12–15–16; 8:45 am]

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FEDERAL REGISTER

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Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 23, and 140

Capital Requirements of Swap Dealers and Major Swap Participants; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 23, and 140

RIN 3038—AD54

Capital Requirements of Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing to adopt new regulations and to amend existing regulations to implement sections 4s(e) and (f) of the Commodity Exchange Act (''CEA''), as added by section 731 of the Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). Section 4s(e) requires the Commission to adopt capital requirements for swap dealers (''SDs'') and major swap participants (''MSPs'') that are not subject to capital rules of a prudential regulator. Section 4s(f) requires the Commission to adopt financial reporting and recordkeeping requirements for SDs and MSPs. The Commission also is proposing to amend existing capital rules for futures commission merchants (''FCMs''), providing specific capital deductions for market risk and credit risk for swaps and security-based swaps entered into by an FCM. The Commission is further proposing several technical amendments to the regulations.

DATES: Comments must be received on or before March 16, 2017.

ADDRESSES: You may submit comments, identified by RIN 3038–AD54 and ''Capital Requirements for Swap Dealers and Major Swap Participants'', by any of the following methods:

- *CFTC Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* Send to Chris Kirkpatrick, Secretary, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.
- *Hand delivery/Courier:* Same as Mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures set forth in Regulation 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Eileen T. Flaherty, Director, Division of Swap Dealer and Intermediary Oversight, 202–418–5326, *eflaherty@cftc.gov;* Thomas Smith, Deputy Director, Division of Swap Dealer and Intermediary Oversight, 202–418–5495, *tsmith@cftc.gov;* Jennifer C.P. Bauer, Special Counsel, Division of Swap Dealer and Intermediary Oversight, 202–418–5472, *jbauer@cftc.gov;* Joshua Beale, Special Counsel, Division of Swap Dealer and Intermediary Oversight, 202–418–5446, *jbeale@cftc.gov;* Rafael Martinez, Senior Financial Risk Analyst, Division of Swap Dealer and Intermediary Oversight, 202–418–5462, *rmartinez@cftc.gov;* Paul Schlichting, Assistant General Counsel, Office of the General Counsel, 202–418–5884, *pschlichting@cftc.gov;* or Lihong McPhail, Research Economist, 202–418–5722, *lmcphail@cftc.gov,* Office of the Chief Economist; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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[1] Commission regulations referred to herein are found at 17 CFR chapter 1. Commission regulations are accessible on the Commission's Web site, *http://www.cftc.gov.*

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I. Introduction

A. Statutory Authority

Section 731 of the Dodd-Frank Act [2] amended the CEA [3] by adding section 4s(e), which requires the Commission to adopt rules establishing capital requirements for SDs and MSPs to help ensure the safety and soundness of the SDs and MSPs.[4] Section 4s(e) applies a bifurcated approach requiring each SD and MSP subject to the capital requirements of a prudential regulator to meet the capital requirements adopted by the applicable prudential regulator, and requiring each SD and MSP that is not subject to the capital requirements of a prudential regulator to meet the capital requirements adopted by the Commission.[5] Therefore, SDs and MSPs that are not banking entities, including nonbank subsidiaries of bank holding companies regulated by the Federal Reserve Board, are subject to the Commission's capital requirements.[6] The Commission is also proposing in this release to require SDs to meet defined liquidity and funding requirements and is proposing certain limitations on the withdrawal of capital from SDs as part of the SD capital requirements.

The Commission is also required to adopt regulations to implement provisions in section 4s related to financial reporting and recordkeeping by SDs and MSPs. Section 4s(f)(2) of the CEA directs the Commission to adopt rules governing financial condition reporting and recordkeeping for SDs and MSPs, and section 4s(f)(1)(A) requires each registered SD and MSP to make such reports as are required by Commission rule or regulation regarding the SD's or MSP's financial condition. The Commission is also proposing record retention and inspection requirements consistent with the provisions of section 4s(f)(1)(B).[7] Pursuant to the financial reporting provisions, the Commission is proposing that SDs and MSPs submit periodic financial information and swaps and security-based swaps position information to the Commission, and that SDs and MSPs file written notices with the Commission whenever defined reportable events are triggered.

In addition to proposing minimum capital and financial reporting requirements for SDs and MSPs, the Commission is also proposing to amend existing capital requirements for FCMs to include specific market risk capital charges and credit risk capital charges for swaps and security-based swaps transactions that are not cleared by clearing organizations.[8] Section 4s(a) of the CEA requires entities that engage in swap dealing activities and otherwise meet the definition of an SD to register with the Commission as SDs. The Commission expects that certain FCMs will engage in swap dealing activities that requires them to register as SDs. In addition, the Commission expects that other FCMs may engage in a level of swap dealing activity that is below the de minimis exception and, therefore, exempts the FCMs from registering as SDs.[9] Accordingly, the Commission is

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] 7 U.S.C. 1 *et seq.*

[4] *See* 7 U.S.C. 6s(e)(3)(A). Section 4s(e) also directs the Commission to adopt regulations for SDs and MSPs imposing initial and variation margin requirements on all swaps that are not cleared by a registered clearing organization. The Commission adopted final SD and MSP margin requirements for uncleared swap transactions on December 18, 2015. *See, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants,* 81 FR 636 (Jan. 6, 2016).

[5] The term ''prudential regulator'' is defined in section 1a(39) of the CEA for purposes of the section 4s(e) capital requirements. Specifically, the term ''prudential regulator'' is defined to mean the Board of Governors of the Federal Reserve System (''Federal Reserve Board''); the Office of the Comptroller of the Currency (''OCC''); the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency. All references to an ''SD'' or an ''MSP'' in this proposal will mean an SD or MSP that is subject to the Commission's capital rules, unless otherwise specified.

[6] The prudential regulators, including the Federal Reserve Board and OCC which have capital responsibilities for SDs provisionally-registered with the Commission, have adopted capital rules that incorporate capital requirements for swap and security-based swap transactions. In this regard, the Federal Reserve Board and OCC have adopted revised capital rules to incorporate Basel III capital adequacy requirements. *See, Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule,* 78 FR 62018 (Oct. 11, 2013).

[7] The Commission previously finalized certain record retention requirements for SDs and MSPs regarding their swap activities. *See, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants,* 76 FR 20128 (Apr. 3, 2012).

[8] Section 4f(b) of the CEA authorizes the Commission to establish minimum financial requirements for FCMs. The Commission previously adopted minimum capital requirements for FCMs, which are set forth in Commission Regulation 1.17.

[9] Regulation 1.3(ggg) defines the term ''swap dealer'' and contains a general exception from the definition for a person that engages in a de minimis

Continued

proposing to amend Regulation 1.17 to establish specific capital requirements for FCMs that engage in swaps or security-based swaps that are not cleared by a clearing organization. These proposed capital requirements would apply to all FCMs that enter into uncleared swaps or security-based swaps. The Commission also is proposing technical amendments to several regulations as part of the proposed capital and financial recordkeeping and reporting requirements.

B. Previous Proposed Rulemaking

The Commission previously proposed capital and financial reporting rules for SDs and MSPs in 2011.[10] The Commission received comments from a broad spectrum of market participants, industry representatives, and other interested parties. The commenters addressed numerous topics including the permissible use of models for computing capital and the need for harmonization of the Commission's rules with capital rules of the prudential regulators and the Securities and Exchange Commission (''SEC'').[11]

The Commission elected to defer consideration of final capital rules until the Commission adopted final regulations governing margin requirements for SDs and MSPs engaging in uncleared swap transactions. The Commission adopted the final margin requirements for uncleared swaps in December 2015.[12]

The Commission has considered the comments it received from its initial capital proposal in developing this proposal. In addition, and as discussed below, the Commission also has considered capital rules adopted by the prudential regulators and capital rules proposed by the SEC for security-based swap dealers (''SBSDs'') and major security-based swap participants (''MSBSPs'') in developing this proposal. The Commission further considered the impact of the final margin rules for uncleared swaps and the final rules addressing the cross-border application of the margin requirements for uncleared swaps in developing this proposal.[13]

C. Consultation With U.S. Securities and Exchange Commission and Prudential Regulators

Section 4s(e)(3)(D) of the CEA provides that the CFTC, SEC, and prudential regulators (collectively, the ''Agencies'') shall, to the maximum extent practicable, establish and maintain comparable minimum capital requirements for SDs and MSPs. Further, section 4s(e)(3)(D) directs staff of the Agencies to meet periodically, but no less frequently than annually, to consult on minimum capital requirements. Accordingly, staff from each of the Agencies had the opportunity to provide oral and/or written comments to the capital and financial reporting regulations for SDs and MSPs contained in this proposing release, and the proposal reflects certain elements of their comments.

II. Proposed Regulations and Amendments to Regulations

A. Capital

1. Introduction

Broadly speaking, in developing the proposed capital requirements for SDs and MSPs, the Commission strived to advance the statutory goal of helping to protect the safety and soundness of SDs and MSPs, while also taking into account the diverse nature of entities participating in the swaps market and the existing capital regimes that apply to these entities and/or their financial group. To that end, the Commission is proposing three alternative capital approaches for SDs and MSPs, which are intended to minimize competitive advantages that might otherwise arise if the Commission were to impose a singular capital approach in light of the different corporate and operating structures of the entities. The Commission further considered the degree to which its proposed capital requirements would be consistent with an existing regulatory framework (if any) to which these entities are already subject and the statutory objective of the capital requirements, to help ensure the safety and soundness of SD and MSP registrants.

The Commission has, to a great extent, drawn on existing CFTC, prudential regulator, and SEC capital rules in developing the proposed capital requirements for SDs and MSPs. Also, as discussed in this release, the Commission's proposed capital requirements for SDs and MSPs are consistent in many respects with the SEC's proposed capital requirements for SBSDs and MSBSPs, and the prudential regulators' capital requirements for banks and bank holding companies.[14] Specifically, the proposal, depending on the characteristics of the registered entity, would: (i) Permit SDs to elect a capital requirement that is based on existing bank holding company capital rules adopted by the Federal Reserve Board (the ''bank-based capital approach''); (ii) permit SDs to elect a capital requirement that is based on the existing CFTC FCM capital rule, the existing SEC broker-dealer (''BD'') capital rule, and the SEC's proposed capital requirements for SBSDs, (the ''net liquid assets capital approach''); or (iii) permit SDs that meet defined conditions designed to ensure that they are ''predominantly engaged in non-financial activities'' to compute their minimum regulatory capital based upon the firms' tangible net worth (the ''tangible net worth capital approach'').

With respect to MSPs, the Commission is proposing a minimum regulatory capital requirement based upon the tangible net worth of the MSP. This tangible net worth approach is consistent with the SEC's proposed capital rule for MSBSPs as discussed in section II.A.2.iii of this release.

The Commission's proposed SD and MSP capital requirements are set forth in new Regulation 23.101, and are discussed in section II.A.2 of this release. Proposed Regulation 23.101 details the minimum capital requirements for each of the three capital approaches and the eligibility criteria (as applicable), and further

level of swap dealing activities. Regulation 1.3(ggg) generally defines the term ''de minimis'' to mean that the swap dealing activities of a person, or any other entity controlling, controlled by or under common control with the person, over the preceding 12 months have an aggregate gross notional amount of no more than $3 billion (subject to a phase in level of $8 billion) and an aggregate notional amount of no more than $25 million with regard to swaps in which the counterparty is a ''special entity'' as defined in section 4s(h)(2)(C) of the CEA and Commission Regulation 23.401(c).

[10] *See Capital Requirements of Swap Dealers and Major Swap Participants,* 76 FR 27802 (May 12, 2011).

[11] Comments received on the Commission's May 12, 2011 proposed capital and financial reporting rules are available on the Commission's Web site. Commenters included financial services associations, agricultural associations, energy associations, insurance associations, banks, brokerage firms, investment managers, insurance companies, pension funds, commercial end users, law firms, public interest organizations, and other members of the public.

[12] *See* 81 FR 636 (Jan. 6, 2016).

[13] The Commission adopted final regulations addressing the cross-border application of the uncleared swaps margin rules. *See, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements,* 81 FR 34818 (May 31, 2016).

[14] Section 15F(e) of the Exchange Act (15 U.S.C. 78o–10(e)(1)(B)) provides that the SEC shall prescribe capital and margin requirements for SBSDs and nonbank MSBSPs that do not have a prudential regulator. The SEC proposed capital requirements for SBSDs and MSBSPs in November 2012. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants,* 77 FR 70214 (Nov. 23, 2012). The prudential regulators adopted amendments to the capital rules for banks and bank holding companies to incorporate certain requirements set forth in the Dodd-Frank Act. *See,* 78 FR 62018 (Oct. 11, 2013).

defines the capital computations for each approach, including various market risk and credit risk charges, whether using models or otherwise, to determine whether an SD satisfies the minimum capital requirements. The proposal also defines a minimum capital requirement for MSPs and defines the capital computation for MSPs.

The Commission is also proposing several amendments to Regulation 1.17, which governs the capital requirements for FCMs. The proposed amendments would establish specific market risk and credit risk capital charges for swap and security-based swap positions, and would provide a process for an FCM that is dually-registered as an SD to seek approval from the Commission or from the registered futures association (''RFA'') of which the FCM is a member to use internal capital models to compute market risk and credit risk capital charges.[15] The discussion of the proposed FCM capital amendments is contained in section II.A.3 of this release.

2. Capital Requirements for Swap Dealers and Major Swap Participants

The Commission is proposing capital requirements for SDs and MSPs in order to help ensure the safety and soundness of the SDs and MSPs by requiring such firms to maintain a minimum level of financial resources that is based upon the activities of the firms. Adequate levels of capital will allow SDs and MSPs to meet their obligations to swap and security-based swap counterparties and general creditors.

The Commission's proposed SD capital requirements in Regulation 23.101 are comprised of two components. First, an SD must compute the minimum amount of capital that the SD is required to maintain under proposed Regulation 23.101. Second, the SD must compute, based upon its balance sheet and certain adjustments including market risk and credit risk charges on its swaps, security-based swaps and other proprietary positions, the actual amount of capital that the SD maintains. The SD's actual capital must be equal to or greater than the SD's minimum capital requirement. This section discusses the proposed minimum amount of capital required to be maintained by an SD or MSP under the proposal and the proposed regulations governing the computation of the amount of capital that an SD or MSP actually maintains.

To provide SDs with flexibility given the diverse nature of their corporate structures and operations, the Commission is proposing a bank-based capital approach, a net liquid assets capital approach, and a tangible net worth capital approach for SDs. And as described below, SDs which are subject to existing capital requirements that would adequately address their swaps transactions may choose to remain under those existing requirements. The Commission believes that providing this flexibility is appropriate as both the bank-based capital approach and the net liquid assets capital approach are based on internationally-recognized and accepted approaches for establishing strong minimum capital requirements for financial institutions. Both of these approaches are designed to ensure that SD's meet their financial obligations and to help ensure that safety and soundness of the SD. Although there are differences between the bank-based and net liquid assets based capital approaches, they are structurally similar in that they evaluate the composition of the SD's balance sheet and are formulated to ensure the SD's ability to continue its operations in times of financial stress. The option to use the tangible net worth approach is appropriate because it would be available only for SDs that are predominantly engaged in non-financial activities. These SDs are primarily involved in commercial activities and engage in a relatively insignificant amount of financial transactions when compared to their entire operations, as described below. As the Commission has previously noted, financial firms generally present a higher level of systemic risk than commercial firms as the profitability and viability of financial firms is more tightly linked to the health of the financial system than commercial firms.[16]

In addition, as noted above, the Commission based the proposal on existing regulatory capital regimes. The Commission recognizes that certain of the current registered SDs are nonbank subsidiaries of bank holding companies that are already subject to the Federal Reserve Board's bank-based capital requirements for bank holding companies. The Commission anticipates that SDs that are nonbank subsidiaries of bank holding companies may elect the bank-based capital approach as the firms consolidate into bank holding companies that are subject to the Federal Reserve Board's bank-based capital requirements. The Commission's proposed bank-based capital approach would allow an SD that consolidates into a bank holding company to maintain books and records, and perform capital computations, in a manner that is consistent with its holding company parent entity.

Furthermore, several of the current provisionally-registered SDs are also dually-registered with the Commission as FCMs or dually-registered with the SEC as BDs or ''OTC derivatives dealers,'' and several of the current provisionally-registered SDs are anticipated to register with the SEC as SBSDs.[17] FCMs, BDs, and OTC derivatives dealers currently are subject to a net liquid assets capital requirement, and the SEC is proposing a net liquid assets capital requirement for SBSDs.[18] The Commission believes that permitting dually-registered SDs/SBSDs or SDs/OTC derivatives dealers to use a uniform CFTC–SEC net liquid assets capital approach would simplify the SDs recordkeeping obligations and allow them to use existing accounting and financial reporting systems. This approach is also consistent with the Commission's long-standing practice of maintaining a uniform capital rule for dually-registered FCM/BDs, while also imposing a strong capital requirement on the SDs to help ensure the safety and soundness of the firms.

In addition to the bank-based capital approach and the net liquid assets capital approach, the Commission is also proposing to permit SDs that are ''predominantly engaged in non-financial activities,'' as defined below, to elect a capital approach that is based on the SD's tangible net worth.[19] The Commission is proposing the tangible net worth capital approach in recognition that not all SDs will be principally engaged in traditional dealing and other financial activities. The Commission anticipates that a small number of SDs will be substantially engaged in commercial operations that would make meeting a traditional bank-based capital approach or net liquid

[15] Section 3 of the CEA states that a purpose of the CEA is to establish a system of effective self-regulation under the oversight of the Commission. Consistent with the self-regulatory concept established under section 3, section 17 of the CEA provides a process whereby an association of persons may register with the Commission as a registered futures association (''RFA''). Currently, the National Futures Association (''NFA'') is the only RFA under section 17 of the CEA.

[16] *See* 81 FR 636, 640 (Jan. 6, 2016).

[17] An OTC derivatives dealer is a limited purpose BD established by SEC regulations. An OTC derivatives dealer's securities activities are limited to engaging in eligible OTC derivative instruments that are securities and other enumerated activities. *See* 17 CFR 240.3b–12.

[18] FCM capital requirements are set forth in CFTC Regulation 1.17. SEC Rule 15c3–1 (17 CFR 240.15c3–1) governs the capital requirements for BDs. SEC proposed Rule 18a–1 would govern the capital requirements for SBSDs that are not registered as BDs. (*See* 77 FR 70214).

[19] *See* proposed Regulation 23.101(a)(2).

assets capital approach extremely challenging, if at all possible, without substantial corporate restructuring. The Commission's proposal to use the tangible net worth approach would be limited to SDs that are predominantly engaged in non-financial (*i.e.,* commercial) activities.

The Commission's proposed approach of recognizing existing capital requirements on firms that register as SDs and the Commission's further recognition that not all SDs will be traditional financial firms offers potential benefits to swap market participants by encouraging more firms to act as SDs and to make markets in swaps. An approach that would impose a standardized capital requirement on firms that otherwise are subject to existing capital regimes that differ substantially from the standardized capital requirement or that would require substantial corporate reorganization to satisfy the standardized capital requirement would increase costs of swap transactions for swap dealers and their counterparties, including commercial end users and other non-financial market participants. A standardized capital requirement may also impose significant disincentives for certain SDs to remain in the market as dealers in swaps, which would concentrate dealing activities in a smaller number of firms. The Commission's proposal implements strong capital requirements to help ensure the safety and soundness of the SDs, while at the same time offers an appropriate degree of flexibility, recognizing that a single, standardized capital approach is not appropriate for all SDs which could result in significant burdens on all swap market participants.

Proposed Regulation 23.101 also is consistent with the statutory requirements under section 4s(e), which effectively provides that SDs subject to the capital rule of a prudential regulator are not subject to the Commission's capital rules.[20] Proposed Regulation 23.101(a)(3) would provide that an SD subject to the capital rules of a prudential regulator is not subject to the Commission's capital rules.

Proposed Regulation 23.101(a)(4) also provides that certain SDs that are otherwise currently subject to the Commission's capital rules are not subject to Regulation 23.101. Specifically, proposed Regulation 23.101(a)(4) would provide that an SD that is also registered as an FCM with the Commission is subject to the Commission's FCM capital requirements contained in Regulation 1.17.[21] These SDs would be subject to the FCM capital requirements, which the Commission is proposing to amend in order to better reflect the specific risks of engaging in uncleared swaps and security-based swap transactions. The Commission is requiring an SD that is dually-registered as an FCM to meet the FCM capital requirements as such requirements reflect the Commission's long experience in regulating the financial requirements of FCMs. For example, the FCM capital requirement, which requires an FCM to hold at least one dollar of liquid assets to meet each dollar of liabilities (except certain subordinated debt), is designed to ensure that an FCM has adequate liquid resources to effectively operate as a market intermediary by having resources to pay customers' requests to withdraw funds and by satisfying its customers' obligations to clearing organizations. The Commission proposed amendments for FCMs are discussed in section II.A.3 of this release.

Lastly, proposed Regulation 23.101(a)(5) would contain a provision of ''substituted compliance'' for capital and financial reporting requirements for SDs that are: (1) Not organized under the laws of the U.S., and (2) not domiciled in the U.S. The proposal would permit these non-U.S. organized and domiciled SDs (or a regulatory authority in the SDs' home country jurisdictions) to petition the Commission to satisfy the Commission's capital and financial reporting requirements through substituted compliance with the capital and financial reporting requirements of the SDs' respective home country jurisdiction.[22] The proposed substituted compliance provisions and the Commission program of conducting comparability determinations of foreign jurisdictions capital requirements are discussed in section II.D of this release.

i. Capital Requirement for Swap Dealers Under a Bank-Based Capital Approach

a. Computation of Minimum Capital Requirement

The Commission is proposing to provide SDs with an option to elect the bank-based capital approach based on the capital requirements adopted by the Federal Reserve Board for bank holding companies. The Federal Reserve Board's bank holding company capital requirements are consistent with the bank capital framework adopted by the Basel Committee on Banking Supervision (''BCBS'').[23] The BCBS framework is an internationally-recognized framework for setting capital requirements for banks and bank holding companies. The Commission believes that proposing capital requirements using the Federal Reserve Board's capital framework is appropriate as the framework specifically reflects swaps and security-based swaps in the capital requirements, and the framework was developed to provide prudential standards to help ensure the safety and soundness of bank and bank holding companies. In addition, as noted above, the proposal to allow SDs an option to elect this approach would provide efficiencies for several of the provisionally registered SDs that are part of a bank holding company structure, and have developed recordkeeping, accounting, and financial reporting systems that are designed to comply with existing prudential requirements.

The Commission's bank-based capital approach is set forth in proposed Regulation 23.101(a)(1)(i), and would require an SD to maintain a minimum level of regulatory capital that is equal to or in excess of the greater of the following four criteria:

(1) $20 million of common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR 217.20, as if the SD itself were a bank holding company subject to 12 CFR part 217;[24]

(2) common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR part 217.20, equal to or greater than eight percent of the SD's risk-weighted assets computed under the bank holding company regulations in 12 CFR part 217 as if the SD were a bank holding company subject to 12 CFR part 217;

(3) common equity tier 1 capital, as defined under 12 CFR 217.20, equal to or greater than 8 percent of the sum of:

(a) The amount of ''uncleared swaps margin'' (as that term is defined in

[20] *See* section 4s(e)(1) and (2).

[21] The Commission, as discussed in section II.A.3 of this release, also is proposing to amend Regulation 1.17 to specifically address capital requirements for FCMs that carry swaps and/or security-based swaps positions.

[22] Proposed Regulations 23.101(a)(5) and 23.106.

[23] BCBS is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Institutions represented on the BCBS include the Federal Reserve Board, the European Central Bank, Deutsche Bundesbank, Bank of France, Bank of England, Bank of Japan, and Bank of Canada.

[24] Common equity tier 1 capital is defined in 12 CFR 217.20 of the Federal Reserve Board's rules. Common equity tier 1 capital generally represents the sum of a bank holding company's common stock instruments and any related surpluses, retained earnings, and accumulated other comprehensive income.

proposed Regulation 23.100) for each uncleared swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to Regulation 23.154;[25]

(b) the amount of initial margin that would be required for each uncleared security-based swap position open on the books of the SD, computed on a counterparty-by-counterparty basis pursuant to proposed SEC Rule 18a–3(c)(1)(i)(B), without regard to any initial margin exemptions or exclusions that the rules of the SEC may provide to such security-based swap positions; and

(c) the amount of initial margin required by a clearing organization for cleared proprietary futures, foreign futures, swaps, and security-based swap positions open on the books of the SD; or

(4) the capital required by an RFA of which each SD is a member.

Each of the proposed minimum capital criteria is discussed below.

The first criterion under the Commission's proposal is that all SDs that elect the bank-based capital approach must maintain a minimum of $20 million of common equity tier 1 capital. The Commission believes that given the role that SDs play in the financial markets by engaging in swap dealing activities that it is appropriate to require that all SDs maintain a minimum level of capital, stated as an absolute dollar amount that does not fluctuate with the level of the firms' dealing activities to help ensure the safety and soundness of SDs.

The proposed $20 million of minimum capital is consistent with the minimum regulatory capital requirements proposed by the Commission in this release for SDs that elect the net liquid assets capital approach or the tangible net worth capital approach discussed in sections II.A.2.ii and II.A.2.iii, respectively, of this release. The $20 million minimum capital requirement is also consistent with the net capital requirement proposed by the SEC for SBSDs, and is consistent with the current minimum net capital requirements for OTC derivatives dealers registered with the SEC.[26]

The second criterion of the minimum capital requirement for SDs that elect the bank-based capital approach is that the SD must maintain common equity tier 1 capital equal to or greater than eight percent of the SD's risk-weighted assets computed under the bank holding company regulations in 12 CFR part 217 as if the SD were a bank holding company. In effect, this provision of Regulation 23.101(a)(1)(i) imposes a capital approach on a SD that is generally consistent with the approach that the Federal Reserve Board imposes on bank holding companies.[27] The Commission believes it is important to include this criterion so that an SD would maintain a level of common equity tier 1 capital that is comparable to the level it would have to maintain if it were subject to the capital rules of the Federal Reserve Board.

The Commission is also proposing to measure the required minimum amount of regulatory capital in terms of a minimum ratio of total qualifying capital to risk-weighted assets of eight percent, in a manner that is comparable to the Federal Reserve Board's capital rules for bank holding companies.[28] For purposes of the Commission's proposal, as is also the case for the Federal Reserve Board's minimum ratio requirement, the assets and off-balance sheet transactions or exposures of the bank holding company are weighted relative to their risk.[29] Thus, under the Commission's proposal, the greater the perceived risk of the assets and the off-balance sheet items, the greater the weighting for the risk and the greater the amount of capital necessary to cover eight percent of the risk-weighted assets.[30]

Proposed Regulation 23.101(a)(1)(i) would require an SD that elects a bank-based capital approach to compute its risk-weighted assets in accordance with the Federal Reserve Board's capital requirements contained in 12 CFR part 217. The proposal includes the two general approaches to computing risk-weighted assets under 12 CFR part 217. The first approach is for SDs that have not obtained Commission or RFA approval to calculate their risk-weighted assets using internal credit risk and market risk models. Proposed Regulation 23.103 would require these SDs to use a standardized, or rules-based, approach to computing their risk-weighted assets. Under this approach, these SDs would use the credit risk charges from the Federal Reserve Board's standardized approach under subpart D of 12 CFR 217 and the market risk charges that are set forth in Regulation 1.17.[31] Regulation 1.17 contains the standard market risk capital charges that have been imposed on FCMs for many years. Generally, market risk charges are determined by multiplying the notional value or market value of an asset by a fixed percentage set forth in the regulations.[32] The market risk charges are then multiplied by a factor of 12.5 and added to the total risk-weighted assets of the SD.[33]

[25] The term ''uncleared swap margin'' is defined in Regulation 23.100 to mean the amount of initial margin that a swap dealer would be required to collect from each swap counterparty pursuant to the margin rules for uncleared swap transactions (Regulation 23.154). The term ''uncleared swap margin'' includes all uncleared swaps that an SD is required to collect margin for under the margin regulations, and also includes all uncleared swaps that are exempt or excluded from the margin requirements including swaps with commercial end users, swaps entered into prior to the respective compliance dates of the Commission's margin requirements set forth in Regulation 23.161 (*i.e.,* legacy swaps), and excluded swaps with an affiliated entity.

[26] The SEC proposed capital requirements for SBSDs would impose a minimum net capital requirement of $20 million for SBSDs that are not approved to use internal capital models and a $100 million dollar tentative net capital and $20 million net capital requirement for SBSDs that are approved to use internal capital models. *See* 77 FR 70214 (Nov. 23, 2012). SEC Rule 15c3–1(a)(5) (17 CFR 240.15c3–1(a)(5)) currently requires an OTC derivatives dealer that has obtained approval to use capital models to maintain a minimum of $100 million of tentative net capital and $20 million of net capital.

[27] As discussed further below, the Commission's proposal differs from the rules of the Federal Reserve Board in that the Commission's proposal would require an SD to add to its risk weighted assets the market risk capital charges computed in accordance with Regulation 1.17 if the SD has not obtained approval from the Commission or from an RFA to use internal market risk and credit risk models.

[28] *See* 12 CFR 217.10.

[29] *See* 12 CFR 217 subparts D, E, and F.

[30] Large, complex banks also must make further adjustments to these risk-weighted assets for the additional capital they must hold to reflect the market risk of their trading assets *See* 12 CFR 217 subpart F. The market risk requirements generally apply to Federal Reserve Board-regulated institutions with aggregate trading assets and trading liabilities equal to 10 percent or more of total assets or one billion dollars or more.

[31] The Federal Reserve Board's standardized approach under subpart D of 12 CFR 217 applies only to credit risk charges; the Federal Reserve Board has not adopted standardized market risk charges. Bank and bank holding companies that are subject to market risk charges are required to use internal models and, accordingly, subpart D of 12 CFR 217 does not include a standardized approach for computing market risk charges. To address this issue, the Commission is proposing that an SD that has not obtained Commission or RFA approval to use internal market risk models must apply the rules-based market risk capital charges contained in Regulation 1.17 in computing its total risk-weighted assets.

[32] For example, U.S. Treasuries are subject to capital charges of between zero and six percent depending on the time to maturity of each treasury instrument, and readily marketable equity securities are subject to a 15 percent capital charge. *See* Regulation 1.17(c)(5)(v), which references SEC Rule 15c3–1(c)(2)(vi) (17 CFR 240.15c3–1(c)(2)(vi)). SEC Rule 15c3–1(c)(2)(vi)(A)(1) provides that a BD shall take a capital charge on U.S. Treasuries of between zero and six percent of the fair market value of the instrument depending upon the time to maturity. Rule 15c3–1(c)(2)(vi)(j) provides a capital charge for equities equal to 15 percent of the fair market value of the securities.

[33] The 12.5 multiplication factor is necessary to ensure that the SD maintains common equity tier 1 capital at level to cover the full amount of the

Continued

The second approach to computing risk-weighted assets allows SDs that have obtained Commission or RFA approval of internal credit risk and market risk models to use those models to calculate their risk-weighted assets. For SDs that have been approved to use internal models to compute market risk and credit risk, the models would have to meet the qualitative and quantitative requirements set forth in proposed Regulation 23.102 and Appendix A to Regulation 23.102, which are based upon the Federal Reserve Board's qualitative and quantitative requirements in 12 CFR 217.[34] The proposed qualitative and quantitative requirements for the models, and the proposed model submission process, are discussed in section II.4 of this release.

The third criterion that comprises the SD minimum capital requirement under the proposed bank-based capital approach would require an SD to maintain common equity tier 1 capital equal to or in excess of eight percent of the sum of: (1) The SD's uncleared swaps margin requirements for uncleared swaps transactions, (2) the initial margin that would be required for each uncleared security-based swap transactions pursuant to SEC's proposed Rule 18a–3(c)(1)(i)(B), without regard for any amounts or security-based swaps that may be exempted or excluded under the SEC's proposal, (3) the risk margin required on the SD's cleared futures, foreign futures, and swaps positions, and (4) the amount of initial margin required by a clearing organization that clears the SD's proprietary security-based swaps. Each of these elements is discussed below.

This criterion is intended to ensure that an SD maintains a minimum level of capital that is correlated to the risk associated with the SD's trading activities. The Commission believes that this approach would be appropriate for SDs as the minimum capital requirement would be correlated with the ''risk'' of the SD's futures, foreign futures, swaps, and security-based swaps positions as measured by the margin required on the positions. Specifically, the SD's minimum capital requirement would increase or decrease as the amount of margin necessary to support the SD's futures, foreign futures, swaps and security-based swaps positions increased or decreased. This approach is consistent with the Commission's current approach to establishing a minimum capital requirement for FCMs.[35]

As noted above, the term ''uncleared swaps margin'' is defined in proposed Regulation 23.100 and would mean the amount of initial margin that the SD would be required to collect from a swap counterparty pursuant to the Commission's margin rules for uncleared swap transactions in Commission Regulations 23.150 through 23.161, subject to certain adjustments to incorporate an amount for the initial margin for swaps that are otherwise exempt or excluded from the Commission's margin requirements. The SD would compute the uncleared margin amount on a portfolio basis for each of its counterparties. Similarly, the Commission would also require the SD to compute, again on a portfolio basis, the amount of initial margin that would be required for each uncleared security-based swap pursuant to SEC's proposed Rule 18a–3(c)(1)(i)(B) without regard for any exemptions or exclusions that may be provided by the SEC's proposal. The term ''risk margin'' is defined in Regulation 1.17(b)(8), and generally refers to the amount of margin required by clearing organizations that clear futures, foreign futures, and swaps transactions. Similarly, the proposed rules would also include the amount of initial margin required by clearing organizations for an SD's cleared security-based swaps.

The proposal would require an SD to include all swaps and security-based swaps in the computation, including swaps that are excluded from the Commission's margin rules for uncleared swaps and any security-based swaps that the SEC may exclude from its margin rules when adopted as final. Specifically, the proposal would provide that an SD must include in its computation of the uncleared swaps margin each outstanding swap, including swaps exempt from the scope of the Commission's swaps margin rules by Regulation 23.150 (''TRIPRA Exemption''),[36] foreign exchange swap as the term is defined in Regulation 23.151, or netting set of swaps or foreign exchange swaps, for each counterparty, as if that counterparty were an unaffiliated SD.

The Commission's proposal also would require an SD to include the initial margin for all swaps that would otherwise fall below the $50 million initial margin threshold amount or the $500,000 minimum transfer amount, as defined in Regulation 23.151, for purposes of computing the uncleared swap margin amount. As such, the uncleared swap margin amount would be the amount that an SD would have to collect from a counterparty, assuming that the exclusions and exemptions for collecting initial margin for uncleared swaps set forth in Regulations 23.150–161 would not apply, and also assuming that the thresholds under which initial margin and/or variation margin would not need to be exchanged would not apply. Accordingly, uncleared swaps that are not subject to the margin requirement such as those executed prior to the compliance date for margin requirements (''legacy swaps''), inter-affiliate swaps, and TRIPRA Exemption swaps would have to be taken into account in determining the capital requirement.

The Commission is proposing to include these swaps and comparable security-based swaps in the computation as it believes that it would be appropriate to require an SD to maintain capital for unmargined swap and security-based swap exposures to counterparties, so that capital would be available to cover the ''residual'' risk of a counterparty's uncleared swaps and security-based swap positions. The Commission believes that its approach is consistent with its statutory mandate—helping to ensure the safety and soundness of the SDs subject to its jurisdiction—to require an SD to reserve capital for all of its uncollateralized exposures, including the exposures that have been excluded or exempted from the Commission's margin requirements. This includes swaps where the counterparty is a commercial end user or an affiliate of the SD, as the uncollateralized exposures from these counterparties present risk to the financial condition of the SD.

The Commission's proposal to require an SD to reserve capital for uncollateralized exposures to swap and security-based swap counterparties is not inconsistent with the Commission's

market risk charge. Since the SD is required to maintain common equity tier 1 capital equal to or in excess of eight percent of the risk-weighted assets, the market risk charge is multiplied by 12.5, which effectively requires the SD to hold common equity tier 1 capital in an amount equal to the full amount of the market risk charge. This approach is consistent with the Federal Reserve Board's approach to bank holding companies.

[34] Federal Reserve Board model-based capital charges for credit risk and market risk are set forth in 12 CFR part 217 subparts E and F, respectively.

[35] FCMs are required to maintain a minimum level of adjusted net capital that is equal to or greater than eight percent of the margin required on futures, foreign futures, and cleared swaps positions carried by the FCM in customer and noncustomer accounts. *See* Regulation 1.17(a)(1)(i)(B).

[36] Title III of the Terrorism Risk Insurance Program Reauthorization Act of 2015 amended sections 731 and 764 of the Dodd-Frank Act to provide that the Commission's margin requirements shall not apply to a swap in which a counterparty: (1) Qualifies for an exception under section 2(h)(7)(A) of the CEA; (2) qualifies for an exemption issued under section 4(c)(1) of the CEA for cooperative entities as defined in such exemption; or (3) satisfies the criteria in section 2(h)(7)(D) of the CEA. *See* Public Law 114–1, 129 Stat. 3.

regulations exempting or excluding uncleared swaps with certain counterparties from margin requirements.[37] Initial margin is a transaction-based financial resource. Initial margin protects counterparties to a swap transaction as well as the overall financial system. Initial margin serves both as a check on risk-taking that might exceed a counterparty's financial capacity and as a resource that can limit losses when there is a failure by a counterparty to meet its obligations. If a swap counterparty defaults, the other party may use initial margin to cover some or all of the loss.

In developing its proposed margin requirements for uncleared swap transactions, the Commission recognized that different categories of counterparties present different levels of risk.[38] The Commission stated its belief that financial firms generally present a higher level of risk than non-financial firms due to the profitability and viability of financial firms being more tightly linked to the health of the financial system than non-financial firms.[39] Non-financial end users, however, generally use swaps to hedge commercial risk and were deemed to pose less risk to SDs.[40] Due to the differences in perceived risk and potential systemic effects, and consistent with Congressional intent, the Commission excluded non-financial end users from the margin requirements.

Capital, however, serves as an overall financial resource for the SD and is intended to cover potential risks that are not adequately covered by other risk management programs (*i.e.,* ''residual risk'') including margin on uncleared swaps. Capital is intended to help ensure the safety and soundness of the SD by providing financial resources to allow an SD to absorb unanticipated losses and declines in asset values from all aspects of its business operations, including swap dealing activities, while also continuing to meet its financial obligations. The Commission is proposing to require that an SD reserve capital against all uncollateralized swaps exposures, as such exposures pose residual risk not covered by other assets of the SD. Accordingly, capital is necessary to provide a financial cushion to protect an SD from financial exposures, including uncollateralized exposures to swap counterparties.

The Commission's proposal would not require an SD to reserve capital equal to the full amount of its uncollateralized swap exposures. The Commission's proposal would require an SD to reserve capital equal to a percentage of its uncollateralized exposures. In this respect, the Commission's capital requirement would not have the same impact on the SD with respect to such uncollaterized swaps (*e.g.,* an SD's funding or pricing of swaps) as would the application of the Commission's margin requirements to such swaps. The Commission's proposal should also not have the same impact on the cost to commercial end users who are counterparties to such uncollaterized swaps as would imposition of margin requirements on such swaps, because of the different impact on an SD's funding or pricing of swaps and because margin requirements impose specific transactional costs on counterparties (*e.g.,* establishment of custodial arrangements, documentation requirements) that are not generated by SD capital requirements. The Commission's proposed approach regarding the inclusion of uncollateralized swap exposures in the SD's capital requirements is also consistent with the approach adopted by the prudential regulators in setting capital requirements for SDs subject to their jurisdiction and is consistent with the approach proposed by the SEC for SBSDs.

The proposed capital requirement would require an SD to include in the eight percent calculation the amount of margin required by a clearing organization for the SD's proprietary cleared swaps, security-based swaps, futures, and foreign futures positions. The Commission notes that while the proposed minimum capital requirement based on eight percent of margin on cleared and uncleared swaps is consistent with the SEC's proposal for SBSDs, the SEC approach would require an SBSD to maintain a minimum level of net capital equal to or greater than eight percent of the risk margin required on cleared and uncleared security-based swaps only. The Commission's proposal would expand the products included in the SD's minimum capital requirement to include swaps, security-based swaps, futures and foreign futures positions. The Commission is expanding the products beyond the SEC proposal as it believes that it is appropriate for SDs to maintain a minimum level of capital that reflects the extent of the risks posed by the full, broad range of the SDs' proprietary positions.

The fourth criterion of the proposed minimum capital requirements would require an SD to maintain the minimum level of capital required by an RFA of which the SD is a member. The proposed minimum capital requirement based on membership requirements of an RFA is consistent with current FCM capital requirements under Regulation 1.17, and reflects Commission regulations that require each SD to be a member of an RFA.[41] The proposal also is consistent with section 17(p)(2) of the CEA, which provides, in relevant part, that an RFA must adopt rules establishing minimum capital and other financial requirements applicable to the RFA's members for which such requirements are imposed by the Commission.[42] As noted above, the NFA currently is the only RFA. The proposal recognizes that the NFA would be required by section 17 of the CEA to adopt SD capital rules once the Commission imposes capital requirements on SDs, and would incorporate the NFA minimum capital requirements into the Commission's regulation.

b. Computation of Common Equity Tier 1 Capital To Meet Minimum Capital Requirement

Each SD subject to the bank-based capital approach is required to maintain a level of common equity tier 1 capital that is equal to or in excess of the highest of the three criteria listed in section II.A.2.i above. The Commission is proposing to limit the SD's capital that qualifies to satisfy the SD's minimum capital requirement to common equity tier 1 capital. This limitation would be different from the Federal Reserve Board's requirements, which allow a bank holding company to meet its minimum capital requirements with a combination of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital.[43]

The Commission is proposing the stricter standard as common equity tier 1 capital is a more conservative form of capital than additional tier 1 or tier 2 capital, particularly as it relates to the

[37] *See* Regulation 23.150.

[38] *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Proposed Rule* 79 FR 59898 (Oct. 3, 2014).

[39] *Id.*

[40] *Id.*

[41] *See* Regulations 1.17(a)(1)(i)(C) and 170.16.

[42] *See* section 17(p)(2) of the CEA, which requires RFAs to adopt rules establishing minimum capital and other financial requirements applicable to its members for which such requirements are imposed by the Commission, provided that such requirements may not be less stringent than the requirements imposed by the CEA or by Commission regulations.

[43] Under the Federal Reserve Board's rules, a bank holding company's total capital must equal or exceed at least eight percent of its risk-weighted assets. In addition, at least six percent of the bank holding company's capital must be in the form of tier 1 capital, and at least 4.5 percent of the tier 1 capital must qualify as common equity tier 1 capital. The remaining two percent of capital may be comprised of tier 2 capital.

permanence of the capital and its availability to absorb unexpected losses. As noted above, common equity tier 1 capital is defined in 12 CFR 217.20 to generally comprise the sum of a bank holding company's common stock instruments and any related surpluses, retained earnings, and accumulated other comprehensive income. Tier 1 capital includes common equity tier 1 capital and further includes such instruments as preferred stock. Tier 2 capital includes certain types of instruments that include both debt and equity characteristics (*e.g.,* certain perpetual preferred stock instruments and subordinated term debt instruments).[44] The Commission also is proposing the stricter common equity tier 1 requirement as it is not proposing to include in the SD's minimum capital requirement certain of the prudential regulators' capital add-ons, including the capital conservation buffer and the countercyclical capital buffer.[45] In order for the SD to meet its minimum requirements, it must demonstrate that its common equity tier 1 capital equals or exceeds the highest of the minimum requirements set forth in proposed Regulation 23.101(a)(1)(i) and discussed in section II.A.2.i.a above.

Request for Comment

The Commission requests comment on all aspects of the proposed bank-based capital approach. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. Is the proposed $20 million fixed amount of minimum tier 1 capital appropriate? If not, explain why not. If the minimum fixed-dollar amount should be set at a level greater or lesser than $20 million, explain what that greater or less amount should be and explain why that is a more appropriate amount.

2. Is the proposed minimum capital requirement based upon an SD's common equity tier 1 capital appropriate? If not, explain why, and suggest what modifications the Commission should make to the regulation. For example, should the proposal include tier 1 capital other than common equity tier 1 capital? Are there specific elements of tier 1 capital that the Commission should include in addition to common equity tier 1 capital? Are there specific elements of tier 2 capital that the Commission should include in the regulation?

3. Is the proposed minimum capital requirement based upon eight percent of the SD's risk weighted assets appropriate? If not, explain why not. Is the proposed requirement that the SD add to its risk-weighted assets market risk capital charges computed in accordance with Regulation 1.17 if the SD has not obtained the approval of the Commission or of an RFA to use internal models appropriate? Are there other options to compute market risk charges when models are not approved? Should the 8 percent be set at a higher or lower level? If so, what percent should the Commission consider?

4. Is the proposed minimum capital requirement based upon eight percent of the margin required on the SD's cleared and uncleared swaps and security-based swaps, and the margin required on the SD's futures and foreign futures appropriate? If not, explain why not. Should the percentage be set at a higher or lower level? Please explain your response. Is including in the computation margin for swaps and security-based swaps that are exempt or excluded from the uncleared margin requirements (*e.g.,* legacy swaps and security-based swaps, and swaps with commercial end users) appropriate? If not, explain why these uncollateralized exposures do not result in risk to the SD without capital to address that risk.

5. Commodity Exchange Act section 4s(e)(3)(A) only cites the risk of uncleared swaps in setting standards for capital. Additionally, in the Commission's final swap dealer definition rule, it said it will ''in connection with promulgation of final rules relating to capital requirements for swap dealers and major swap participants, consider institution of reduced capital requirements for entities or individuals that fall within the swap dealer definition and that execute swaps only on exchanges, using only proprietary funds.'' [46] Given these pronouncements, should the Commission exclude cleared swaps from the capital calculation requirements?

6. In addition to swaps, the proposal includes security-based swaps, futures, and foreign futures in the capital calculation requirements. The SEC's capital proposal only included security-based swaps. Given the statements above in question 5 and the narrower scope of the SEC's proposal, should the Commission limit its capital calculation requirements to uncleared swaps only?

7. If the swap dealer *de minimis* level falls to $3 billion, what impact would the proposed capital rule have on any new potential registrants? Please provide any quantitative estimates.

ii. Capital Requirement for Swap Dealers Under a Net Liquid Assets Capital Approach

a. Computation of Minimum Capital Requirement

Proposed Regulation 23.101(a)(ii) would permit an SD to elect to be subject to a net liquid assets capital approach. The net liquid assets capital approach is consistent with the Commission's current capital approach for FCMs, and is consistent with the SEC's proposed capital rule for SBSDs and the SEC's current capital requirements for BDs and OTC derivatives dealers.[47] Harmonization of the CFTC and SEC capital requirements benefit firms that are dually-registered (including dually-registered SDs and SBSDs) as such firms should be able to meet the regulatory requirements of both the CFTC and SEC with a uniform set of books and records, and one capital computation. This concept of a harmonized capital approach is consistent with the Commission's and SEC's long standing uniform capital rule for FCMs and BDs. An SD that elects the proposed net liquid assets capital rule contained in Regulation 23.101(a)(1)(ii) would be required to comply with proposed SEC Rule 18a–1 as if the SD were a SBSD registered with the SEC, subject to several modifications discussed below.[48]

SDs that elect to comply with the proposed net liquid assets capital approach would be required to maintain a minimum level of net capital [49] equal to or greater than the highest of the following criteria:

(1) $20 million;

(2) net capital equal to or greater than eight percent of the sum of:

(a) The amount of ''uncleared swaps margin'' (as that term is defined in proposed Regulation 23.100) for each uncleared swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to Regulation 23.154;

[44] *See* 12 CFR 217.10.

[45] *See* 12 CFR 217.11. The capital conservation buffer and the countercyclical capital buffer represent capital ''add-ons'' to the standard bank capital requirements and are intended to require entities subject to the rules to have certain levels of capital in order to make capital distributions and discretionary bonuses.

[46] 77 FR 30596, 30610 fn. 199 (May 23, 2012).

[47] The SEC has proposed a net liquid assets capital requirement for SBSDs that is set forth in proposed SEC Rule 18a–1. *See* 77 FR 70214 (Nov. 23, 2012).

[48] *See* SEC proposed Rule 18a–1(a)(1) (77 FR 70214).

[49] Net capital is generally defined to mean the SD's liquid assets (less deductions for potential decreases in value of the assets) less all of the SD's liabilities (excluding qualifying subordinated debt).

(b) the amount of initial margin that would be required for each uncleared security-based swap position open on the books of the SD, computed on a counterparty-by-counterparty basis pursuant to proposed SEC Rule 18a–3(c)(1)(i)(B), without regard for any amounts that may be excluded or exempted under the SEC's rules;

(c) the amount of ''risk margin requirement'' (as that term is defined in Regulation 1.17(b)(8)) for the SD's cleared futures, foreign futures, and swaps positions open on the books of the SD; and

(d) the amount of initial margin required by a clearing organization for proprietary cleared security-based swaps positions open on the books of the SD; or

(3) the capital required by the RFA of which the SD is a member.

In addition, the proposal provides that an SD that has received approval from the Commission, or from an RFA of which the SD is a member, to use internal models to compute market risk and credit risk capital charges for its swaps and/or security-based swaps and other proprietary positions when computing its capital, as described in section II.A.4 of this release, must maintain a minimum level of tentative net capital equal to $100 million and net capital of $20 million.[50] The proposal is consistent with the SEC's proposed requirement that SBSDs that have obtained approval to use internal capital models must maintain tentative net capital of $100 million and net capital of $20 million.[51]

The first criterion of proposed Regulation 23.101(a)(1)(ii) would require the SD to maintain a minimum of $20 million of net capital. This requirement is consistent with the minimum requirements proposed for SDs under the bank-based capital approach discussed in section II.A.2.i.a of this release. As discussed in section II.A.2.i.a above, the Commission believes that given the role that SDs play in the financial markets by engaging in swap dealing activities that it is appropriate to require that all SDs maintain a minimum level of capital, stated as an absolute dollar amount that does not fluctuate with the level of the firms' dealing activities to help ensure the safety and soundness of the SDs. Furthermore, the proposed $20 million minimum capital requirement is consistent with the SEC's current minimum capital requirement for OTC derivatives dealers and the SEC proposed minimum capital requirement for SBSDs.

The second criterion under the net liquid assets capital approach would require an SD to maintain a minimum level of net capital equal to or greater than eight percent of the sum of: (1) The amount of ''uncleared swap margin'' (as that term is proposed to be defined in Regulation 23.100) for each uncleared swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to Regulation 23.154; (2) the amount of initial margin that would be required for each uncleared security-based swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to SEC proposed Rule 18a–3(c)(1)(i)(B) without regard to any initial margin exemptions or exclusions that the rules of the SEC may provide to such security-based swap positons; (3) the amount of ''risk margin'' (as defined in Regulation 1.17(b)(8)) required by a clearing organization for the SD's futures, swaps, and foreign futures positions that are open on the books of the SD; and (4) the amount of initial margin required by a clearing organization for security-based swaps that are open on the books of the SD.

Consistent with the requirements for SDs that elect the bank-based capital approach discussed in section II.A.2.a above, an SD that elects the net liquid assets approach would have to include all swaps and security-based swaps in its computation of the margin for uncleared swaps subject to the eight percent calculation, including any swaps positions that are not included in the Commission's margin requirements in Regulations 23.150 through 23.161 and any security-based swaps positions that may be exempt or excluded from the SEC's proposed margin requirements in Rule 18a–3(c)(1)(i)(B).

Consistent with the bank-based capital approach discussed in section II.A.2.a above, this minimum capital requirement is generally comparable to the SEC's proposed minimum capital requirement for SBSDs, with the exception that the SEC proposal only requires a SBSD to compute its minimum capital requirement based upon eight percent of the initial margin required on cleared and uncleared security-based swaps. The Commission is proposing to require that an SD expand the positions subject to the eight percent initial margin minimum capital requirement to include the SD's proprietary swaps, futures, and foreign futures positions. The Commission believes that the minimum capital requirement should reflect these additional positions to more fully reflect the potential exposure from all of the SD's swaps, security-based swaps, futures and foreign futures positions. Accordingly, the Commission's proposal has adjusted the calculation to include these additional positions of the SD.

The proposed third criterion would require an SD to maintain net capital that is equal to or greater than the amount of net capital required by the RFA of which is a member. As discussed more fully in section II.A.2.i.a above, this provision recognizes that an RFA is required to adopt minimum capital requirements for SDs pursuant to Commission Regulation 170.16 and section 17(p)(2) of the CEA.

b. Computation of Net Capital To Meet Minimum Capital Requirement

Each SD that elects the proposed net liquid assets capital approach would be required to maintain net capital in excess of the highest of the three criteria listed above. The second component of the proposed capital requirement would require an SD to compute its net capital, including applicable charges for market and credit risk on its swaps and security-based swaps positions and other proprietary positions (including debt instruments such as U.S. treasury instruments and municipal bonds, and equity instruments), and determine if such net capital equals or exceeds the highest level required under the three criteria discussed in section II.A.2.ii.a above.

Proposed Regulation 23.101(a)(1)(ii) would require each SD electing the net liquid assets capital approach to compute its tentative net capital and net capital in accordance with the SEC's proposed computation of tentative net capital and net capital for SBSDs under proposed Rule 18a–1 as if the SD were a SBSD, subject to several adjustments. Under proposed SEC Rule 18a–1, a SBSD that has not received permission to use models to compute its market risk and credit risk capital charges, as described below, must maintain net capital of not less than the greater of $20 million or eight percent of the risk margin amount on cleared and uncleared security-based swaps positions. For a SBSD that has received permission from the SEC to use internal models to compute its market risk and credit risk capital charges, the SBSD must at all times maintain tentative net capital of not less than $100 million and adjusted net capital of not less than the greater of $20 million or eight percent

[50] SEC Rules generally define ''tentative net capital'' as the registrant's assets less liabilities (excluding certain qualifying subordinated debt), and ''net capital'' as tentative net capital less certain capital deductions such as market risk and credit risk deductions. *See* 17 CFR 240.15c3–1.

[51] *See* SEC proposed Rule 18a–1(a)(2), (77 FR 70214, 70333).

of the risk margin amount on cleared and uncleared security-based swaps positions. The Commission is proposing the SEC's general approach with the adjustments to include an SD's swaps, security-bases swaps, futures and foreign futures positions in its calculation of the eight percent minimum capital requirement as discussed above.

(1) Swap Dealers Computation of Tentative Net Capital and Net Capital Without Approval To Use Internal Capital Models

The Commission is proposing that an SD electing the net liquid assets capital approach which has not obtained Commission or RFA approval to use internal models to compute its market risk and credit risk charges for positions in swaps, security-based swaps, and other proprietary positions must use the standardized capital charges set forth in proposed SEC Rule 18a–1 and the appendices thereto. The use of standardized capital charges would be consistent with the SEC's proposal for SBSDs that have not obtained SEC approval to use internal capital models to compute market risk and credit risk capital charges. The Commission anticipates that this consistency would promote parity between SDs and SBSDs, as well as efficiency for an entity that is dually-registered as both an SBSD and SD.

Under the Commission's proposal, an SD would be required to compute a market risk capital charge for swaps and security-based swaps by multiplying the notional amount or fair market value of the swap or the security-based swap by a specified percentage set forth in proposed Rule 18a–1. The resulting market risk charge would be deducted from the SD's tentative net capital to arrive at the firm's net capital.

SDs would also be required to compute standardized credit risk charges pursuant to proposed Rule 18a–1. Rule 18a–1 generally provides that a SBSD's unsecured receivables are subject to a 100 percent credit risk capital charge (*i.e.,* the SBSD would have to deduct 100 percent of any unsecured receivable balance from tentative net capital in computing its net capital). The Commission, however, is modifying the SEC approach in proposed Regulation 23.101(a)(1)(ii) by providing that an SD may recognize as a secured receivable, and not take a capital charge for, the amount of initial margin that the SD has deposited with a third party custodian for uncleared swap transactions pursuant to the Commission's margin rules at Regulations 23.150 through 23.161 or margin deposited with a third party custodian for uncleared security-based swap transactions pursuant to the SEC's proposed margin rules.[52] Regulation 23.157 provides that each SD that posts margin with a third party custodian must enter into an agreement with the custodian that, in relevant part: (1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring the collateral held by the custodian; and (2) is a legally binding and enforceable agreement under the laws of all relevant jurisdictions including in the event of bankruptcy, insolvency, or similar proceeding.

(2) Swap Dealers Approved To Use Internal Capital Models

The Commission is proposing to permit an SD that elects a net liquid assets capital approach to seek Commission or RFA approval to use internal models to compute market risk and credit risk capital charges on its swaps, security-based swaps and other proprietary positions in lieu of the standardized deductions contained in the SEC's proposed Rule 18a–1. In order to be considered for approval, the SD's models would have to meet the qualitative and quantitative requirements set forth in proposed Regulation 23.102 and Appendix A to Regulation 23.102.

The Federal Reserve Board has adopted quantitative and qualitative requirements for internal models used by bank holding companies to compute market risk and credit risk capital charges.[53] In developing the proposed market risk and credit risk requirements for SDs, including the proposed quantitative and qualitative requirements, the Commission has incorporated the market risk and credit risk model requirements adopted by the Federal Reserve Board. The Commission's proposed model requirements are also comparable to the SEC's model requirements. The model requirements and the process for obtaining Commission or RFA review is set forth in section II.4 of this release.

Request for Comment

The Commission requests comment on all aspects of the proposed net liquid assets capital approach. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. Is the proposed minimum $20 million fixed-dollar amount of net capital appropriate for SDs that elect a net liquid assets capital approach? If not, explain why not. If the minimum fixed-dollar amount should be set at a level greater or lesser than $20 million, explain what that amount should be and why that is a more appropriate amount.

2. Is the proposed minimum $100 million fixed dollar amount of tentative net capital appropriate for SDs that use market risk and credit risk models approved by the Commission or by an RFA? If not, explain why not. If the minimum fixed-dollar amount should be set at a level greater or lesser than $100 million, explain what that amount should be and explain why that is more appropriate.

3. Is the proposed minimum capital requirement based upon eight percent of the margin required on the SD's cleared and uncleared swaps and security-based swaps, and the margin required on the SD's futures and foreign futures appropriate? If not, explain why not. Should the percentage be set at a higher or lower level? Is so, what percent should the Commission consider? Please explain your response. Is including in the computation margin for swaps and security-based swaps that are exempt or excluded from the uncleared margin requirements (*e.g.,* legacy swaps and security-based swaps, and swaps with commercial end users) appropriate? If not, explain why these uncollateralized exposures would not result in an SD that is not adequately capitalized.

4. Is the proposed requirement for an SD to compute its capital in accordance with the SEC proposed capital rules for stand-alone SBSDs (*i.e.,* SEC proposed Rule 18a–1) appropriate? If not, explain why not. What other alternatives approaches should the Commission consider?

5. Is the proposal to allow SDs to recognize as current assets margin funds deposited with third-party custodians as margin for uncleared swaps or security-based swaps in accordance with the Commission's margin rules or the SEC's proposed margin rules appropriate? If not, explain why not.

6. Are there other adjustments to the SEC's proposed capital rules for SBSDs that the Commission should consider in adopting such requirements for SDs that elect the net liquid asset capital approach? Is so, explain such adjustments and why the Commission should consider such adjustments.

7. If the swap dealer de minimis level falls to $3 billion, what impact would the capital rule have on any new

[52] Under the SEC's proposed Rule 18a–1, a SBSD would not be permitted to include margin funds deposited with a third party custodian as a current asset in computing the SBSD's net capital.

[53] *See,* 12 CFR 217, subparts E and F.

potential registrants? Please provide any quantitative estimates.

iii. Capital Requirement for Swap Dealers That Are ''Predominantly Engaged in non-Financial Activities''

a. Computation of the Minimum Capital Requirement

The Commission is proposing that SDs that are ''predominantly engaged in non-financial activities'', as defined below, would be permitted to elect a capital requirement based upon the SD's tangible net worth.[54] An SD eligible to elect the tangible net worth approach would have to maintain tangible net worth in an amount equal to or in excess of the greatest of:

(1) $20 million plus the amount of the SD's market risk exposure requirement and credit risk exposure requirement associated with the SD's swap and related hedge positions that are part of the SD's swap dealing activities;

(2) Eight percent of the sum of:

(a) The amount of uncleared swap margin (as that term is defined in Regulation 23.100) for each uncleared swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to Regulation 23.154 without regard to any initial margin exemptions or thresholds that the Commission's margin rules may provide;

(b) the amount of initial margin that would be required for each uncleared security-based swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to 17 CFR 240.18a–3(c)(1)(i)(B) without regard to any initial margin exemptions or exclusions that the rules of the SEC may provide to such security-based swap positions; and

(c) the amount of initial margin required by clearing organizations for cleared proprietary futures, foreign futures, swaps and security-based swaps positions open on the books of the SD; or

(3) the amount of net capital required by the registered futures association of which the SD is a member.

The Commission is proposing that in order to be eligible to elect the tangible net worth capital approach, an SD's overall financial activities would have to be insignificant in relation to its other overall non-financial activities. Accordingly, proposed Regulation 23.101(a)(2) would define the term ''predominantly engaged in non-financial activities'' by referencing the definition of the term ''financial activities'' under the Federal Reserve Board's regulations establishing criteria for determining if a nonbank financial company is predominantly engaged in financial activities.[55] For purposes of the proposal, an entity would be considered ''primarily engaged in non-financial activities'' if: (1) The consolidated annual gross financial revenues of the entity in either of its two most recently completed fiscal years represents less than 15 percent of the entity's consolidated gross revenue in that fiscal year (''15% revenue test''), and (2) the consolidated total financial assets of an entity at the end of its two most recently completed fiscal years represents less than 15 percent of the entity's consolidated total assets as of the end of the fiscal year (''15% asset test''). For purposes of the 15% revenue test, consolidated annual gross financial revenues means that portion of the consolidated total revenue of the entity that are related to activities that are financial in nature. For purposes of the 15% asset test, consolidated total financial assets means that portion of the consolidated total assets of the entity that are related to activities that are financial in nature.

The Commission is proposing to define the financial activities covered by the 15% revenue test and 15% asset test by reference to the listed financial activities set forth in Appendix A of 12 CFR part 242, which covers an extensive range of financial activities and services. The financial activities include, among other things: (1) Lending, exchanging, transferring, investing for others, or safeguarding money or securities; (2) insuring, guaranteeing, or indemnifying against loss or harm, damage or death in any state; (3) providing financial, investment, or economic advisory services; (4) issuing or selling interests in a pool; (5) underwriting, dealing in, or making a market in securities; and (6) engaging as principal in the investment and trading of certain financial instruments. The Commission, however, is proposing to explicitly provide that accounts receivable from non-financial activities, which may meet the definition of financial activities under 12 CFR part 242, may be excluded by the SD from the computation of its financial activities. The purpose of providing this exclusion is to prevent the SD's non-financial activities from becoming part of the computation of the firm's financial activities merely on the basis that the non-financial activities result in the SD recognizing receivables.

The Commission is proposing an option to use a tangible net worth capital approach as it recognizes that certain entities that engage primarily in non-financial activities may currently or in the future meet the statutory and regulatory definition of the term ''swap dealer'' and, therefore, will be required to register as such with the Commission.[56] However, while these entities may engage in dealing activities, they are primarily commercial entities and differ from financial entities in various ways, including the composition of their balance sheet (*e.g.,* the types of assets they hold), the types of transactions they enter into, and the types of market participants and swap counterparties that they deal with. Because of these differences, the Commission believes that application of the bank-based or net liquid assets capital approaches to these SDs could result in inappropriate capital requirements that would not be proportionate to the risk associated with them, and, therefore, these SDs should have the option to apply a tangible net worth approach.[57]

b. Computation of Tangible Net Worth To Meet Minimum Capital Requirement

Proposed Regulation 23.101(a)(2) would require an SD to maintain tangible net worth in an amount equal to or in excess of the greater of the tangible net worth of the SD plus the market risk capital charges and credit risk capital charges associated with the SD's dealing swaps and related hedging, or eight percent of the initial margin required on the SD's proprietary swaps, security-based swaps, futures, and foreign futures. The term ''tangible net worth'' is proposed to be defined as the net worth of an SD as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets.[58] The proposal would further require an SD in computing its tangible net worth to include all liabilities or obligations of a subsidiary or affiliate that the SD guarantees, endorses, or assumes either directly or indirectly to ensure that the tangible net worth of the SD reflects the full extent

[54] *See* proposed Regulation 23.101(a)(2)(ii).

[55] *See,* 12 CFR 242.3. The Financial Stability Oversight Council will use the criteria when it considers the potential designation of a nonbank financial company for consolidated supervision by the Federal Reserve Board.

[56] The term ''swap dealer'' is defined by section 1a(49) of the CEA and § 1.3(ggg) of the Commission's regulations. Section 1.3(ggg)(3) provides that an entity may apply to limit its designation as an SD to specified categories of swaps or specified activities in connection with swaps.

[57] Furthermore, as a SD, the firm is subject to the Commission's final swaps margin requirements.

[58] *See* proposed Regulation 23.100.

of the SD's potential financial obligations.[59] The proposed definition would further provide that in determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value to ensure that the tangible net worth reflects the current market value of the SD's swaps and security-based swaps, including any accrued losses on such positions.[60]

In proposing this approach and as discussed above, the Commission recognizes that SDs that predominantly engage in non-financial activities may differ from financial entities. However, the Commission also recognizes that capital should account for all the activities entered into by the entity and not just its swap dealing activities in order to help ensure the safety and soundness of the SD.[61] By requiring the SD electing this approach to maintain tangible net worth equal to its liabilities and swaps market risk and credit risk exposures, the Commission believes that its approach would impose a sufficient level of capital (*i.e.,* unencumbered tangible assets) to help ensure the safety and soundness of an SD and that the SD can meet its swap-related obligations to its swap counterparties.

Pursuant to the proposal, the SD would have to compute its market risk charges and credit risk charges associated with its dealing swaps and related hedges. Proposed Regulation 23.101(a)(2)(i)(A) provides that the SD may use internal capital models to compute its market risk and credit risk capital charges if the SD has obtained the approval of the Commission or an RFA. If the SD has not obtained approval to use internal capital models, the SD must use the standardized deductions under Regulation 1.17.

Request for Comment

The Commission requests comment on all aspects of the proposed tangible net worth capital approach for SDs that are predominantly engaged in non-financial activities. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. Is the proposed minimum net capital requirement of $20 million plus the amount of the SD's market risk and credit risk charges for its dealing swaps appropriate for SDs that are eligible and elect the tangible net worth net capital approach? If not, explain why not. If the minimum dollar amount should be set at a level greater or lesser than $20 million, explain what that amount should be and explain why that is more appropriate.

2. Should the market risk and credit risk associated with the SD's security-based swap positions be added to the market risk and credit risk associated with the SD's swap positions in setting the minimum capital requirement under proposed Regulation 23.101(a)(2)(A)? Explain why or why not such security-based swap positions should or should not be included in the minimum capital requirement. Provide any empirical data to support your analysis.

3. Is the proposed minimum capital requirement based upon eight percent of the margin required on the SD's cleared and uncleared swaps and security-based swaps, and the margin required on the SD's futures and foreign futures appropriate? If not, explain why not. Should the percentage be set at a higher or lower level? Please explain your response. Is including in the computation margin for swaps and security-based swaps that are exempt or excluded from the uncleared margin requirements (*e.g.,* legacy swaps and security-based swaps, and swaps with commercial end users) appropriate? If not, explain why these uncollateralized exposures would not result in an SD that is not adequately capitalized.

4. Is the Commission's proposed 15% revenue test and 15% asset test appropriate for determining whether an SD is predominantly engaged in non-financial activities? If not, explain why not. What other alternatives should the Commission consider? If the approach is appropriate, should the Commission consider raising or lowering the percentages in the 15% revenue test and the 15% asset test?

5. Is the Commission's proposed reference to the definition of the term ''financial activities'' in Rule 242.3 of the Federal Reserve Board (12 CFR 242.3) to define whether an SD's activities are ''financial activities'' for purposes of computing the 15% revenue test and 15% asset test appropriate? If not, explain why not. Provide other alternatives that the Commission should consider.

6. Is the Commission's adjustment in the application of Rule 242.3 to permit SDs to exclude receivables resulting from non-financial activities from the term ''financial activities'' in computing the 15% revenue and 15% asset tests appropriate? If not, explain why not. Are there other adjustments that the Commission should consider in the application of the 15% revenue and 15% asset tests? If yes, explain what those adjustments are and why it is appropriate for the Commission to make such adjustments.

iv. Capital Requirements for Major Swap Participants

Proposed new Regulation 23.101(b) would establish capital requirements for MSPs that are not subject to the capital rules of a prudential regulator.[62] An MSP is by definition a person that is not a swap dealer and that: (1) Maintains a substantial position in swaps, excluding positions held to hedge or mitigate commercial risk; (2) has outstanding swaps that create substantial counterparty exposures that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or (3) is a financial entity that is highly leveraged, is not subject to capital requirements of a prudential regulator, and has a substantial position in swaps, including positions used to hedge and mitigate commercial risk.[63]

Under proposed Regulation 23.101(b), an MSP would be required to maintain positive tangible net worth or the amount of capital required by the RFA of which the MSP is a member. A tangible net worth standard is being proposed for MSPs, rather than the net liquid assets capital approach or the bank-based capital approach, as the Commission anticipates that entities that register as MSPs may engage in a diverse range of business activities different from, and broader than, the activities engaged in by SDs. For example, MSPs may engage in commercial activities that require them to have substantial fixed assets to support manufacturing and/or result in them having significant assets comprised of non-current assets as defined in the Regulations. In addition, MSPs typically use swaps for different purposes (*e.g.,* hedging or investing) than SDs, which engage in swaps as a dealing activity. The Commission believes requiring MSPs to comply with the proposed net liquid assets capital approach or bank-based capital approach could result in MSPs having to obtain significant additional capital or engage in costly restructuring.

[59] *See* proposed definition of ''tangible net worth'' in Regulation 23.100.

[60] *Id.*

[61] Section 4s(e)(2)(C) of the CEA states that for SDs that are designated as SDs for one single class or category of swap or activities, the Commission shall take into account the risks associated with other types of swaps or classes of swaps or categories of swaps engaged in and the other activities conducted by that person that are not otherwise subject to regulation applicable to that person by virtue of the status of the person as an SD.

[62] There are currently no MSPs provisionally registered with the Commission.

[63] *See* Regulation 1.3(hhh).

The term ''tangible net worth'' is proposed to be defined as the net worth of an MSP as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets.[64] The proposal would further require an MSP in computing its tangible net worth to include all liabilities or obligations of a subsidiary or affiliate that the MSP guarantees, endorses, or assumes either directly or indirectly to ensure that the tangible net worth of the MSP reflects the full extent of the MSP's potential financial obligations.[65] The proposed definition would further provide that in determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value to ensure that the tangible net worth reflects the current market value of the MSP's swaps and security-based swaps, including any accrued losses on such positions.[66]

In developing the proposed positive tangible net worth requirement for MSPs, the Commission also considered the impact of its recent margin rules for uncleared swap transactions. Under the margin rules, MSPs are required to post and collect initial margin and variation margin with SDs, other MSPs, and financial end users (subject to certain thresholds and minimum transfer amounts). The exchanging of variation margin and the posting of initial margin by MSPs will substantially reduce their uncollateralized exposures, which will mitigate the possibility that MSPs could destabilize the financial markets or present systemic risk. Lastly, the Commission's proposed MSP capital standard and definitions are comparable with the SEC's proposal for MSBSPs, and are intended to require an MSP to maintain a sufficient level of assets to meet its obligations to counterparties and creditors and to help ensure the safety and soundness of the MSP.

Request for Comment

The Commission requests comment on the proposed capital requirements for MSPs. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. Is a tangible net worth test an appropriate standard for MSPs? If not, explain why not. Would the net liquid assets approach or bank-based capital approach be a more appropriate method for establishing capital requirements for MSPs? If so, please state which approach is more appropriate and describe the rationale for such approach. What other capital approaches should the Commission consider for MSPs?

2. Should the proposed minimum capital requirement for MSPs include a minimum fixed-dollar amount of tangible net worth, for example, equal to $20 million or some greater or lesser amount? Is so, explain the merits of imposing a fixed-dollar amount and identify the recommended fixed-dollar amount.

3. Should proposed Regulation 23.101(b) require an MSP to maintain positive tangible net worth in an amount in excess of the market risk and credit risk charges on the MSP's swaps and security-based swap positions? If so, please explain why. Should any other adjustments be made to the MSP's minimum capital requirement? If so, please explain why.

3. Capital Requirements for FCMs

i. Introduction

Section 4s(e)(3)(B)(i) of the CEA provides that the requirements applicable to SDs and MSPs under section 4s do not limit the Commission's authority with respect to FCM regulatory requirements.[67] The Commission's current capital requirements for FCMs are contained in Regulation 1.17, and are designed to require a minimum level of ''liquid assets'' in excess of the FCM's liabilities to provide resources for the FCM to meet its financial obligations as a market intermediary in the regulated futures and cleared swaps markets. Specifically, an FCM is required to hold at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (*e.g.,* money owed to customers, counterparties and creditors). The capital requirements also are intended to ensure that an FCM maintains a sufficient level of liquid assets to wind-down its operations by transferring customer accounts to other FCMs in the event that the FCM decides, or is forced, to cease operations.

Regulation 1.17(a) specifies the minimum amount of adjusted net capital that an FCM is required to maintain as the greatest of: (1) $1 million; (2) for an FCM that engages in off-exchange foreign currency transactions with retail forex customers,[68] $20 million, plus five percent of the FCM's liabilities to the retail forex customers that exceed $10 million; (3) eight percent of the sum of the risk margin of futures, options on futures, foreign futures, and swap positions cleared by a clearing organization and carried by the FCM in customer and non-customer accounts;[69] (4) the amount of adjusted net capital required by the RFA of which the FCM is a member; and (5) for an FCM that also is registered with the SEC as a BD, the amount of net capital required by the rules of the SEC.

Regulation 1.17(c)(5) defines the term ''adjusted net capital'' as an FCM's ''current assets'' (*i.e.,* current, liquid assets excluding, however, most unsecured receivables), less all of the FCM's liabilities (except certain qualifying subordinated debt). An FCM is further required to impose certain prescribed capital deductions (''capital charges'' or ''haircuts'') from the current market value of the FCM's proprietary positions (*e.g.,* futures positions, securities, debt instruments, money market instruments, and commodities) in computing its adjusted net capital to reflect potential market risk and credit risk of the firm's current assets.

An FCM, in computing its adjusted net capital, is required to compute a capital charge to reflect the potential market risk associated with uncleared swap and security-based swap positions. Regulation 1.17(c)(5) establishes specific capital charges for market risk for an FCM's proprietary positions in physical inventory, forward contracts, fixed price commitments, and securities. Regulation 1.17(c)(5) does not explicitly address uncleared swap or security-based swap positions. The Commission, however, requires an FCM to use the capital charges specified in Regulation 1.17(c)(5)(ii), or the capital charges established by SEC Rule 15c3–1 for dually registered FCM–BDs, to compute its capital charges for uncleared swap and security-based swap positions.

The Commission is proposing to amend the minimum adjusted net capital requirements for FCMs that are also registered as SDs. In this regard, the Commission is proposing amendments to Regulation 1.17(a) that would require an FCM that is also an SD to maintain

[64] *See* proposed Regulation 23.100.

[65] *See* proposed Regulation 23.100.

[66] *Id.*

[67] Section 4s(e)(3)(B)(i) states that nothing in section 4s(e) imposing capital and margin requirement on SDs and MSPs limits, or shall be construed to limit, the authority of the Commission to set financial responsibility rules for FCMs pursuant to section 4f(a).

[68] Regulation 5.1(k) defines the term ''retail forex customer'' as a person, other than an eligible contract participant as defined in section 1a(18) of the CEA, acting on its own behalf in any account agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the CEA.

[69] The term ''risk margin'' is defined in Regulation 1.17(b)(8).

adjusted net capital that is equal to or greater than the highest of:

(1) $20 million;

(2) Eight percent of the sum of the following:

(a) The total risk margin (as defined in Regulation 1.17(b)(8)) for positions carried by the FCM in customer and non-customer accounts;

(b) the total initial margin that the FCM is required to post with a clearing agency or broker for security-based swaps positions carried in customer and non-customer accounts;

(c) the total uncleared swaps margin as defined in Regulation 23.100;

(d) the total initial margin that the FCM is required to post with a broker or clearing organization for all proprietary cleared swap positions carried by the FCM;

(e) the total initial margin computed pursuant to SEC Rule 18a–3(c)(1)(i)(B) (17 CFR 240.181–3(c)(1)(i)(B)) for all proprietary uncleared security-based swap positions carried by an FCM, without regard to any exemptions or exclusions that may be available to the FCM under the SEC's proposal; and

(f) the total initial margin that the FCM is required to post with a broker or clearing agency for proprietary cleared security-based swaps;

(3) the amount of net capital required by the SEC if the FCM was a BD; or

(4) the amount of capital required by the RFA of which the FCM was a member.

The Commission's proposed increase in the FCM's minimum capital requirement from $1 million to $20 million is consistent with the Commission's proposal to adopt a minimum $20 million capital requirement for SDs and MSPs, and is necessary and appropriate given the change and increase in risk when the FCM is registered as an SD and engaging in uncleared swap activities. The Commission also notes that the proposed minimum dollar amount of $20 million is consistent with the current minimum dollar amount of adjusted net capital imposed by Regulation 1.17(a) on FCMs that engage in OTC forex transactions with counterparties that do not qualify as ECPs, and is consistent with the minimum dollar amount of net capital proposed by the SEC for SBSDs.[70]

The Commission is also proposing amendments to Regulation 1.17(a) to require an FCM to include eight percent of the uncleared swaps margin in its adjusted net capital. Currently FCMs must maintain adjusted net capital in excess of eight percent of the risk margin on futures, foreign futures and cleared swaps positions carried in customer and noncustomer accounts. The proposed amendments would also include in the FCM's minimum capital requirements eight percent of the ''uncleared swaps margin'' for uncleared swaps and the initial margin for uncleared security-based swaps position for which the FCM is a counterparty. The term ''uncleared swaps margin'' is defined in proposed new Regulation 23.100 as the amount of initial margin that an SD would be required to collect pursuant to the Commission's uncleared swaps margin rules for each outstanding swap.[71] The ''uncleared swaps margin'' would include both swaps that an SD is required to collect margin for under the margin rules as well as swaps that are exempt from the margin rules. For example, the FCM would be required to compute the amount of initial margin that an SD would be required to collect from commercial end users and affiliated counterparties as if the swaps were not exempt from the scope of the Commission's margin requirements. In addition, the FCM would have to compute the initial margin requirements for exempt foreign exchange swaps and foreign exchange forwards as if the transactions were not exempt from the Commission's margin requirements. Finally, the ''uncleared swaps margin'' amount would not exclude initial margin that was below the initial margin threshold amount or the minimum margin transfer amounts defined in Regulation 23.151. Not excluding these amounts in determining the capital requirement is consistent with the approach as described above for those SDs that elect to apply a net capital standard as these uncollateralized exposures may present risk to the SD for which it should maintain capital. Similarly, the Commission would require an FCM to include in its initial margin amounts for security-based swap positions both the amounts that an SD would be required to collect and the amounts that the SD would not be required to collect if the SD were treated as an SBSD under SEC's proposed rule 18a–3(c)(1)(i)(B) due to the SEC provided an exemption or exclusion on the requirement to post or collect initial margin.

As discussed above, the capital rule is intended to help ensure the safety and soundness of the SD. Accordingly, the FCM's capital should reflect uncollateralized exposures to swap counterparties.

ii. FCM Capital Charges for Swaps and Security-Based Swaps in Computing Adjusted Net Capital

As noted in section II.A.3.i above, in computing its adjusted net capital, an FCM is required to take certain market risk and credit risk capital charges on its proprietary positions. Regulation 1.17(c) provides two approaches for an FCM to take capital charges in computing its adjusted net capital. The first approach is a rules-based approach of standardized haircuts that are set forth in Regulation 1.17(c)(5). The second approach is an approved model approach that is currently available only to FCMs that are dual-registered FCM/BDs that have been approved by the SEC to use internal models to compute market risk and credit risk capital charges in lieu of standardized capital charges. These dually-registered FCM/BDs are referred to as Alternative Net Capital Firms (''ANC Firms'').

a. Standardized Market Risk and Credit Risk Capital Charges

Currently, Regulation 1.17(c)(5) does not explicitly define market risk capital charges for swaps, and the Commission has imposed the general standardized haircuts that are applicable to inventory, fixed price commitments, and forward contracts to swaps. For example, an energy swap that is not offset by a futures contract is considered a fixed price commitment under Regulation 1.17(c)(5) and the FCM is required to take a market risk capital charge equal to 20 percent of the notional value of the energy swap. The purpose of the capital charge is to require an FCM to reserve a minimum level of capital to cover potential future losses in the value of the swap, which may have to be paid to the swap counterparty in the form of variation margin or otherwise.

The Commission recognizes that the current market risk capital charges, which were not explicitly designed for swaps or security-based swaps, should be amended to provide specific capital charges. Accordingly, the Commission is proposing to amend Regulation 1.17(c)(5)(iii) to provide a schedule of standardized market risk capital deductions for positions in credit default swaps, interest rate swaps, foreign exchange swaps, commodity swaps, and all other uncleared swaps. This schedule of standardized capital deductions is the same as the standardized market risk capital deduction proposed by the SEC for such positions in SEC Rule 15c3–1 (17 CFR

[70] The SEC proposed capital requirements for SBSDs and MSBSPs was proposed in 2012. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, 77 FR 70214 (Nov. 23, 2012).

[71] *See* Regulations 23.150, 23.152, and 23.154.

240.15c3–1).[72] The Commission is also proposing to amend Regulation 1.17(c)(5)(iv) to provide that the FCM must impose the standardized market risk capital deduction set forth in SEC Rule 15c3–1 (17 CFR 240.15c3–1) for any security-based swap positions.

Except for credit default swaps as described below, the proposed standardized market risk capital deductions would be the deduction currently prescribed in 17 CFR 240.15c3–1 or proposed amended Regulation 1.17 applicable to the instrument referenced by the swap multiplied by the contract's notional amount.

The proposed standardized market risk deductions for swaps that are credit default swaps are designed to account for the unique attributes of these positions. Credit default swaps are generally defined by the reference asset or entity, the notional amount, the duration of the contract, and credit events. Therefore, the Commission believes that proposing a schedule of deductions for credit default swaps based on a ''maturity grid'' approach would be appropriate, as the Commission currently applies a maturity grid approach in setting standardized capital deductions for debt instruments.[73] Under the proposal, the market risk capital deductions for credit default swaps would be based on two variables: The length of time to maturity and the amount of the current offered basis point spread on the credit default swap. The Commission's proposed standardized deductions are consistent with the SEC's proposed amendments to its capital rule.

The Commission would allow an FCM to net long and short positions where the credit default swaps reference the same entity or obligation, reference the same credit events that would trigger payment by the seller of the protection, reference the same basket of obligations that would determine the amount of payment by the seller of protection upon the occurrence of a credit event, and are in the same or adjacent maturity and spread categories (as long as the long and short positions each have maturities within three months of the other maturity category). In this case, the FCM would need to take the specified percentage deduction only on the notional amount of the excess long or short position.

The Commission would also allow limited netting in, for example, long and short credit default swap positions in the same maturity and spread categories and that reference corporate entities in the same industry sector; where the FCM is long (short) the bond or asset and long (short) protection through a credit default swap referencing the same underlying bond or asset.

As noted above, the Commission is proposing the same market risk haircut schedule for swaps as proposed by the SEC in its proposed capital and margin rule for SBSDs. The Commission understands that the proposed capital charges for credit default swaps are derived from the SEC's experience with maturity grids for other securities. Given the Commission's experience with FCMs and the financial transactions that they may enter into, and also in recognition of the SEC's experience with BDs and their financial products, the Commission believes that these charges should account for the risks of engaging in these swaps and security-based swaps. Further, the Commission believes that its approach is appropriate, given its long history of referencing 17 CFR 240.15c3–1 in setting forth capital deductions for certain financial instruments held by FCMs and the SEC's reciprocal practice of referencing Regulation 1.17 when setting forth capital deductions for certain CFTC-regulated products held by BDs. The Commission further believes that this harmonized approach would benefit registrants that are dually registered with the Commission and the SEC.

FCMs also are currently required to take a capital charge to reflect credit risk associated with uncleared swap and security-based swap transactions. Regulation 1.17(c)(2)(ii) requires an FCM to exclude unsecured receivables, which includes any unsecured receivables from swap and security-based swap counterparties and would include any margin collateral for swap or security-based swap transactions that the FCM deposits with a third-party custodian pursuant to the Commission's or SEC's uncleared margin rules.

The Commission is proposing to amend Regulation 1.17(c)(2)(ii) to permit FCM's to include margin deposited with third-party custodians for swap and security-based swap transactions, provided that such margin is held by the custodians in accordance with the requirements established by the Commission and SEC rules, as applicable.

b. Model-Based Market Risk and Credit Risk Capital Charges

As noted in section II.A.3 above, the SEC has approved certain BDs to use internal models for computing market risk capital charges in lieu of the standardized haircuts in SEC Rule 15c3–1(c)(2)(vi) and (vii) (17 CFR 240.15c3–1(c)(2)(vi) and (vii)) for their proprietary positions in securities, debt instruments, futures, security-based swaps and swaps and for computing credit risk charges associated with exposures from swap and security-based swap counterparties in lieu of the unsecured receivable capital charges in Rule 15c3–1(c)(2)(iv) (17 CFR 240.15c3–1(c)(2)(iv)). The BDs that have been approved to use these internal models are referred to as ANC Firms. As described in section II.A.3 above, ANC Firms may obtain SEC approval to use internal models to compute their capital. Once approved by the SEC to use internal models, the ANC Firms that are also registered as FCMs may use the same models to compute market risk and credit risk charges under CFTC Regulation 1.17.

The ANC Firms' market risk and credit risk models must satisfy certain qualitative and quantitative requirements that are set forth in the SEC's rules in order to be approved, and the firms are subject to certain enhanced reporting requirements. The requirements for such models are discussed in section II.A.4 of this release.

ANC Firms are subject to heightened SEC capital requirements in order to qualify to use the market risk and credit risk models. Currently, an ANC Firm must maintain tentative net capital of at least $1 billion and net capital of at least $500 million in order to be approved, and to continue to use market risk and credit risk models.[74] The SEC also requires an ANC Firm to provide notice to the SEC if the ANC Firm's tentative net capital falls below $5 billion.[75] In such situations, the SEC may impose restrictions on the ANC Firm, including limiting its use of the market risk and/or credit risk models.[76]

As previously noted, CFTC Regulation 1.17(c)(6) currently provides that an FCM that is also an ANC Firm, may use the same market risk and credit risk models approved by the SEC in lieu of the standardized capital charges in Regulation 1.17(c)(5). The Commission is proposing to retain this provision in Regulation 1.17(c)(6). Accordingly, FCMs that are ANC Firms that have obtained SEC approval to use market risk and credit risk models may continue to use such models in lieu of

[72] *See* 77 FR 70214 (Nov. 23, 2012).

[73] The capital deductions for debt instruments are incorporated into Regulation 1.17 by cross reference to the SEC's standardized capital charges for debt instruments. *See* Regulation 1.17(c)(5)(v).

[74] 17 CFR 240.15c3–1(a)(2)(7)(i).

[75] 17 CFR 240.15c3–1(a)(2)(7)(ii).

[76] *See Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities,* 69 FR 34428 (Jun 21, 2004).

taking the standardized capital chares in Regulation 1.17(c). Maintaining this provision would allow ANC Firms to engage in swap and security-based swap transactions under the existing regulatory structure, including the current capital requirements.

The Commission notes that the SEC has proposed various changes to its regulations as part of its proposed capital requirements for SBSDs that, if adopted, would impact the ANC Firm's CFTC and SEC capital requirements. In this connection, the SEC is proposing to increase the amount of tentative net capital that an ANC Firm must maintain from $1 billion to $5 billion, and the amount of net capital that the ANC Firm must maintain from $500 million to $1 billion.[77] The early warning threshold for an ANC Firm also would be increased from $5 billion to $6 billion.[78]

The SEC is also proposing to subject ANC Firms to liquidity risk management requirements.[79] Under the SEC's proposal, ANC Firms would need to perform a liquidity stress test at least monthly that takes into account certain assumed conditions lasting for 30 consecutive days.[80] The results of the liquidity stress test would need to be provided within ten business days of the month end to senior management responsible for overseeing risk management at the firm.[81] In addition, the assumptions underlying the liquidity stress test would need to be reviewed at least quarterly by senior management responsible for overseeing risk management at the firm and at least annually by senior management of the firm.[82] The Commission is also proposing similar liquidity requirements for SDs, which are discussed in section II.B of this release.

In addition, the SEC is proposing to amend its regulations to limit an ANC Firm's use of credit risk models to credit exposures solely from counterparties that are commercial end users.[83] Currently, an ANC Firm is permitted to compute its credit charges for swaps and security-based swaps from all counterparties. This amendment would result in the uncollateralized receivables from counterparties that are non-commercial end users being subject to a 100 percent charge to capital.

Since those ANC Firms that are also registered as FCMs will be subject to both the capital requirements of the SEC and CFTC, the SEC proposed amendments, if adopted, would be applicable to the ANC Firm's computation of net capital under CFTC Regulation 1.17(c)(6).

iii. Market Risk and Credit Risk Capital Models for Futures Commission Merchants That Are Not Alternative Net Capital Firms

As noted in section II.A.3 above, currently only FCMs that are registered with the SEC as ANC Firms and that have obtained SEC approval may use market risk and credit risk models in lieu of standardized haircuts on their swaps, security-based swaps and other proprietary positions in computing net capital. The Commission is proposing to amend current Regulation 1.17(c)(6) to extend the use of capital models to FCMs that are dually-registered as SDs and are not otherwise registered with the SEC as BDs.[84] An FCM/SD that would seek to use capital models would have to obtain approval for the models from the Commission or from an RFA of which the FCM/SD is a member. The Commission is also proposing to amend Regulation 1.17(a)(1)(ii) to provide that any FCM/SD that seeks approval to use market risk and/or credit risk models must maintain a minimum level of net capital of $100 million and a minimum level of adjusted net capital equal to $20 million.

Proposed Regulation 1.17(c)(6)(v) would require an FCM/SD to apply in writing to the Commission or RFA of which the FCM/SD is a member for approval to use internal models to compute market risk and credit risk capital deductions in lieu of the standardized charges contained in Regulation 1.17(c)(2) and (5). The models must meet certain qualitative and quantitative requirements proposed to be established by the Commission in new Regulation 23.102 and Appendix A to new Regulation 23.102. The qualitative and quantitative requirements for the models are discussed in detail in section II.A.4 of this release.

The Commission is proposing the higher minimum net capital requirement of $100 million for FCM/SDs that have received permission to model their credit and market risk charges to account for the limitations that may be inherent in a model. The Commission notes that the $100 million minimum net capital requirement is the same as the SEC's proposed minimum net capital requirement for stand-alone SBSDs that receive SEC approval to use internal models to compute their market and credit risk capital deductions, and is consistent with the Commission's proposed requirement for SDs that elect to use a net capital approach as discussed in section II.A.2.ii of this release. The proposed $100 million net capital requirement for FCM/SDs, however, is not consistent with the SEC's current approach for BDs approved to use internal capital models (*i.e.,* ANC Firms), nor is it consistent with the SEC's proposed capital requirements for SBSDs/ANC Firms approved to use internal models. As noted above, ANC Firms are subject under SEC rules to substantial capital requirements of a $5 billion ''early warning'' requirement, a $1 billion tentative net capital requirement, and a $500 million net capital requirement.[85]

The Commission believes, however, that FCM/SDs that are not BDs do not raise the same types of risks as ANC firms. ANC firms represent the largest BDs and engage in significant brokerage business including providing customer financing for securities transactions, engaging in repurchase transactions and other activities. FCMs generally have limited proprietary futures trading and operate primarily as market intermediaries for customers trading futures and foreign futures transactions. In this capacity, FCMs receive and hold customer funds in segregated accounts that are used to satisfy the customers' financial obligations to derivatives clearing organizations (''DCOs''). FCMs also collect and hold funds from affiliates for futures trading.

The Commission also expects that FCMs that are not registered as BDs and that register as SDs will provide a market in swaps for customers that may not be able to trade with larger SDs. The FCM/SDs may be more willing to provide swaps markets in commodities to agricultural firms and smaller commercial end users such as farmers and ranchers that might not otherwise be able to use such markets to manage risks in their businesses or might have to pay higher fees to engage in swaps if the number of SDs was limited. The Commission further believes that given the nature of the business operations of FCM/SDs, the proposed minimum capital requirement of $100 million of

[77] *See* proposed amendments to Rule 15c3–1(a)(7)(ii), 77 FR 70214, 70329.

[78] *Id.*

[79] *See* proposed new paragraph (f) to Rule 15c3–1, 77 FR 70214, 70331.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] 77 FR 70214 at 70329.

[84] If an FCM or SD is also a registered BD, it may only use market risk and credit risk capital models if the SEC approves the firm as an ANC Firm. Accordingly, the Commission's proposal to extend models to other FCMs would only apply to FCMs that are not also subject to the SEC's capital requirements.

[85] As noted above, the SEC has proposed to increase the ''early warning'' requirement to $6 billion, the tentative net capital requirement to $5 billion, and the net capital requirement to $1 billion.

adjusted net capital is consistent with section 4s(e) of the CEA.

The Commission believes that setting the same amount of minimum required capital would ensure a level playing field for SDs and FCMs that engage in swaps. However, to the extent that an FCM is dually registered as a BD and has received permission to use internal models for its credit and market risk charges, the FCM would follow the SEC's requirements with respect to the minimum capital it needs to maintain.

iv. Liquidity Requirements

The Commission is further proposing to require an FCM that is also registered as an SD to comply with the liquidity requirements in Proposed Rule 23.104(b)(1). The Commission recognizes that an FCM that acts as an SD is acting as a counterparty rather than as an intermediary between its customer and another counterparty. Therefore, for all the reasons discussed further below in section 3, the Commission is proposing to require FCMs that are also SDs to comply with the liquidity requirement set forth in Proposed Rule 23.104(b)(1).

Request for Comment

The Commission requests comment on all aspects of the proposed amendments to the FCM capital requirements. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. Is the proposed minimum adjusted net capital requirement of $20 million appropriate for an FCM that is dually-registered as an SD? If not, explain why not. If the minimum dollar amount should be set at a level greater or lesser than $20 million, explain what that greater or lesser amount should be and explain why that is a more appropriate amount.

2. Is the proposed minimum net capital requirement of $100 million appropriate for an FCM that is dually-registered as an SD, and has been approved to use internal models to compute market risk and credit risk? If not, explain why not. If the minimum dollar amount should be set at a level greater or lesser than $100 million, explain what that greater or lesser amount should be and explain why that is a more appropriate amount.

3. The proposal's minimum capital requirement based on 8% of margin, includes swaps exempt or excluded from the CFTC's margin requirements, such as inter-affiliate swaps. Please provide comment on the breadth of the definition. Should the scope be narrowed? If so, how?

4. Should the 8 percent of margin capital requirement be set at a higher or lower level? If it should be adjusted, what percent should the Commission consider? Please provide analysis in support of the adjustment.

4. Model Approval Process

Under the proposal as discussed above, SDs subject to the bank-based capital approach, the net liquid assets capital approach, or the tangible net worth capital approach are subject to market risk and credit risk capital charges on their swaps, security-based swaps and other proprietary positions in computing their regulatory capital. The Commission is proposing in Regulation 23.102 to permit SDs to compute market risk and credit risk capital charges using internal models in lieu of the standardized rules-based capital charges. The Commission recognizes that internal models, including value-at-risk models, can provide a more effective means of measuring economic risk from complex trading strategies involving uncleared swaps and other investment instruments.

The Commission, however, is concerned, given the number of SDs and the likely complexity of the capital models, that it may not be able to review models as thoroughly and expeditiously as would be necessary with its limited resources. In addition, the Commission recognizes that with its current resources it would be challenged to perform appropriate ongoing monitoring and assessment of the capital models to ensure that such models operate as designed. Accordingly, the Commission is proposing in Regulation 23.102 to permit an SD to use internal capital models that have been approved by the Commission or by an RFA of which the SD is a member to compute market risk and credit risk capital charges in lieu of standardized deductions.[86]

As previously noted, NFA currently is the only RFA. Allowing an SD to use internal capital models that have been approved by NFA is consistent with the Commission's recent approach with respect to margin models for uncleared swap transactions.[87] Specifically, Commission Regulation 23.154(b) allows an SD to obtain NFA's approval to use a model to calculate the initial margin requirement for uncleared swaps and security-based swap positions. NFA has established a process, and is reviewing the margin models submitted by SDs.

Capital models, however, would pose different challenges for regulators, including NFA. Unlike the approach for initial margin, where SDs jointly developed a standardized initial margin model for swaps and security-based swaps that would be available for use by market participants, each SD seeking NFA approval would submit for review several individually developed capital models to compute the market risk for the full portfolio of trading positions, including swaps and security-based swaps, and counterparty credit risk charges that are discussed below. Therefore, reviewing capital models would significantly increase the number of models that NFA would need to review and approve relative to the margin models.[88] In addition, NFA would have to perform ongoing supervision over the models to assess the effective operation and implementation.

The SD's application to use internal models must be in writing and must be filed with the Commission and with an RFA in accordance with the applicable instructions. The model application must include specified information regarding the models, which is contained in proposed Appendix A to Regulation 23.102. For example, proposed Appendix A would require an SD to submit: (1) A list of categories of positions the SD holds in its proprietary accounts and a brief description of the methods the SD would use to calculate deductions for market risk and credit risk on those categories of positions; (2) a description of the mathematical models to be used to price positions and to compute deductions for market risk, including those portions of the deductions attributable to specific risk, if applicable, and deductions for credit risk; (3) a description of how the SD will calculate current exposure and potential future exposure for it credit risk charges, and (4) a description of how the SD

[86] *See* proposed Regulation 23.102(b).

[87] *See* 81 FR 636, 654 (Jan. 6, 2016). As an RFA, NFA also is required to establish minimum capital requirements for its members, including SDs and MSPs, that are at least as stringent as the capital rules imposed by the Commission. The Commission anticipates that NFA's capital rules will permit SDs to use NFA approved capital models in computing regulatory capital.

[88] In many instances, SDs whose capital models would be subject to NFA review would be affiliates of SDs whose capital models are subject to review by one of the prudential regulators, or affiliates of foreign SDs whose capital models are reviewed by a foreign regulatory authority. The Commission expects that a prudential regulator's or foreign regulator's review and approval of capital models that are used throughout the corporate family would be a significant factor in NFA determining the scope of its review, provided that appropriate information would be available to the Commission and NFA.

would determine internal credit risk weights of counterparties, if applicable.

The Commission or RFA may also require the SD to submit supplemental information relating to its models. If any information in an application is found to be or becomes inaccurate before the Commission or RFA approves the application, the SD must notify the Commission and RFA promptly and provide the Commission and RFA with a description of the circumstances in which the information was inaccurate along with updated accurate information. As part of the approval process, and on an ongoing basis, an SD would be required to demonstrate to the Commission or RFA that the models reliably account for the risks that are specific to the types of positions the SD intends to include in the model computations. The Commission or RFA may approve, in whole or in part, an application or an amendment to the application, subject to any conditions or limitations the Commission or RFA may require.

After receiving approval of its models, an SD would be required to amend and submit to the Commission or RFA for approval its application before materially changing its models or its internal risk management control system. Further, an SD would be required to notify the Commission or the RFA 45 days before it ceases using models to compute its capital. The Commission or the RFA may revoke an SD's ability to use models to compute capital if either the Commission or the RFA finds that the use of the models by the SD is no longer appropriate. If the Commission or the RFA revokes an SD's ability to use models to compute capital, the SD would need to use the standardized haircuts for all of its positions.

In developing the proposed market risk and credit risk requirements, including the proposed quantitative and qualitative requirements discussed below, the Commission has incorporated in the proposed requirements the market risk and credit risk model requirements adopted by the Federal Reserve Board for bank holding companies, including the value at risk (''VaR''), stressed VaR, specific risk, incremental risk, and comprehensive risk qualitative and quantitative standards and requirements. The Commission's proposed qualitative and quantitative requirements for capital models also are comparable to the SEC's existing capital model requirements for OTC derivatives dealers and ANC BDs.

i. VaR Models

Proposed Regulation 23.102 would require that a VaR model's quantitative criteria include the use of a VaR-based measure based on a 99 percent, one-tailed confidence interval. The VaR-based measure must be based on a price shock equivalent to a ten business-day movement in rates or prices. Price changes estimated using shorter time periods must be adjusted to the ten-business-day standard. The minimum effective historical observation period for deriving the rate or price changes is one year and data sets must be updated at least quarterly or more frequently if market conditions warrant. For many types of positions it is appropriate for an SD to update its data positions more frequently than quarterly. In all cases, an SD must have the capability to update its data sets more frequently than quarterly in anticipation of market conditions that would require such updating.

The SD would not need to employ a single internal capital model to calculate its VaR-based measure. An SD may use any generally accepted approach, such as variance-covariance models, historical simulations, or Monte Carlo simulations. However, the level of sophistication of the SD's internal capital model must be commensurate with the nature and size of the positions the model covers. The internal capital model must use risk factors sufficient to measure the market and credit risk inherent in all positions. The risk factors must address the risks including interest rate risk, credit spread risk, equity price risk, foreign exchange risk, and commodity price risk. For material positions in the major currencies and markets, modeling techniques must incorporate enough segments of the yield curve—in no case less than six—to capture differences in volatility and less than perfect correlation of rates along the yield curve.

The internal capital model may incorporate empirical correlations within and across risk categories, provided that the SD validates and demonstrates the reasonableness of its process for measuring correlations. If the internal capital model does not incorporate empirical correlations across risk categories, the SD must add the separate measures from its internal capital models for the appropriate risk categories as listed above to determine its aggregate VaR-based measure of capital.

The VaR-based measure must include the risks arising from the nonlinear price characteristics of options positions or positions with embedded optionality and the sensitivity of the fair value of the positions to changes in the volatility of the underlying rates, prices or other material factors. An SD with a large or complex options portfolio must measure the volatility of options positions or positions with embedded optionality by different maturities and/or strike prices, where material.

The internal capital model must be subject to back-testing requirements that must be calculated no less than quarterly. An SD must compare its daily VaR-based measure for each of the preceding 250 business days against its actual daily trading profit or loss, which includes realized and unrealized gains and losses on portfolio positions as well as fee income and commissions associated with its activities. If the quarterly backtesting shows that the SD's daily net trading loss exceeded its corresponding daily VaR-based measure, a backtesting exception has occurred. If an SD experiences more than four backtesting exceptions over the preceding 250 business days, it is generally required to apply a multiplication factor in excess of three when it calculates its capital requirements.

The qualitative requirements would specify, among other things, that: (1) Each VaR model must be integrated into the SD's daily internal risk management system; (2) each VaR model must be reviewed periodically by the firm's internal audit staff and annually by a third party service provider; and (3) the VaR measure computed by the model must be multiplied by a factor of at least three but potentially a greater amount if there are exceptions to the measure resulting from quarterly back-testing results.

An SD would also be subject to on-going supervision by staff of the Commission and or RFA with respect to its internal risk management, including its use of VaR models.

ii. Stressed VaR Models

The Commission is proposing a stressed VaR component for SDs that have permission to use VaR models to compute market risk capital deductions. The stressed VaR measure supplements the VaR measure, as the VaR measure's inherent limitations produced an inadequate amount of capital to withstand the losses sustained by many financial institutions in the financial crisis of 2007–2008.[89] The stressed VaR measure should also contribute to a

[89] See *Revisions to the Basel II market risk framework,* published by the Basel Committee on Banking Supervision for an explanation of the implementation of the stressed VaR requirement.

more appropriate measure of the risks of an SD's positions, as it should account for more volatile and extreme price changes.

An SD would be required to use the same model that it uses to compute its VaR measure for its stressed VaR measure. The model inputs however would be calibrated to reflect historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the SD's portfolio. The stressed VaR measure must be calculated at least weekly and be no less than the VaR measure. The Commission would expect that the stressed VaR measure would be substantially greater than the VaR measure.

The Commission would require the stress tests to take into account concentration risk, illiquidity under stressed market conditions, and other risks arising from the SD's activities that may not be captured adequately in the SD's internal models. For example, it may be appropriate for the SD to include in its stress testing large price movements, one-way markets, nonlinear or deep out-of-the-money products, jumps-to-default, and significant changes in correlation. Relevant types of concentration risk include concentration by name, industry, sector, country, and market.

The SD must maintain policies and procedures that describe how it determines the period of significant financial stress used to compute its stressed VaR measure and be able to provide empirical support for the period used. These policies and procedures must address: (1) How the SD links the period of significant financial stress used to calculate the stressed VaR-based measure to the composition and directional bias of the SD's portfolio; and (2) the SD's process for selecting, reviewing, and updating the period of significant financial stress used to calculate the stressed VaR measure and for monitoring the appropriateness of the 12-month period in light of the SD's current portfolio. Before making material changes to these policies and procedures, an SD must obtain approval from the Commission or RFA. The Commission or the RFA may also require the SD to use a different period of stress to compute its stressed VaR measure.

iii. Specific Risk Models

The Commission's proposal would allow SDs to model their specific risk. Under the proposal, the specific risk model must be able to demonstrate the historical price variation in the portfolio, be responsive to changes in market conditions, be robust to an adverse environment, and capture all material aspects of specific risk for its positions. The Commission would require that an SD's models capture event risk (such as the risk of loss on equity or hybrid equity positions as a result of a financial event, such as the announcement or occurrence of a company merger, acquisition, spin-off, or dissolution) and idiosyncratic risk, capture and demonstrate sensitivity to material differences between positions that are similar but not identical, and to changes in portfolio composition and concentrations. If an SD calculates an incremental risk measure for a portfolio of debt or equity positions under paragraph (I) of 23.102 Appendix A, the SD is not required to capture default and credit migration risks in its internal models used to measure the specific risk of these portfolios.

The Commission understands that not all debt, equity, or securitization positions (for example, certain interest rate swaps) have specific risk. Therefore, there would be no specific risk capital requirement for positions without specific risk. An SD must have clear policies and procedures for determining whether a position has specific risk.

The Commission believes that an SD should develop and implement VaR-based models for both market risk and specific risk. An SD's use of different approaches to model specific risk and general market risk (for example, the use of different models) will be reviewed to ensure that the overall capital requirement for market risk is commensurate with the risks of the SD's covered positions.

iv. Incremental Risk Models

The Commission is proposing an incremental risk requirement for SDs that measures the specific risk of a portfolio of debt positions using internal models. Incremental risk consists of the default risk and credit migration risk of a position. Default risk means the risk of loss on a position that could result from the failure of an obligor to make timely payments of principal or interest on its debt obligation, and the risk of loss that could result from bankruptcy, insolvency, or similar proceeding. Credit migration risk means the price risk that arises from significant changes in the underlying credit quality of the position. An SD may also include portfolios of equity positions in the incremental risk model with the prior permission from the Commission or RFA, provided that the SD consistently includes such equity positions in how it internally measures and manages the incremental risk for such positions at the portfolio level. Default is assumed to occur with respect to an equity position that is included in its incremental risk model upon the default of any debt of the issuer of the equity position.

v. Comprehensive Risk Models

Under the proposal, an SD would be required to compute all material price risks of one or more portfolios of correlation trading positions using an internal model. The Commission would require the model to measure all price risk consistent with a one-year time horizon at a one-tail, 99.9 percent confidence level, under the assumption either of a constant level of risk or of constant positions. The Commission would expect that the SD remains consistent in its choice of constant level or risk or positions, once it makes a selection. Also, the SD's choice of a liquidity horizon must be consistent between its calculation of its comprehensive and incremental risk.

The Commission would require an SD's comprehensive risk model to capture all material price risk, including, but not limited to: (1) The risk associated with the contractual structure of cash flows of each position, its issuer, and its underlying exposures (for example, the risk arising from multiple defaults, including the ordering of defaults in tranched products); (2) credit spread risk, including nonlinear price risks; (3) volatility of implied correlations, including nonlinear price risks such as the cross-effect between spreads and correlations; (4) basis risks; (5) recovery rate volatility as it relates to the propensity for recovery rates to affect tranche prices; and (6) to the extent that comprehensive risk measure incorporates benefits from dynamic hedging, the static nature of the hedge over the liquidity horizon. The Commission notes that additional risks that are not explicitly discussed but are a material source of price risk must be included in the comprehensive risk measure.

The Commission would require an SD to have sufficient market data to ensure that it fully captures the material price risks of the correlation trading positions in its comprehensive risk measure. Moreover, an SD must be able to demonstrate that its model is an appropriate representation of comprehensive risk in light of the historical price variation of its correlation trading positions. An SD would also be required to inform the Commission and RFA if the SD plans to extend the use of a model that has been

approved to an additional business line or product type.

The comprehensive risk measure must be calculated at least weekly. In addition, an SD must at least weekly apply to its portfolio of correlation trading positions a set of specific stressed scenarios that capture changes in default rates, recovery rates, and credit spreads, and various correlations. An SD must retain and make available to the Commission and the RFA the results of the stress testing, including comparisons with capital comparisons generated by the SD's comprehensive risk model. An SD must promptly report to the Commission or the RFA any instances where the stress tests indicate any material deficiencies in the comprehensive risk model.

vi. Credit Risk Models

Swap dealers that obtain Commission or RFA approval to use internal models to compute credit risk would be required to submit credit risk models that satisfy the quantitative and qualitative requirements set forth in Appendix A to proposed Regulation 23.102. With respect to OTC derivatives contracts, an SD would need to determine an exposure charge for each OTC derivatives counterparty. The exposure charge for a counterparty that is insolvent, in a bankruptcy proceeding, or in default of an obligation on its senior debt, is the net replacement value of the OTC derivatives contracts with the counterparty (*i.e.,* the net amount of uncollateralized current exposure to the counterparty). The counterparty exposure charge for all other counterparties is the credit equivalent amount of the SD's exposure to the counterparty multiplied by an applicable credit risk weight factor multiplied by eight percent. The credit equivalent amount is the sum of the SD's (1) maximum potential exposure (''MPE'') multiplied by a back-testing determined factor; and (2) current exposure to the counterparty. The MPE amount is a charge to address potential future exposure and is calculated using the VaR model as applied to the counterparty's positions after giving effect to a netting agreement, taking into account collateral received, and taking into account the current replacement value of the counterparty's positions.

The Commission in its margin requirements (*see* Regulations 23.150 through 23.161) has set forth the requirements for eligible collateral for uncleared swaps. In order to account for collateral in its VaR model for the credit risk charges, the Commission would expect an SD to account for only the collateral that complies with Regulation 23.156 and is held in accordance with Regulation 23.157 for uncleared swaps that are subject to the Commission's margin rules. An SD would be able to take into consideration in its VaR calculation collateral that does not comply with Regulation 23.156 and is not held in accordance with Regulation 23.157 for uncleared swaps that are not subject to the Commission's margin rules.

The Commission is allowing SDs to use internal methodologies to determine the appropriate credit risk weights to apply to counterparties, if it has received the Commission's or the RFA's approval. A higher percentage credit risk weight factor would result in a larger counterparty exposure charge amount. The Commission expects that the counterparty credit risk weight should be based on an assessment of the creditworthiness of the counterparty.

The second component to the credit risk charge would be a counterparty concentration charge. This charge is intended to account for the additional risk resulting from a relatively large exposure to a single counterparty. This charge is triggered if an SD's current exposure to a counterparty exceeds five percent of the tier 1 or tentative net capital of the SD. In this case, an SD must take a counterparty concentration charge equal to: (1) Five percent of the amount by which the current exposure exceeds five percent of the tier 1 or tentative net capital of the SD for a counterparty with a credit risk weight of 20 percent or less; (2) 20 percent of the amount by which the current exposure exceeds five percent of the tentative net capital for a counterparty with a risk weight factor of greater than 20 percent and less than 50 percent; and (3) 50 percent of the amount by which the current exposure exceeds five percent of the tier 1 or tentative net capital for a counterparty with a risk weight factor of 50 percent or more.

The Commission is also proposing a portfolio concentration charge to address the risk of having a large amount of exposure relative to the capital of the SD. This charge is triggered when the aggregate current exposure of the SD to all counterparties exceed 50 percent of the SD's common equity tier 1capital or tentative net capital. In this case, the portfolio concentration charge would be equal to 100 percent of the amount by which the aggregate current exposure exceeds 50 percent of the SD's common equity tier 1capital or tentative net capital.

The Commission believes that its approach to calculating credit risk charges is appropriate given that its requirements are based on a method of computing capital charges for credit risk exposures in the international capital standards for banking institutions. Since credit risk is the risk that a counterparty could not meet its obligations on an OTC derivatives contract in accordance with agreed terms (such as failing to pay), the considerations that inform an SD's assessment of a counterparty's credit risk should be broadly similar across the various relationships that may arise between the dealer and the counterparty. Therefore, the Commission believes that its approach should be a reasonable model, as the SEC also uses a similar approach for its ANC broker-dealers or security-based SDs using models.

SDs that are subject to the bank-based capital requirement could also request Commission or RFA approval to use the Federal Reserve Board's internal ratings-based and advanced measurement model approaches to compute risk-weighted assets for the credit exposures listed in subpart E of 12 CFR 217. The SD would have to include such exposures in its application to the Commission and RFA, and explain how its proposed models are consistent with the Federal Reserve Board's model criteria in subpart E of 12 CFR 217.

Request for Comment

The Commission requests comment on all aspects of the proposed model approval process and the computation of the credit risk charges. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. Do the proposed models appropriately account for the market and credit risk of swaps and security-based swaps? If not, explain why and provide alternatives that the Commission should consider.

2. Is the proposed model review process appropriate? If not, explain why not and provide alternatives that the Commission should consider.

3. The proposal states that the Commission expects that a prudential regulator's or foreign regulator's review and approval of capital models that are used in the corporate family of an SD would be a significant factor in NFA determining the scope of its review, provided that appropriate information sharing agreements are in place. Given the number and complexity of the model review process, please provide comments on the viability of the proposed model review process? What other alternatives should the Commission consider?

4. Should the Commission provide for automatic approval or temporary approval of capital models already approved by a prudential or foreign regulator? If so, please provide information regarding on what conditions such models should be approved?

5. What factors should the Commission consider in setting an effective date for the capital rules given the application process and the model approval process? Are most SDs that would be subject to the rule already using models that are consistent with the proposed regulations?

6. Are there other approaches available to facilitate the timely review of applications from SDs to use internal models? For example, could a more limited review be performed of models that have been approved by another regulator? If so, what conditions, if any, should the Commission consider prior to approving the model?

7. How much implementation time is needed for the Commission's proposed model review and approval process?

8. Are the proposed methods of computing the credit risk charge appropriate for nonbank SDs? If not, explain why not. For example, are there differences between FCM/BDs that are also SDs and standalone SDs that would make the method of computing the credit risk charge appropriate for the former but not the latter. If so, identify the differences and explain why they would make the credit risk charge not appropriate for nonbank SDs. What modifications should be made in that case?

9. Is the method of computing the counterparty exposure charge appropriate for nonbank SDs? If not, explain why not. For example, is the calculation of the credit equivalent amount (*i.e.,* the sum of the MPE and the current exposure to the counterparty) a workable requirement for nonbank SDs? If not, explain why not.

10. Are the conditions for taking collateral into account when calculating the credit equivalent amount appropriate for nonbank SDs? If not, explain why not.

11. Are the conditions for taking netting agreements into account when calculating the credit equivalent amount appropriate for nonbank SDs? If not, explain why not.

12. Are the standardized risk weight factors (20%, 50%, and 150%) proposed for calculating the credit equivalent amount appropriate for nonbank SDs? If not, explain why not.

13. Is the method of computing the counterparty concentration charge appropriate for nonbank SDs? If not, explain why not.

14. Is the method of computing the portfolio concentration charge appropriate for SDs? If not, explain why not.

B. Swap Dealer and Major Swap Participant Liquidity Requirements and Equity Withdrawal Restrictions

1. Liquidity Requirements

The Commission is proposing liquidity requirements for SDs that elect a bank-based capital approach under proposed Regulation 23.101(a)(1)(i) or a net liquid assets capital approach under proposed Regulation 23.101(a)(1)(ii). The Commission also is proposing liquidity requirements for SDs that are registered FCMs. The Commission's proposed liquidity requirements are designed to address the potential risk that an SD may not be able to efficiently meet both expected and unexpected current and future cash flow and collateral needs as a result of adverse events impacting the SD's daily operations or financial condition. The proposed liquidity requirements for SDs subject to the bank-based capital approach are consistent with existing liquidity requirements adopted by the Federal Reserve Board for bank holding companies.[90] The proposed liquidity requirements for SDs subject to the net liquid assets capital approach are consistent with liquidity requirements proposed by the SEC for SBSDs.[91]

SDs that are subject to the capital requirements of a prudential regulator, would not be subject to the Commission's proposed liquidity requirements as such SDs are subject to regulation by the prudential regulators, including liquidity requirements established by the prudential regulators. The Commission also is not proposing liquidity requirements for SDs that are eligible to use the tangible net worth capital approach under proposed Regulation 23.101(a)(2)(i). SDs that are eligible to use the net worth capital approach are required to be primarily engaged in commercial activities, with their financial activities limited by the 15% asset test or 15% revenue tests discussed in section II.A.2.iii of this release. Accordingly, the business operations of SDs that are eligible to use the tangible net worth capital approach are significantly different from the traditional business activities of financial firms and financial market intermediaries whose need for access to liquidity is crucial to meet their obligations to make daily payments to their clients and to meet other daily funding obligations. In contrast, the liquidity needs of SDs that are eligible to use the tangible net worth approach would encompass the daily funding and payment obligations of the non-financial business with which the SD is connected.

i. Swap Dealers Subject to the Bank-Based Capital Approach

Proposed Regulation 23.104(a)(1) would provide that an SD that elects the bank-based capital approach would need to meet the liquidity coverage ratio requirements set forth in 12 CFR part 249, and apply such requirements as if the SD were a bank holding company subject to 12 CFR part 249. The proposed liquidity coverage ratio would require the SD to maintain each day an amount of high quality liquid assets (''HQLAs''), as defined in 12 CFR 249.20, that is no less than 100 percent of the SDs total net cash outflows over a prospective 30 calendar-day period.[92]

HQLAs are assets that are unencumbered by liens and other restrictions on the ability of the SD to transfer the assets.[93] There are three categories of HQLAs (level 1 and levels 2A and 2B),[94] and there are haircuts and concentration restrictions on the level 2A and level 2B assets.[95] Specifically, level 2A and level 2B assets are valued at 85 percent and 50 percent, respectively, of the fair value of the assets.[96] The HQLA categories are designed so that the assets that are HQLAs could be converted quickly into cash without reasonably expecting to incur losses in excess of the applicable haircuts during a stress period.

An SD's total net cash outflow amount would be determined by applying outflow and inflow rates, which reflect certain standardized stressed assumptions, against the balances of an SD's funding sources, obligations, transactions, and assets over a prospective 30 day period.[97] Inflows that can be included to offset outflows are limited to 75 percent of the outflows

[90] *See* 12 CFR part 249.

[91] *See* SEC proposed Rule 18a–1(f), 77 FR 226 (Nov. 23, 2012).

[92] *See* 12 CFR 249.10. Federal Reserve Board rules require a regulated institution to maintain a liquidity coverage ratio of HQLA to net cash outflows that is equal to or greater than 1.0 on each business day.

[93] *See* 12 CFR 249.22(b).

[94] *See* 12 CFR 249.20.

[95] *See* 12 CFR 249.21. Level 2A liquid assets are subject to a 15 percent haircut, and level 2B liquid assets are subject to a 50 percent haircut. The concentration limits on level 2A and 2B assets are set forth in 12 CFR 249.21(d), and effectively provide that level 2A and level 2B assets may not comprise more than 40 percent and 15 percent, respectively, of an entity's HQLAs.

[96] *See* 12 CFR 249.21(a).

[97] *See* 12 CFR 249.32.

to ensure that the SD is maintaining sufficient liquidity and is not overly reliant on inflows. The stressed assumptions include events such as a partial loss of secured, short-term financing with certain collateral and counterparties and losses from derivatives positions and the collateral supporting those positions.

The Commission recognizes that certain portions of 12 CFR part 249 may not be applicable to a particular SD. For example, an SD may not have certain of the instruments listed in 12 CFR part 249 as an asset or may not have certain of the cash inflows and outflows listed in the regulation.[98] However, the Commission believes that the portion of the regulations applicable to derivative transactions would be applicable to an SD. Therefore, the SD would be required to apply the portions of 12 CFR part 249 that are applicable to it, based on its balance sheet and the composition of its assets and liabilities.

Furthermore, the Commission is proposing to adjust the Federal Reserve Board's liquidity coverage ratio to better reflect the business of an SD. Specifically, the proposal would explicitly include an SD's cash deposits that are readily available to meet the general obligations of the SD as a level 1 liquid asset in computing its liquidity coverage ratio.[99] The Commission is also modifying the proposal to provide that an SD organized and domiciled outside of the U.S. may include in its HQLAs assets held in it home country jurisdiction.[100] The Commission believes that these adjustments are appropriate to better align the liquidity coverage ratio with the expected operations of certain SDs.

The Commission also believes that the results of stress tests play a key role in shaping an SD's liquidity risk contingency planning. Thus, stress testing and contingency planning are closely intertwined. Under proposed Regulation 23.104(a)(4), an SD would be required to establish a contingency funding plan. The contingency funding plan would need to clearly set out the strategies and funding sources for addressing liquidity shortfalls in emergency situations and would need to address the policies, roles, and responsibilities for meeting the liquidity needs of the SD.

The proposal further provides that the SD's senior management that has responsibility for risk management would need to be informed if the SD did not maintain a liquidity coverage ratio of at least 1.0. In addition, the assumptions underlying the calculation of the liquidity coverage ratio would need to be reviewed at least quarterly by senior management that has responsibility to oversee risk management at the SD and at least annually by senior management of the SD.[101]

The Commission also is proposing to require an SD to obtain Commission approval prior to transferring HQLAs to the SD's affiliates or parent if, after the transfer of those liquid assets, the SD would not be able to comply with the liquidity coverage ratio requirement.[102] Therefore, an SD may not transfer assets that would qualify for the numerator of the liquidity coverage ratio to its affiliates or parent if, after the transfer, the SD's HQLA would be below 100 percent of its total projected net cash flows over a 30 day period.

ii. Swap Dealers Subject to the Net Liquid Assets Capital Approach

An SD that elects to be subject to a net liquid assets capital approach would need to comply with liquidity risk management requirements set forth in proposed Regulation 23.104(b). The Commission understands that many financial institutions have traditionally used liquidity funding stress tests as a means to measure liquidity risk. These tests would generally estimate cash and collateral needs over a period of time and assume that sources to meet those needs (*e.g.,* obtaining secured funding lines and lines of credit) will become impaired or be unavailable. Therefore, to raise funds during a liquidity stress event, a firm would generally keep a pool of unencumbered liquid assets that can be used to meet its current liabilities or other funding needs. The size of the pool of unencumbered liquid assets would be based on a firm's estimation of how much of a diminution of value in those liquid assets and the amount of funding that would be lost from external sources during a stress event and the duration of the event.

Under proposed Regulation 23.104(b), an SD would need to perform a liquidity stress test at least monthly that takes into account certain assumed conditions lasting for 30 consecutive days. The results of the liquidity stress test would need to be provided within 10 business days of the month end to senior management responsible for overseeing risk management at the SD. In addition, the assumptions underlying the liquidity stress test would need to be reviewed at least quarterly by senior management responsible for overseeing risk management at the SD and at least annually by senior management of the SD.[103]

As noted above, the Commission's proposed liquidity requirements for SDs that are subject to a net liquid assets capital approach are consistent with the SEC's proposed liquidity requirements for SBSDs, and are intended to address the types of liquidity outflows experienced by ANC Firms in times of stress. Consistent with the SEC approach, the Commission's liquidity stress test proposal is designed to ensure that SDs are using a stress test that is severe enough to produce an estimate of a potential funding loss of a magnitude that might be expected in a severely stressed market. Proposed Regulation 23.104(b)(3) would require an SD to maintain at all times liquidity reserves based on the results of the liquidity stress test in the form of unencumbered cash or U.S. government securities. The Commission is proposing this requirement to ensure that only the most liquid instrument are held in reserves, given that the market for less liquid instruments may not be available during a time of market stress.

As noted above, the results of stress tests play a key role in shaping an SD's liquidity risk contingency planning. Therefore, similar to the requirement for an SD that elects to be subject to a bank-based capital approach, an SD that elects to be subject to a net liquid assets capital approach would be required by proposed Regulation 23.104(b)(4) to establish a contingency funding plan. The plan would need to clearly set out the strategies and funding sources for addressing liquidity shortfalls in emergency situations and would need to address the policies, roles, and responsibilities for meeting the liquidity needs of the SD.

Request for Comment

The Commission requests comment on all aspects of the proposed capital rule and liquidity requirements, including empirical data in support of

[98] The Commission is also proposing to explicitly include an SD's cash deposits that are readily available to meet the general obligations of the SD as a level 1 liquid asset. The Commission is also modifying the proposal to provide that SDs organized and domiciled outside of the U.S. may include in its HQLAs held outside of the U.S. (*See* proposed Regulation 23.104(a)(1)).

[99] *See* proposed Regulation 23.104(a)(1).

[100] *Id.*

[101] *See* proposed Regulation 23.104(a)(2) and (3).

[102] *See* proposed Regulation 23.104(a)(2).

[103] The assumptions would include (1) a decline in creditworthiness of the SD severe enough to trigger contractual credit related commitment provisions of counterparty agreements; the loss of all existing unsecured funding at the earlier of its maturity and an inability to acquire a material amount of new unsecured funding; and, the potential for a material loss of secured funding.

comments. In addition, the Commission requests comment in response to the following questions:

1. Should the Commission phase-in the implementation of any final capital rule? For example, the capital requirements would be implemented first and the liquidity requirements would be implemented second. Please provide recommendations and implementation time-periods.

2. Should the Commission consider alternative approaches to the proposed liquidity requirements? If so, explain the alternatives and the rationale for the alternatives. Please provide any quantitative analysis in support of alternative approaches, if possible.

2. Swap Dealer Equity Withdrawal Restrictions

The Commission is proposing certain equity withdrawal restrictions for SDs that elect either the bank-based capital approach or the net liquid assets capital approach. Proposed Regulation 23.104(c) would provide that the capital of an SD, or any subsidiary or affiliate of the SD that has any of its liabilities or obligations guaranteed by the SD, may not be withdrawn by action of an SD or equity holder of the SD, or by redemption of shares of stock by the swap dealer or such affiliates or subsidiaries, or through the payment of dividends or any similar distribution, if such withdrawal or payment, and any other similar transactions that are scheduled to occur within the succeeding six months, results in the SD holding less than 120 percent of the minimum regulatory capital that the SD is required to hold pursuant to proposed Regulation 23.101. The proposal includes an exception for paying required tax payments and for paying reasonable compensation to equity holders of the SD. The proposal is consistent with existing equity withdrawal restrictions imposed on FCMs and BDs, and is consistent with equity withdrawal restrictions proposed by the SEC for SBSDs.[104]

Proposed Regulation 23.104(d) would grant the Commission the ability to issue an order temporarily restricting for up to 20 business days the withdrawal of capital from an SD, or prohibiting the SD from making an unsecured loan or advance to any stockholder, partner, member, employee or affiliate of the SD. The Regulation would further provide that the Commission may issue such an order if, based upon the information available, the Commission concludes that such withdrawal, loan or advance may be detrimental to the financial integrity of the SD, or may unduly jeopardize the SD's ability to meet its financial obligations to counterparties or to pay other liabilities which may cause a significant impact on the markets or expose the counterparties and creditors of the SD to loss. The proposal further provides that the SD may request a hearing on the order, which must be held within two business days of the date of the written request by the SD. The proposed grant of authority to the Commission to issue an order temporarily restricting certain unsecured loans or advances is consistent with the existing Commission authority under Regulation 1.17(g)(1) for FCMs and with the SEC's authority over BDs.[105] The proposed Commission authority to temporarily restrict equity withdrawals also is consistent with the SEC's proposal governing SBSDs.[106]

Both the limitation on the withdrawal of equity capital and the authority of the Commission to temporarily restrict the withdrawal of capital are intended to provide mechanisms for the Commission to assess the financial and operational condition of SDs in times of financial stress. In such situations, it is a priority for the Commission that SDs maintain the financial strength and liquidity to meet their financial obligations to counterparties and creditors.

C. Swap Dealer and Major Swap Participant Financial Recordkeeping, Reporting and Notification Requirements

1. Swap Dealer and Major Swap Participant Financial Recordkeeping and Financial Statement Reporting Requirements

Section 4s(f) of the CEA directs the Commission to adopt regulations governing reporting and recordkeeping for SDs and MSPs, including financial condition reporting and position reporting. Consistent with section 4s(f), the Commission is proposing new Regulation 23.105, which would require SDs and MSPs to satisfy current books and records requirements, ''early warning'' and other notification filing requirements, and periodic and annual financial report filing requirements with the Commission and with any RFA of which the SDs and MSPs are members.

As discussed below, however, the proposed notice and financial reporting requirements differentiate between SDs and MSPs that are subject to the Commission's capital requirements and SDs and MSPs that are subject to the prudential regulators' capital requirements.[107] The Commission is proposing not to impose the majority of the financial reporting provisions contained in Regulation 23.105 on SDs and MSPs that are subject to the capital rules of a prudential regulator from, with the exception of certain financial and swaps position and margin reporting requirements and notice filing requirements discussed below, as the financial condition of these entities will be supervised by the applicable prudential regulator and subject to its financial reporting requirements. The Commission believes that the proposal is consistent with section 4s of the CEA which grants the prudential regulators the authority to establish capital requirements for SDs and MSPs subject to their jurisdiction. Additionally, the Commission's proposed approach avoids imposing potential duplicative, and potentially contradictory, requirements on SDs and MSPs that are subject to both Commission and prudential regulator oversight.

Proposed Regulation 23.105(b) is based upon existing FCM and BD financial recordkeeping and reporting requirements and would require an SD or MSP to prepare current ledgers or other similar records showing or summarizing each transaction affecting its asset, liability, income, expense and capital accounts.[108] The accounts must be classified in accordance with U.S. generally accepted accounting principles (''U.S. GAAP'') provided, however, that if the SD or MSP is organized under the laws of a foreign jurisdiction and is not otherwise required to prepare its records or financial statements in accordance with U.S. GAAP, the SD or MSP may prepare the required records in accordance with International Financial Reporting Standards (''IFRS'') issued by the International Accounting Standards Board (''IASB'').[109] Proposed Regulation

[104] Equity withdrawal restrictions for FCMs are set forth in Regulation 1.17(e), and for BDs is set forth in 17 CFR 240.15c3–1(e)(2). SEC proposed equity withdrawal restrictions for SBSDs is contained in proposed Rule 18a–1(e)(2). *See* 77 FR 226 (Nov. 23, 2012).

[105] *See* Rule 15c3–1(e)(3) (17 CFR 240.15c3–1(e)(3)).

[106] *See* SEC proposed Rule 18a–1(e)(3) (77 FR 70214 (Nov. 23, 2012).

[107] *See* proposed Regulation 23.105(a)(2).

[108] Commission Regulation 1.18 requires each FCM to prepare and keep current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting its asset, liability, income, expense and capital accounts. SEC Rule 17a–3 (17 CFR 240.17a–3) requires a BD to make and maintain comparable ledgers and other similar records reflecting its assets, liabilities, income and expenses.

[109] FCMs are required to classify accounts only in accordance with U.S. GAAP.

23.105(b) also would require an SD or MSP to maintain its ledgers or other similar records showing or summarizing each transaction affecting its asset, liability, income, expense and capital accounts for a period of five years pursuant to Regulation 1.31.

The Commission is proposing in Regulation 23.105(b) to permit an SD or MSP organized and domiciled outside of the U.S. to maintain financial books and records in accordance with IFRS in recognition that U.S. GAAP may not be the native accounting principles for a non-U.S. firm and that these firms may be subject to existing non-U.S. GAAP financial reporting requirements in their home country jurisdictions. These SDs and MSPs would be subject to substantial expense and burden if they were required to maintain two separate accounting records and systems to satisfy two separate financial reporting requirements. The Commission, however, is proposing that if the SD or MSP is otherwise required to maintain books and records in accordance with U.S. GAAP, the SD or MSP must maintain its records pursuant to U.S. GAAP in order to comply with Regulation 23.105(b).

The Commission is also proposing to require SDs and MSPs to file periodic financial reports with the Commission and with the SDs' or MSPs' RFA. Consistent with the recordkeeping requirements, the proposed financial reporting requirements are consistent with existing Commission requirements for FCMs and SEC requirements for BDs.[110]

Proposed Regulation 23.105(d)(1) would require an SD or MSP to file a monthly unaudited financial report within 17 business days of the close of business each month, and proposed Regulation 23.105(e)(1) would require an SD or MSP to file an annual audited financial report within 60 days of the close of the SD's or MSP's fiscal year-end date.[111] The monthly unaudited and the annual audited financial reports must be prepared in the English language and denominated in U.S. dollars.[112] The monthly unaudited and annual audited financial reports also must include: (1) A statement of financial condition; (2) a statement of income or loss; (3) a statement of cash flows; (4) a statement of changes in ownership equity; (5) a statement of the applicable capital computation; and (6) any further materials that are necessary to make the required statements not misleading.[113] Proposed Regulation 23.105(e)(4)(iii) would further require that the annual audited financial statements also include any necessary footnote disclosures. Proposed Regulation 23.105(e)(2) would require the annual financial statements to be audited by a public accountant that is in good standing in the accountant's home country jurisdiction.[114]

The monthly unaudited and annual audited financial statements must be prepared in accordance with U.S. GAAP, provided, however, that the Commission is proposing to permit SDs or MSPs that are organized and domiciled outside of the U.S., and otherwise are not required to prepare financial statements in accordance with U.S. GAAP, to prepare the financial statements in accordance with IFRS or another local accounting standard, after requesting approval by the Commission, which is discussed below, in lieu of U.S. GAAP.[115] The use of IFRS in lieu of U.S. GAAP is consistent with the proposed treatment in Regulation 23.105(b) discussed above that would allow a these SDs and MSP to maintain their financial books and records in accordance with IFRS.

The Commission, however, is proposing that if the non-U.S. SD or non-U.S. MSP is otherwise required to prepare financial statements in accordance with U.S. GAAP, the SD or MSP must submit financial statements prepared in accordance with U.S. GAAP to the Commission and to the firm's RFA in order to comply with the regulations. This requirement reflects the fact that certain foreign-based SDs or MSPs that consolidate into a U.S. parent organization may prepare U.S. GAAP financial statements as part of the consolidation. Under the proposed regulations, if the foreign-based SD or MSP prepares U.S. GAAP financial statements as part of the consolidation, it would be required to submit such U.S. GAAP statements to the Commission and to the firm's RFA to comply with Regulation 23.105(d)(2) and (e)(3).

While the Commission has proposed to permit SDs or MSPs organized and domiciled outside the U.S. to use IFRS in lieu of U.S. GAAP in the preparation and presentation of the monthly unaudited and annual audited financial reports, the Commission recognizes that not all non-U.S. jurisdictions have adopted IFRS. In addition, the Commission understands that even in certain foreign jurisdictions that have adopted IFRS, SDs and MSPs may be permitted to prepare and present their financial statements in accordance with local accounting standards. To address this issue, the Commission is proposing in Regulation 23.105(o) to permit an SD or MSP organized and domiciled outside of the U.S. to petition the Commission to use local accounting standards in lieu of U.S. GAAP or IFRS in monthly unaudited and annual audited financial reports filed with the Commission.

The process for seeking Commission approval to use local accounting standards is set forth in proposed Regulation 23.106 and is discussed in more detail in section II.D below. The Commission would review each request on a case-by-case basis and determine what, if any, additional information would be necessary in order to accept financial reports prepared in accordance with local accounting standards, including possible reconciliations of the financial information to U.S. GAAP. The Commission notes further that notwithstanding the proposed substituted compliance provisions, financial statements from all SDs and MSPs must be prepared in the English language and denominated in U.S. dollars, as proposed in Regulation 23.105(d)(2) and 23.105(e)(3).

The Commission is also proposing in Regulation 23.105(d)(3), (4) and (e)(5) to permit an SD or MSP that is registered with the Commission as an FCM or registered with the SEC as a BD to satisfy the Commission's SD or MSP financial statement reporting requirements by submitting a CFTC Form 1–FR–FCM or its applicable SEC Financial and Operational Combined Uniform Single (" FOCUS") Report in lieu of the specific financial statements required under proposed Regulation

[110] Regulation 1.10 requires FCMs to submit unaudited monthly and audited annual financial reports to the Commission and to the FCMs' respective designated self-regulatory organization. SEC Rule 17a–5 (17 CFR 240.17a–5) directs BDs to file unaudited monthly reports and annual audited reports with the SEC.

[111] The Commission also is proposing certain technical, administrative provisions for SD and MSP financial statements. Proposed paragraph (g) to Regulation 23.105 would prohibit an SD or MSP from changing its fiscal year end date unless the SD or MSP has requested and received written approval for the change from the RFA of which it is a member. Proposed paragraph (j) would provide that an SD or MSP may request an extension of time to file its unaudited monthly or audited annual report from the RFA, which may be granted on a conditional or unconditional basis, or disapproved by the RFA. Proposed paragraphs (g) and (j) of Regulation 23.105 are consistent with current provisions governing FCMs under Regulation 1.10.

[112] *See* proposed Regulations 23.105(d)(2) and (e)(3).

[113] *See* proposed Regulations 23.105(d)(2) and (e)(4).

[114] FCMs currently are required to file unaudited financial reports and an annual financial report with the Commission within 17 and 60 days, respectively, of the end of the reporting period. *See* Regulation 1.10(b).

[115] *See* proposed Regulations 23.105(d)(2) and (e)(3). Regulation 1.10 provides that FCMs must present its unaudited monthly reports and audited annual reports in accordance with U.S GAAP.

23.105.[116] The financial information that would be required under proposed Regulation 23.105(d) for SDs and MSPs is consistent with the Commission's current requirements for Form 1–FR–FCM and the SEC's requirements for FOCUS Reports for BDs. The proposal also is consistent with the Commission's long history of permitting SEC registrants to meet their financial statement filing obligations with the Commission by submitting a FOCUS Report in lieu of CFTC Form 1–FR–FCM and reduces the burden on dually-registered firms by not requiring two separate financial reporting requirements.[117]

In addition to the specific financial reporting requirements discussed above, the Commission is also proposing in Regulation 23.105(h) to require any SD or MSP to file additional financial or operational information as the Commission may deem necessary in order to adequately assess the SD's or MSP's financial condition or operational status. This additional financial and operational information may be necessary at times when an SD or MSP is experiencing a financial or operational crisis, and the additional information is necessary for the Commission to assess whether the SD or MSP will be able to continue to meet its obligations to counterparties and other creditors. The authorization to request additional information from a registrant also is consistent with existing Regulation 1.10 which provides the Commission with the authority to request financial information from FCMs and IBs, and it is consistent with existing authority that the SEC has with respect to BDs and with the proposed authority that the SEC would have over SBSDs and MSBSPs.[118]

The Commission also is proposing limited financial reporting for SDs and MSPs that are subject to the capital requirements of a prudential regulator as such regulators have existing financial reporting requirements in place for these SDs and MSPs. The financial reporting requirements for such SDs and MSPs are described in section II.C.6 below.

The Commission, however, is proposing that SDs and MSPs that are subject to capital rules of a prudential regulator file financial reports and specific position and margin information with the Commission and with the RFA of which the SDs and MSPs are members within 17 business days of the end of each calendar quarter and not on a monthly basis. The financial reports and specific position information that would be required is set forth in Appendix B to proposed Regulation 23.105.

SDs and MSPs that are dually registered as FCMs will continue to be subject to the capital requirements in Regulation 1.17, and along with proposed conforming amendments in Regulation 1.17 applicable to dually registered SDs and MSPs discussed above, will be permitted to comply with the applicable financial recordkeeping, notification and reporting under Regulation 23.105 by following applicable FCM requirements in Regulations 1.10, 1.12, and 1.16.[119] Similarly, SDs and MSPs dually registered with the SEC as either SBSDs or MSBSPs will be permitted to comply with the Commission's financial reporting and notification requirements under Regulation 23.105 by filing simultaneously with the Commission all applicable notices or reports required under the SEC's rules.[120]

The Commission is further proposing to require that SDs and MSPs provide public disclosure on their Web site of some of the proposed required financial reporting, including a statement of financial condition and of the amount of minimum regulatory capital required and the amount of regulatory capital of the SD or MSP no less than quarterly, with the same information provided from an audited financial statement no less than annually. The proposal for public disclosure is consistent with financial reporting information the Commission has previously determined should not qualify as exempt from the Freedom of Information Act for FCMs. The proposal to require quarterly reporting is intended to make the frequency of such public disclosure consistent with publicly available information provided by bank entities in call reports.

2. Swap Dealer and Major Swap Participant Notice Requirements

The Commission is proposing to require SDs and MSPs to file certain regulatory notices with the Commission and with the RFA of which the SDs or MSPs are members if certain defined triggering events occur. Proposed Regulation 23.105(c) would require an SD or MSP that is not subject to the capital rules of a prudential regulator to provide the Commission and RFA with immediate written notice when the firm is: (1) Undercapitalized; (2) fails to maintain capital at a level that is in excess of 120 percent of its minimum capital requirement; or (3) fails to maintain current books and records.

Proposed Regulation 23.105(c) would further require an SD or MSP, as applicable, to provide notice to the Commission and to the RFA within 24 hours of: (1) Failing to comply with the liquidity requirements under proposed Regulation 23.104, (2) experiencing a 30 percent reduction in capital as compared to the last reported capital in a financial report filed with the Commission, or (3) failing to post or collect initial margin for uncleared swap transactions or exchange uncleared swap variation margin as required under the Commission's uncleared swaps margin rules and the initial margin that would be required for uncleared security-based swaps as required under 17 CFR 240.18a–3(c)(1)(i)(B), if the total amount that has not been either collected by and exchanged with or posted by and exchanged with the SD is equal to or greater than: (1) 25 percent of the SD's required capital under the Commission's proposal calculated for a single counterparty or group of counterparties that are under common ownership or control; or (2) 50 percent of the SD's required capital under the Commission's proposal calculated for all of the SD's counterparties.[121]

Proposed Regulation 23.105(c) also would require an SD to provide the Commission and the RFA with two business day's advance notice of a withdrawal that would exceed 30

[116] FCMs are required to file monthly unaudited and annual audited Forms 1–FR–FCM with the Commission and with their designated self-regulatory organization. The Forms 1–FR–FCM include, among other information, a statement of financial condition, a statement of income or loss, a statement of changes in ownership equity, a statement of liabilities subordinated to the claims of general creditors, a statement of the computation of regulatory minimum capital, and any further information as may be necessary to make the required statements not misleading. *See* Regulation 1.10(d).

SEC FOCUS Reports are required to contain, among other statements and information, a statement of financial condition, a statement of income or loss, a statement of changes in ownership equity, a statement of liabilities subordinated to the claims of general creditors, and a statement of the computation of regulatory minimum capital. *See* SEC Rule 17a–5 (17 CFR 240.17a–5).

[117] *See* Regulation 1.10(h), which permits an FCM that is also registered as a BD to file its SEC FOCUS Report in lieu of the Commission's Form 1–FR–FCM.

[118] *See* CFTC Regulation 1.10(b)(4).

[119] *See* Regulation 23.105(d)(4) and (e)(6), wherein SDs and MSPs dually registered as FCMs will be permitted to comply with the monthly and annual financial reporting requirements by filing form 1–FR–FCM in lieu of the financial reports required under proposed Regulation 23.105.

[120] *See* Regulation 23.105(c)(5) referencing proposed 17 CFR 240–18a–8 for notification requirements for SBSDs and MSBSPs. See § 23.105(d)(3) and § 23.105(e)(5) referencing proposed 17 CFR 240–18a–7, for monthly and annual financial reporting requirements for SBSDs and MSBSPs.

[121] *See* CFTC Regulations 23.152 and 23.153.

percent of the SD's excess regulatory capital.[122] Finally, the proposal would also require an SD or MSP that is dually-registered with the SEC as an SBSD or MSBSP to file with the Commission and with its RFA a copy of any notice that the SBSD or MSBSP is required to file with the SEC under SEC Rule 18a–8 (17 CFR 240.18a–8). SEC proposed Rule 18a–8 requires SBSDs and MSBSPs to provide written notice to the SEC for comparable reporting events as proposed by the Commission in Regulation 23.105(c), including if a SBSD or MSBSP is undercapitalized or fails to maintain current books and records. The Commission is proposing to require SDs and MSPs that are dually-registered with the SEC to file copies with the Commission of notices filed with the SEC under Rule 18–8 to allow the Commission to be aware of any events that may indicate that the SD or MSP is unable to meet its operational or financial obligations on an ongoing basis.

The proposed notice provisions are intended to provide the Commission and the appropriate RFA with timely notice of potentially adverse financial or operational issues that may warrant immediate attention and ongoing surveillance. The proposed notice requirements are comparable to the notice requirements concerning capital currently required for FCMs under Regulation 1.12 of the Commission's regulations and with the SEC's notice requirements for BDs.[123]

3. Electronic Filing Requirements for Financial Reports and Regulatory Notices

Proposed Regulation 23.105(m) would require all notifications and financial statement filings submitted to the Commission pursuant to Regulation 23.105 to be filed in an electronic manner using a user authentication process approved by the Commission. The Commission notes that the many SDs and MSPs are already familiar with the Commission approved WinJammer filing system maintained jointly by NFA and Chicago Mercantile Exchange. WinJammer currently allows Commission registrants that are authorized to use the electronic system to file financial reports and notices with the Commission and NFA simultaneously. The Commission views this system, as well as other future Commission approved systems, as the most effective way to ensure that the filings required under proposed Regulation 23.105 would be submitted promptly and directly to the Commission.

4. Swap Dealer and Major Swap Participant Reporting of Position Information

Proposed Regulation 23.105(l) would require each SD or MSP that was not subject to the capital rules of a prudential regulator to file monthly swap and security-based swap position information with the Commission and with the RFA of which the SD or MSP is a member. The information required to be submitted would be included in proposed Appendix A to Regulation 23.105, and is based upon the information that the SEC is proposing be filed with the SEC by SBSDs.[124] Accordingly, SDs or MSPs that are dually-registered as SBSDs would be subject to file the same position information with both regulators.

The position information that would be required by proposed Regulation 23.105(l) would include an SD's or MSP's: Current net exposure by the top 15 counterparties, and all other counterparties combined; total exposure by the top 15 counterparties, and all others combined; the internal credit rating, gross replacement value, net replacement value, current net exposure, total exposure, and margin collected for the top 36 counterparties. The SD or MSP would also have to provide current exposure and net exposure by country for the top 10 countries. The Commission would use this information as part of its financial surveillance program to monitor the financial condition and positions of SDs and MSPs.

5. Reporting Requirements for Swap Dealers Approved To Use Internal Capital Models

The Commission is proposing reporting requirements for SDs that have received approval from the Commission or from an RFA under proposed Regulation 23.102(d) to use internal models to compute market risk capital charges or credit risk capital charges. The Commission's proposed requirements for the collection of model information are largely based on existing requirements for ANC Firms under Regulation 1.17 and the rules of the SEC, and on SEC proposed Rules for SBSDs and BDs.

Regulation 23.105(k) would require an SD to file, on a monthly basis, a listing of each product category for which the SD does not use an internal model to compute market, and the amount of the market risk deduction; a graph reflecting, for each business line, the daily intra-month VaR; the aggregate VaR for the SD; for each product for which the SD uses scenario analysis, the product category and the deduction for market risk; and, credit risk information on swap, mixed swap, and security-based swap exposures, including: (A) Overall current exposure, (B) current exposure listed by counterparty; (C) the 10 largest commitments listed by counterparty, (D) the SD's maximum potential exposure listed by counterparty for the 15 largest exposures; (E) the SD's aggregate maximum potential exposure, (F) a summary report reflecting the SD's current and maximum potential exposures by credit rating category, and (G) a summary report reflecting the SD's current exposure for each of the top 10 countries to which the SD is exposed.

Regulation 23.105(k) would also require an SD to report the results of the liquidity stress tests required by proposed Regulation 23.104. Regulation 23.104 also would require each SD approved to use internal capital models to submit a report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR and the results of backtesting of all internal models used to compute allowable capital, including VaR, and credit risk models, indicating the number of backtesting exceptions. All of the information required to be submitted to the Commission or RFA under proposed Regulation 23.105(k) would be required to be filed within 17 days of the close of each month, with the exception of the report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR, which would be required on a quarterly basis.

6. Financial Reporting Requirements for Swap Dealers and Major Swap Participants Subject to the Capital Rules of a Prudential Regulator

The Commission is proposing not to require an SD or MSP that is subject to the capital rules of a prudential regulator to file monthly unaudited or annual audited financial statements with the Commission or with the RFA of which the SD or MSP is a member. The Commission also is proposing to not to require such SDs or MSPs to file notifications contained in Regulation 23.105(c) with the Commission or with an RFA.

The Commission is, however, proposing to require SDs and MSPs that are subject to capital rules of a

[122] The term ''regulatory capital'' is defined in proposed Regulation 23.100 and means the relevant capital approach applicable to the SD under proposed Regulation 23.101.

[123] *See* SEC Rule 17a–11 (17 CFR 240.17a–11).

[124] *See* SEC proposed Form SBS part 4.

prudential regulator to file quarterly unaudited financial reports and certain regulatory notices with the Commission and with an RFA. Proposed Regulation 23.105(p) would require SDs and MSPs that are subject to the capital requirements of a prudential regulator to file quarterly unaudited financial reports with the Commission that are largely based on existing ''call reports'' that the SDs and MSPs are required to file with their respective prudential regulator.[125] The proposed financial reporting requirement is consistent with the SEC proposed filing requirement for SBSDs that are subject to the capital rule of a prudential regulator.[126] Specifically, the Commission is proposing that the SDs and MSPs submit to the Commission Appendix B of proposed Regulation 23.105, which is largely based on the SEC's proposed Form SBS part 2 and part 5.

The financial information required by Regulation 23.105(p) would include the SD's or MSP's balance sheet and details of the SD's or MSP's capital composition and capital ratios. The financial information would further focus on the SD's or MSP's swap and security-based swap activities, including requiring aggregate security-based swaps, mixed swaps, swaps, and other derivatives information. The information would include both cleared and uncleared positions and would further differentiate between long and short positions. The Commission is requiring this information in order to provide the Commission and the SD's or MSP's RFA with swap and security-based swap trading data, which may be monitored as part of their respective financial and market surveillance monitoring programs.

Proposed Regulation 23.105(p) would also require SDs and MSPs that are subject to the capital rules of a prudential regulator to file regulatory notices with the Commission and with an RFA. Proposed Regulation 23.105(p)(3)(i) would require an SD or MSP to file a notice with the Commission and with an RFA if the SD or MSP filed a notice of change of its reported capital category with the Federal Reserve Board, the OCC, or the FDIC. Prudential regulators have established five capital categories that are used to describe a bank's capital strength: (1) Well capitalized; (2) adequately capitalized; (3) undercapitalized; (4) significantly undercapitalized; and (5) critically undercapitalized.[127] The definition of each capital category is based on capital measures under the bank capital standard and other factors.[128]

A bank is required to notify its appropriate prudential regulator of adjustments to the bank's capital category that may have occurred that would put the bank into a lower capital category from the category previously assigned to it. Following the notice, the prudential regulator determines whether the bank needs to adjust its capital category.[129] Because these notices may indicate that a bank is in or approaching financial difficulty, the Commission is proposing to include a notification requirement in proposed regulation 23.105(p)(3)(i) that would require a bank SD or a bank MSP to give notice to the Commission when it files an adjustment of reported capital category with its prudential regulator by transmitting a copy of the notice to the Commission.

The rules of the Federal Reserve Board, OCC and FDIC also establish minimum capital requirements in the form of capital ratios that banks and bank holding companies are required to meet in order to comply with the respective Agencies capital requirements.[130] The Commission is proposing to require a bank SD or bank MSP to file notice with the Commission if the SD's or MSP's regulatory capital is less than the applicable minimum capital requirements set forth in the prudential regulators' rules.

The Commission also is proposing in Regulation 23.105(p)(3) to require an SD that is a foreign bank to notify the Commission if the SD's files a notice of a change in its capital category or a notice of falling below its minimum capital requirement with a prudential regulator or with it home country supervisors. This notice requirement is intended to provide the Commission with information that a registered SD may be experiencing financial issues, and provides the Commission with the opportunity to consult with the appropriate prudential regulator.

The Commission also is proposing to require a bank SD or a bank MSP to file a notice in the event the SD or MSP fails to post or collect initial margin for uncleared swap transactions or post or collect uncleared swap variation margin as required under the respective prudential regulators' rules, if the total amount that has not been either collected or posted by and exchanged with the SD or MSP is equal to or greater than: (1) 25 percent of the SD's or MSP's minimum capital requirement; or (2) 50 percent of the SD's or MSP's minimum capital requirement.

Consistent with section 4s(e) of the CEA, bank SDs and bank MSPs are subject to the capital rules of the prudential regulators. The proposed bank SD and MSP notice requirements contained in Regulation 23.105(p) are intended to provide the Commission with sufficient information to effectively monitor these entities as market participants in the swap markets subject to Commission oversight. For example, bank SDs and bank MSPs may be swap counterparties to non-bank SDs and non-bank MSPs subject to the Commission's capital and margin rules. The proposed notice provisions will assist Commission staff with monitoring these bank SDs and bank MSPs for compliance with other statutory and regulatory requirements, such as the existing business conduct rules applicable on all SDs, and the potential impacts these bank SDs and bank MSPs may have on other Commission registrants and on the market as a whole. The Commission anticipates that its staff, as appropriate, would engage with staff of the relevant prudential regulator in assessing the potential market impacts upon receiving a regulatory notice.

Proposed paragraph (p) of Regulation 23.105 would also include identical oath and affirmation provisions and electronic filing requirements for SDs and MSPs that are subject to the capital rules of a prudential regulator as the Commission is proposing under paragraphs (f) and (n) of Regulation 23.105 for SDs and MSPs that are subject to the Commission's capital rules.

7. Weekly Position and Margin Reporting

The Commission is proposing weekly reporting of position and margin information for the purposes of conducting risk surveillance of SDs and MSPs. This requirement would apply to SDs and MSPs subject to the capital and margin rules of either the Commission or a prudential regulator. Similar reporting is currently provided on a daily basis by DCOs for cleared swaps.[131]

Proposed Regulation 23.105(q)(1) would require SDs and MSPs to report position information, in a format specified by the Commission, (i) by

[125] *See* proposed § 23.105(p) and Appendix B. *See also* Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices (''call reports''); 12 U.S.C. 324; 12 U.S.C. 1817; 12 U.S.C. 161; and 12 U.S.C. 1464.

[126] *See* proposed SEC Rule 17 CFR 240.18a–8.

[127] *See* 12 CFR 325.103; 12 CFR 6.4; 12 CFR 208.43.

[128] *See id.*

[129] *See* 12 CFR 6.3(c); 12 CFR 208.42(c); 12 CFR 325.102(c).

[130] *See* 12 CFR 3.10; 12 CFR 217.10; 12 CFR 324.10.

[131] 17 CFR 39.19(c)(1).

counterparty, and (ii) for each counterparty, by the following asset classes—commodity, credit, equity, and foreign exchange or interest rate. Under the uncleared margin rules, these are asset classes within which margin offsets may be taken.[132]

Proposed Regulation 23.105(q)(2) would require SDs and MSPs to report margin information, in a format specified by the Commission, showing (i) the total initial margin posted by the SD or MSP with each counterparty; (ii) the total initial margin collected by the SD or MSP from each counterparty; and (iii) the net variation margin paid or collected over the previous week with each counterparty.

The Commission currently uses the position and margin information filed by DCOs to identify and to take steps to mitigate the risks posed to the financial system by participants in cleared markets including DCOs, clearing members, and large traders. The Commission would incorporate the additional data file by SDs and MSPs into that program. The Commission would analyze positions and margin across cleared and uncleared markets in order to obtain a picture of the risks posed by large market participants to one another and to the financial system.

Request for Comment

The Commission requests comment on all aspects of the proposed financial reporting, recordkeeping and notification requirements. In addition, the Commission requests comment, including empirical data in support of comments, in response to the following questions:

1. For SDs or MSPs organized and domiciled outside the U.S., is IFRS issued by the IASB an appropriate accounting standard that would allow the Commission and RFA to properly assess the financial condition of SDs and MSPs? If not, explain why not, and suggest what modifications the Commission should make to the proposed regulation.

2. Should the Commission accept financial statements prepared in accordance with local accounting standards from SDs or MSPs located in foreign jurisdictions and are not required to prepare financial statements in accordance with U.S. GAAP or IFRS? If not, explain why not. Should such firms be required to submit a reconciliation of the local accounting to U.S. GAAP? Would such a reconciliation provide the necessary information for the Commission and RFA to fully understand the financial position of the SD or MSP? What costs would be incurred by the SD or MSP in preparing the reconciliation?

3. Should SDs or MSPs that file non-U.S. GAAP financial statements also file a reconciliation of the non-U.S. GAAP financial statements to U.S. GAAP? Would such a reconciliation provide the Commission with necessary information to understand the non-U.S. GAAP financial statements? What costs would be incurred by the SD or MSP in preparing the reconciliation?

4. Are there competitive advantages to SDs and MSPs that would be permitted to prepare financial statements in accordance with IFRS or another non-U.S. GAAP reporting standard? If so, is it necessary for the Commission to address such advantages? How should the Commission address those advantages?

5. The Commission is proposing to require SDs and MSPs that are subject to the capital rules of a prudential regulator to file notices with the Commission and with the SDs' or MSPs' RFA. Such notices include if the SD's or MSP's regulatory capital is less than the applicable minimum requirements set forth in the prudential regulators' rules or an adjustment in the SD's or MSP's reported capital category. The proposal would also require SDs that are foreign banks to file notice with the Commission and with their RFA if they experience an adjustment in their regulatory capital category under the rules of a prudential regulator or a similar provision of the regulations of its home country supervisors, and to file notice with the Commission and with their RFA if their regulator capital is below the minimum required by the prudential regulators or their home country supervisors. Should the Commission require SDs that are subject to the capital rules of a prudential regulator to file notices with the Commission regarding changes to their capital status? If not, explain why not? Are SDs that are banks subject to an legal restrictions on disclosing such capital information to the Commission? If so, cite such legal restrictions. Should the Commission differentiate between SDs that are U.S. banks from SDs that are non-U.S. banks? If so, explain how and why the Commission should differentiate between such SDs. Are there other notices that the Commission should consider receiving from SDs or MSPs that are subject to the capital and margin rules of a prudential regulator? Do these rules adequately address SDs and MSPs that are foreign domiciled entities subject to prudential regulation by foreign banking authorities? Are there alternative provisions that the Commission should consider for both domestic and foreign SDs and MSPs that are subject to prudential regulation?

6. Are the reporting elements to Appendix A adequately defined to capture the relevant information? If not, what specific changes should the Commission consider?

7. Are the reporting elements to Appendix B adequately defined to capture the relevant information? If not, what specific changes should the Commission consider?

8. Should the Commission make public any other monthly unaudited or annual audited financial information filed by an SD or MSP under Regulation 23.105? If so, how would the public disclosure of such information be consistent with the FOIA and Sunshine Act exemptions?

9. What SD or MSP financial information should the Commission make publicly available?

10. Is it appropriate to have different disclosure rules for SDs and MSPs? If so, explain why disclosure rules should be different for SDs and MSPs?

11. Would disclosure of certain financial information provide SD and MSP counterparties with necessary information concerning some SDs or MSPs without adversely impacting that particular SD's or MSP's ability to maintain a trading book?

12. Should the Commission post SD and MSP financial data on the Commission's Web site?

D. Comparability Determinations for Eligible Swap Dealers and Major Swap Participants

The Commission is proposing to permit eligible SDs and MSPs to rely on substituted compliance to meet certain components of the Commission's capital and financial reporting requirements to the extent that the Commission determines that the relevant foreign jurisdiction's capital and financial reporting requirements are comparable to the Commission's corresponding capital and financial reporting requirements (*i.e.,* ''Comparability Determination''). Proposed Regulation 23.106 outlines a framework for the Commission's Comparability Determinations, including establishing a standard of review for determining whether some or all of the relevant foreign jurisdiction's capital and financial reporting requirements are comparable to the Commission's corresponding capital and financial reporting requirements. This framework is generally consistent with the framework set forth in Regulation 23.160 for assessing substituted compliance for applying margin to

[132] 17 CFR 23.154(b)(2)(v).

uncleared cross border swap transactions.

Proposed Regulation 23.106 identifies persons eligible to request a Comparability Determination with respect to the Commission's capital and financial reporting requirements, including any SD or MSP that is eligible for substituted compliance under Regulation 23.101 and any foreign regulatory authority that has direct supervisory authority over one or more SDs or MSPs that are eligible for substituted compliance under Regulation 23.101 and that is responsible for administering the relevant foreign jurisdiction's capital adequacy and financial reporting requirements over the SD or MSP. The proposal would permit eligible persons to request a Comparability Determination individually or collectively with respect to the Commission's capital and financial reporting requirements. Eligible SDs and MSPs may wish to coordinate with their home regulators and other SDs or MSPs in order to simplify and streamline the process. The Commission would make Comparability Determinations on a jurisdiction-by-jurisdiction basis.

Persons requesting Comparability Determinations would need to provide the Commission with certain documents and information in support of their request. Notably, the proposal would require requesters to provide copies of the relevant foreign jurisdiction's capital and financial reporting requirements (including English translations of any foreign language documents), descriptions of their objectives and how they are comparable to or differ from the Commission's capital and financial reporting requirements (*e.g.,* the net liquid assets approach and bank-based approach), international standards such as Basel bank capital requirements, if applicable, and how they address the elements of the Commission's capital requirements. The requestors would need to identify the regulatory provisions that correspond to the Commission's capital requirements (and, if necessary, whether the foreign jurisdiction's capital requirements do not address a particular element). Requesters would also need to provide a description of the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital requirements and any other information and documentation the Commission deems appropriate.

The proposal identifies certain key factors that the Commission would consider in making a Comparability Determination. Specifically, the Commission would consider the scope and objectives of the relevant foreign jurisdiction's capital requirements; how and whether the relevant foreign jurisdiction's capital adequacy requirements compare to international Basel capital standards for banking institutions or to other standards such as those use for securities brokers or dealers; whether the relevant foreign jurisdiction's capital requirements achieve comparable outcomes to the Commission's corresponding capital requirements; the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements; as well as any other facts or circumstances the Commission deems relevant. In making a comparability determination, it is possible that a foreign capital regime may be comparable in some, but not all, elements of the Commission's capital requirements.

Proposed Regulation 23.106 would provide that any SD or MSP that, in accordance with a Comparability Determination, complies with a foreign jurisdiction's capital requirements would be deemed in compliance with the Commission's corresponding capital adequacy and financial reporting requirements. Accordingly, the failure of such an SD or MSP to comply with the relevant foreign capital and financial reporting requirements may constitute a violation of the Commission's capital adequacy and financial reporting requirements. In addition, all SDs and MSPs remain subject to the Commission's examination and enforcement authority regardless of whether they rely on a Comparability Determination. The proposal would further provide that the Commission retains the authority to impose any terms and conditions it deems appropriate in issuing a Comparability Determination and to further condition, modify, suspend, terminate or otherwise restrict any Comparability Determination it has issued in its discretion. This could result, for example, from a situation where, after the Commission issues a comparability determination, the basis of that determination ceases to be true.

In this regard, Comparability Determinations issued by the Commission would require that the Commission be notified of any material changes to information submitted in support of a Comparability Determination, including, but not limited to, changes in the relevant foreign jurisdiction's supervisory or regulatory regime. The Commission expects that the comparability determination process would require close consultation, cooperation, and coordination with other appropriate U.S. regulators and relevant foreign regulators. The Commission would also expect that the relevant foreign regulator will enter into, or will have entered into, an appropriate memorandum of understanding or similar arrangement with the Commission in connection with a Comparability Determination.

E. Technical Amendments

1. Amendments to the Financial Reporting Requirements in Regulation 1.10 and 1.16

Regulation 1.10 currently requires each FCM to file within 17 business days of the close of each month an unaudited financial with the Commission and with the firm's designated self-regulatory organization.[133] Regulation 1.10 also requires each FCM to file within 60 days of the end of the firm's fiscal year end an audited annual financial report. An FCM's monthly financial reports must be submitted on CFTC Form 1–FR–FCM, while the annual financial report may be submitted on Form 1–FR–FCM or, subject to certain conditions, presented in a manner consistent with U.S. GAAP.[134]

Regulation 1.10 requires each IB to file an unaudited financial report with NFA on a semi-annual basis, and an audited annual financial report with the NFA. The IB unaudited reports must be submitted on Form 1–FR–IB and the audited annual report may be filed on Form 1–FR–IB or, subject to certain conditions, presented in a manner consistent with U.S. GAAP.

Regulation 1.10(h) currently provides relief from the Form 1–FR filing requirements to FCMs or IBs that are dually-registered as BDs. Such dual-registrants are permitted to file the SEC's Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE (FOCUS Report), in lieu of a Form 1–FR–FCM or Form 1–FR–IB.

The Commission is proposing to amend Regulation 1.10(h) to permit an

[133] The term ''self-regulatory organization'' (''SRO'') is defined in Regulation 1.3(ee) as a contract market (as defined in Regulation 1.3(h)), a swap execution facility (as defined in Regulation 1.3(rrrr)), or a registered futures association under section 17 of the Act. The term ''designated self-regulatory organization'' is defined in Regulation 1.3(ff) and generally means the SRO that has primary financial surveillance responsibilities over a registrant.

[134] *See* Regulation 1.10(d)(3).

FCM or IB that is dually-registered as SBSD or MSBSP to file its SEC FOCUS Report in lieu of a CFTC Form 1–FR–FCM or CFTC Form 1–FR–IB. The proposed amendment would be consistent, as noted above, with the current relief provided to entities that are dually-registered as an FCM and a BD. Furthermore, the Commission's experience with Regulation 1.10(h) indicates that the FOCUS Reports include information that is substantially comparable to the Form 1–FR and adequate for the Commission to conduct financial surveillance of the registrant.

Regulations 1.10(f) and 1.16(f) currently provide that a dually-registered FCM/BD or IB/BD may automatically obtain an extension of time to file its unaudited and audited financial reports required under Regulation 1.10 by submitting a copy of the written approval for the extension issued by the BD's securities designated examining authority (''DEA''). The Commission is proposing to amend Regulations 1.10(f) and 1.16 to provide that an FCM or IB that is also registered with the SEC as a SBSD or MSBSP may obtain the automatic extension of time to file its unaudited or audited FOCUS Report or Form SBS with the Commission and with the firm's DSRO, as applicable, by submitting a copy of the SEC's or the DEA's approval of the extension request. This proposed amendment maintains the intent of the current regulations by retaining a consistent approach to the granting to dual registrants extensions of time to file financial reports. The Commission also is proposing a technical amendment to Regulation 1.16 to correct a cross reference to SEC Rule 17a–5 (17 CFR 240.17a–5) for extensions of time to file audited financial statements.

2. Amendments to the Notice Provisions in Regulation 1.12

Regulation 1.12 requires an FCM or IB to file a notice with the Commission and with the firm's DSRO when certain prescribed events occur that trigger a notice filing requirement. Such events include the firm: (1) Failing to maintain compliance with the Commission's capital requirements or the capital rules of a SRO; (2) failing to hold sufficient funds in segregated or secured amount accounts to meet its regulatory requirements; (3) failing to maintain current books and records; and (4) experiencing a significant reduction in capital from the previous month-end.

The Commission is proposing several amendments to Regulation 1.12. The proposed amendments to Regulation 1.12(a) would revise the obligation of an FCM or IB to file a notice when it fails to meet the capital requirement of the Commission or of an SRO to include if the firm fails to meet the SEC's capital requirements when the firm is a dual-registrant. Such notice is appropriate as it would provide Commission staff with the opportunity to assess the potential impact on its CFTC regulated activities, and to initiate discussions with the SEC regarding the capital deficiency.

Commission Regulation 1.12(b) requires an FCM or IB to file notice with the Commission and with the firm's DSRO if the firm's adjusted net capital falls below the applicable ''early warning level'' set forth in the regulation.[135] The Commission is proposing amendments to Regulation 1.12(b) to require an FCM or IB that is also registered with the SEC as a SBSD or a MSBSP to file a notice if the SBSD or MSBSP falls below the ''early warning level'' established in the rules of the SEC. The proposal is intended to provide additional information to the Commission in its efforts to monitor the financial condition of its registrants.

3. Commissions Receivable for Certain Swap Transactions in Regulation 1.17

The Commission is proposing to amend Regulation 1.17(c)(2)(ii)(B) to codify several staff no-action letters that permit IBs to reflect certain commissions receivable balances from swap transactions that are aged not more than 60 days from the month-end accrual date as a current asset in computing the IB's adjusted net capital, provided that the commissions are promptly billed. The proposed amendments would extend the current asset treatment to commission receivables from both cleared swaps and uncleared swaps.

4. Changes to Notice and Disclosure Requirements for Bulk Transfers in Regulation 1.65

Regulation 1.65 describes the notice and disclosure requirements to customers and to the Commission, which must be given prior to the transfer of customer accounts other than at the request of the customer, to another futures commission merchant or introducing broker. Regulation 1.65(b) requires that notice of such a transfer be filed with the Commission at least five business days in advance of the transfer if the transfer meets certain enumerated conditions. Further, Regulation 1.65(d) requires, among other things, that such notice to the Commission must be filed by mail, addressed to the Deputy Director, Compliance and Registration Section, Division of Swap Dealer and Intermediary Oversight and does not provide for electronic filing. Finally, Regulation 1.65(e) provides that in the event notice cannot be filed with the Commission within five days, then it must be filed as soon as practicable and no later than the day of the transfer along with a brief statement explaining the circumstances necessitating the delay in filing.

The Commission has found that five days' notice, when given, is often not a sufficient amount of time to allow the Commission to oversee the bulk transfer of customer accounts. Accordingly, the Commission is proposing to amend Regulation 1.65(b) to require that the notice of a bulk transfer of customer accounts be filed with the Commission at least ten business days in advance of a transfer. The Commission notes that bulk transfers of customer accounts are generally planned well in advance such that the FCM should be able to provide the Commission ten days advance notice of such a transfer. The Commission is also proposing to amend Regulation 1.65(d) to require the notice to be filed electronically. This is consistent with the filing requirements of other notices and financial forms with the Commission, which are already required to be filed electronically. The Commission notes that the electronic system to file such notices already exists and is in use by registrants, therefore, this change should not result in any additional costs either to the Commission or to registrants.

Finally, the Commission is proposing to amend Regulation 1.65(e) to delegate to the Director of the Division of Swap Dealer and Intermediary Oversight the authority to accept a lesser time period for the notification provided for in Regulation 1.65(b). However, the notice must be filed as soon as practicable and in no event later than the day of the transfer.

5. Conforming Amendments to Delegated Authority Provisions in Regulation 140.91

Commission Regulations 1.10, 1.12, and 1.17 reserve certain functions to the Commission, the greater part of which the Commission has delegated to the Director of the Division of Swap Dealer and Intermediary Oversight through the provisions of Regulation 140.91. The Commission proposes to amend Regulation 140.91 to provide similar delegations with respect to functions reserved to the Commission in part 23.

Proposed Regulation 23.101(c) would require an SD or MSP to be in

[135] If an FCM's or IB's adjusted net capital falls below a certain threshold, such as 120 percent of its minimum adjusted net capital requirement, the firm is deemed to be maintaining adjusted net capital at a level below its ''early warning level.''

compliance with the minimum regulatory capital requirements at all times and to be able to demonstrate such compliance to the Commission at any time. Proposed Regulation 23.103(d) would require an SD or MSP, upon the request of the Commission, to provide the Commission with additional information regarding its internal models used to compute its market risk exposure requirement and OTC derivatives credit risk requirement. Proposed Regulation 23.105(a)(2) would require an SD or MSP to provide the Commission with immediate notification if the SD or MSP failed to maintain compliance with the minimum regulatory capital requirements, and further authorizes the Commission to request financial condition reporting and other financial information from the SD or MSP. Proposed Regulation 23.105(d) authorizes the Commission to direct an SD or MSP that is subject to capital rules established by a prudential regulator, or has been designated a systemically important financial institution by the Financial Stability Oversight Council and is subject to capital requirements imposed by the Board of Governors of the Federal Reserve System to file with the Commission copies of its capital computations for any periods of time specified by the Commission.

The Commission is proposing to amend Regulation 140.91 to delegate to the Director of the Division of Swap Dealer and Intermediary Oversight, or the Director's designee, the authority reserved to the Commission under proposed Regulations 23.101(c), 23.103(d), and 23.105(a)(2) and (d). The delegation of such functions to staff of the Division of Swap Dealer and Intermediary Oversight is necessary for the effective oversight of SDs and MSPs compliance with minimum financial and related reporting requirements. The delegation of authority also is comparable to the authorities currently delegated to staff under Regulation 140.91 regarding the supervision of FCMs compliance with minimum financial requirements.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities.[136] This proposed rulemaking would affect the obligations of SDs, MSPs, FCMs, and IBs. The Commission has previously determined that SDs, MSPs, and FCMs are not small entities for purposes of the RFA.[137] Therefore, the requirements of the RFA do not apply to those entities. The Commission has found it appropriate to consider whether IBs should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.[138] As certain IBs may be small entities for purposes of the RFA, the Commission considered whether this proposed rulemaking would have a significant economic impact on such registrants. Only a few of the regulations included in this proposed rulemaking, the amendment of Commission regulations 1.10, 1.12, 1.16 and 1.17, will impact the obligations of IBs. As discussed above, these amendments will permit the filing and harmonization of financial reporting and notification rules as adopted by the SEC for dual registered SBSD and MSBSPs and accommodate common billing practices in the swap industry surrounding the collection of commission receivables. Because these amendments benefits IBs, they are not expected to impose any new burdens or costs on them. The Commission does not, therefore, expect small entities to incur any additional costs as a result of this proposed rulemaking.

Accordingly, for the reasons stated above, the Commission believes that this proposed rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities. The Commission invites comment on the impact of this proposal on small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'')[139] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This proposed rulemaking, would result in an amendment to existing collection of information ''Regulations and Forms Pertaining to Financial Integrity of the Market Place; Margin Requirements for SDs/MSPs''[140] as discussed below. The Commission, therefore, is submitting this proposed rulemaking to the Office of Management and Budget (''OMB'') for its review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR Regulation 1320.11.

The responses to this collection of information are mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by OMB.

1. New Information Collection Requirements and Related Burden Estimates[141]

Currently, there are approximately 104 SDs and no MSPs provisionally registered with the Commission that may be impacted by this proposed rulemaking and, in particular, the collections of information contained herein and discussed below.[142]

i. Form SBS

The proposed amendments to Commission regulation 1.10(h) would allow an FCM or IB that is also a securities broker or dealer to file, subject to certain conditions, its Form SBS in lieu of its Form 1–FR. Because these amendments would provide an alternative to filing Form 1–FR, the Commission believes that the amendments would not cause FCMs or IBs to incur any additional burden. Rather, to the extent that the proposed rule provides an alternative to filing a Form 1–FR and is elected by FCMs or

[136] 5 U.S.C. 601 *et seq.*

[137] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (FCMs) and Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs).

[138] *See* Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; Registration and Other Regulatory Requirements, 48 FR 35248, 35276 (Aug. 3, 1983).

[139] 44 U.S.C. 3501 *et seq.*

[140] *See* OMB Control No. 3038–0024, *http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0024* (last visited Apr. 7, 2016). This collection is being retitled ''Regulations and Forms Pertaining to Financial Integrity of the Market Place.''

[141] This discussion does not include information collection requirements that are included under other Commission regulations and related OMB control numbers. For example, Proposed Commission Regulation 1.17(c)(5)(iii)(E)(4) would require that appropriate documentation of qualifying master netting agreements be maintained by dual-registered FCM–SDs for purposes of certain margin deductions from net capital. As noted in the Margin rulemaking, this collection is already covered under OMB Control Number 3038–0088 pertaining to swap trading relationship documentation. *See* 81 FR 636, 680 (Jan. 6, 2016).

[142] The number of impacted SDs and MSPs is significantly smaller than the 300 expected in the Commission's previous proposed rulemaking, and the Commission has reduced its burden estimates accordingly herein. *See, Capital Requirements of Swap Dealers and Major Swap Participants,* 76 FR 27802 (May 12, 2011).

IBs, it is reasonable for the Commission to infer that the alternative is less burdensome to such FCMs and IBs.

The proposed amendments to Commission regulation 1.10(f) would allow an FCM or IB that is dually-registered with the SEC as either a SBSD or MSBSP to request an extension of time to file its uncertified Form SBS. The Commission is unable to estimate with precision how many requests it would receive from registrants under proposed § 1.10(f) in relation to Form SBS annually. The Commission anticipates that it would receive one such request in the aggregate annually, and that preparing such a request would consume five burden hours, resulting in an annual increase in burden of five hours in the aggregate.

ii. Notice of Failure To Maintain Minimum Financial Requirements

Commission regulations 1.12(a) and (b) currently require FCMs and IBs, to file notices if they know or should have known that certain specified minimum financial thresholds have been exceeded. The amendments to Commission regulation 1.12(a) and (b) would add as an additional threshold for such notices certain financial requirements of the SEC if the applicant or registrant is registered with the SEC as an SBSD or MSBSD. The Commission is unable to estimate with precision how many additional notices it would receive from such entities as a result of the additional minimum threshold. In an attempt to provide conservative estimates, the Commission anticipates that it would receive 10 such notices in the aggregate annually, and that preparing such a notice would consume five burden hours, resulting in an annual increase in burden of 50 hours in the aggregate.

iii. Requests for Extensions of Time To File Financial Statements

The proposed amendments to Commission regulation 1.16(f) would allow an FCM or IB that is registered with the SEC as an SBSD or MSBSP to request an extension of time to file its audited annual financial statements.[143] The Commission is unable to estimate with precision how many of such requests it would receive from such entities. The Commission anticipates that it would receive one of such requests in the aggregate annually, and that preparing such a request would consume five burden hours, resulting in an annual increase in burden of five hours in the aggregate.

iv. Capital Requirement Elections

Proposed Commission regulation 23.101(a)(7) would require that certain SDs that wish to change their capital election submit a written request to the Commission and provide any additional information and documentation requested by the Commission. The Commission is unable to estimate with precision how many of such requests it would receive from such entities. The Commission anticipates that it would receive one such request in the aggregate annually, and that preparing such a request would consume five burden hours, resulting in an annual increase in burden of five hours in the aggregate.

v. Application for Use of Models

Commission regulation 23.102(a) would allow an SD to apply to the Commission or an RFA of which it is a member for approval to use internal models when calculating its market risk exposure and credit risk exposure under §§ 23.101(a)(1)(i)(B), 23.101(a)(1)(ii)(A), or 23.101(a)(2)(ii)(A), by sending to the Commission and such RFA an application, including the information set forth in Appendix A to Commission regulation 23.102 and meeting certain other requirements. Proposed Commission regulation 1.17(c)(6)(v) relatedly would allow an FCM that is also an SD to apply in writing to the Commission or an RFA of which it is a member for approval to compute deductions for market risk and credit risk using internal models in lieu of the standardized deductions otherwise required under Commission regulation 1.17.[144]

Appendices A and B to Commission regulation 23.102 contain further related information collection requirements, including that the SD: (i) Provide notice to the Commission and RFA and/or update its application and related materials for certain inaccuracies and amendments; (ii) notify the Commission or RFA before it ceases to use such internal models to compute deductions; (iii) if a VaR model is used, have an annual review of such model conducted by a qualified third party service, (iv) conduct stress-testing, retain and make available to the Commission and the RFA records of the results and all assumptions and parameters thereof, and notify the Commission and RFA promptly of instances where such tests indicate any material deficiencies in the comprehensive risk model; (v) demonstrate to the Commission or the RFA that certain additional conditions have been satisfied and retain and make available to the Commission or the RFA records related thereto; and (vi) comply with additional conditions that may be imposed on the SD by the Commission or the RFA.

As discussed above, there are currently 104 SDs and 0 MSPs provisionally registered with the Commission. Of these, the Commission estimates that approximately 53 SDs and no MSPs would be subject to the Commission's capital rules as they are not subject to the capital rules of a prudential regulator. The Commission further estimates conservatively that 32 of these SDs would seek to obtain Commission approval to use models for computing their market and credit risk capital charges.

The Commission staff estimates that an SD approved to use internal models would spend approximately 5,600 hours per year to review and update the models and approximately 640 hours per year to back-test the models for the aggregate of 6240 annual burden hours for each SD.[145] Consequently, Commission staff estimates that reviewing and back-testing the models for the 32 SDs would result in an aggregate annual hour burden of approximately 199,680 hours.[146]

vi. Liquidity Requirements

Commission regulation 23.104 proposes additional liquidity requirements and equity withdrawal restrictions on certain SDs. Commission regulation 23.104(a)(2) would provide that certain SDs may not dispose of, or transfer to an affiliate, a high quality liquid asset without prior notice to and approval by the Commission. Section 23.104(a)(3) would require certain SDs to have a written contingency funding plan that addresses the SD's policies and the roles and responsibilities of relevant personnel for meeting the liquidity needs of the SD and communicating with the public and other market participants during a liquidity stress event.

Commission regulations 23.104(a)(2) and 23.104(a)(3) apply only to SDs that have elected to be subject to the requirements of 23.101(a)(1)(i) as if the

[143] The registrant would also be required to promptly file with the DSRO designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time.

[144] Note that the changes to proposed 1.17(c)(6)(i), which permit any dual registered FCM Broker-Dealer who has received approval by the SEC under § 240.15c3–1(a)(7) to use models to calculate its market and credit risk charges, do not add an additional collection of information and therefore are not considered in this analysis.

[145] *Id.* at 70294.

[146] 343,200 is the product of 55 and the sum of 5,600 and 640.

SD were regulated by the Federal Reserve Board. Out of the 104 provisionally registered SDs, the Commission currently estimates that 16 SDs will elect to be subject to the requirements of 23.101(a)(1)(i). Accordingly, the Commission estimates these proposed regulations will add 50 burden hours per month, or 600 burden hours per year, for each of the 16 electing SDs, resulting in a an aggregate annual burden of 9,600.

Commission regulation 23.104(b)(1) would require that certain SDs perform a monthly liquidity stress test, provide the results of that test to senior management, and perform a quarterly and annual reviews with appropriate levels of management. Commission regulation 23.104(b)(2) would require that an SD document any differences with those of the liquidity stress test of the consolidated parent and regulation 23.104(b)(4) would require that an SD have a written contingency funding plan. Regulation 23.104(b) applies only to SDs that have elected to be subject to the requirements of regulation 23.101(a)(1)(ii). The Commission estimates that 11 SDs out of the 104 provisionally registered will fall into this category and that all 11 will be part of a consolidated entity that performs a liquidity stress test. As such, the Commission estimates that the proposed regulations will add 50 burden hours per month, or 600 burden hours per year, resulting in an aggregate annual burden of 6,600 hours.

Commission regulation 23.104(c) would allow an SD to apply in writing for relief from restrictions on certain equity withdrawals. Regulation 23.104(c) applies to SDs that have elected to comply under regulation 23.101(a)(1)(i) and 23.101(a)(1)(ii). Commission staff estimates that 28 of the 104 currently provisionally registered SDs would be subject to this regulation. Commission staff estimates that each of these 28 SDs would file approximately two notices annually with the Commission and that it would take approximately 30 minutes to file each of these notices. This results in an aggregate annual hour burden estimate of approximately 28 hours.

vii. Financial Recordkeeping, Reporting and Notification Requirements for SDs and MSPs

Commission regulation 23.105 would require generally that each SD and MSP maintain certain specified records, report certain financial information and notify or request permission from the Commission under certain specified circumstances, in each case, as provided in the proposed regulation. For example, the regulation requires generally that SDs and MSPs maintain current books and records, provide notice to the Commission of regulatory capital deficiencies and related documentation, provide notice of certain other events specified in the proposed rule, and file financial reports and related materials with the Commission (including the information in Appendix A and B to the proposed regulation, as applicable). Regulation 23.105 also requires the SD or MSP to furnish information about its custodians that hold margin for uncleared swap transactions and the amounts of margin so held, and for SDs approved to use models (as discussed above), provide additional information regarding such models, as further described in regulation 23.105(k).

The Commission estimates that there are 28 SD firms which will be required to fulfill their financial reporting, recordkeeping and notification obligations under Regulation 23.105(a)–23.105(n) because they are not subject to a prudential regulator, not already registered as an FCM, and not dually registered as a SBSD. The Commission expects these 28 firms will apply to use models. Commission staff estimates that the preparation of monthly and annual financial reports for these SDs, including the recordkeeping, related notification and preparation of the specific information required in proposed Appendix A to regulation 23.105, would impose an on-going burden of 250 hour per firm annually. The Commission further estimates it would cost each SD $300,000 to retain an independent public accountant to audit its financial statements each year. Thus, the total burden hours estimated for compliance with 23.105(a)–23.105(n) for these 28 SD firms would be 7,000 hours annually.

Regulation 23.105(p) and its accompanying Appendix B propose a quarterly financial reporting and notification obligations on SDs which are subject to a prudential regulator. The Commission expects that approximately 51 of the 104 currently provisionally registered SDs are subject to a prudential regulator. The Commission estimates that this proposed reporting and notification requirements will impose a burden of 33 hours on-going annually. This results in a total aggregate burden of 1,683 hours annually.

Regulation 23.105(q) requires all SDs and MSPs to report to the Commission weekly summary position and margin data. The Commission expects that all 104 SDs and no MSPs will be subject to this requirement. The Commission estimates that it would impose 520 burden hours per firm annually. This results in total aggregate burden of 54,080 hours annually.

viii. Capital Comparability Determinations

Commission regulation 23.106 would allow certain SDs, MSPs, and foreign regulatory authorities to request a Capital Comparability Determination with respect to capital adequacy and financial reporting requirements for SDs or MSPs, as discussed above. As part of this request, persons are required to submit to the Commission certain specified supporting information and further information, as requested by the Commission. Further, if such a determination was made by the Commission, an SD or MSP would be required to file a notice with the RFA of which it is a member of its intent to comply with the capital adequacy and financial reporting requirements of the foreign jurisdiction. Moreover, in issuing a Capital Comparability Determination, the Commission would be able to impose any terms and conditions it deems appropriate, including additional capital and financial reporting requirements.

The Commission expects that 17 firms out of the 104 currently provisionally registered SDs would seek Capital Comparability Determinations. These 17 firms are located in five different jurisdictions, all of which appear to have adopted some level of Basel compliant capital rule or another capital rule that would apply to SDs. As such, Commission staff estimates that it will take approximately ten hours per firm annually to prepare and submit requests for Capital Comparability Determinations and otherwise comply with the requirements of proposed Regulation 23.106, resulting in aggregate annual burden of 170 hours.

2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C.3506(c)(2)(B), the Commission will consider public comments on such proposed requirements in:

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- Evaluating the accuracy of the estimated burden of the proposed information collection requirements, including the degree to which the

methodology and the assumptions that the Commission employed were valid;

• Enhancing the quality, utility, and clarity of the information proposed to be collected; and

• Minimizing the burden of the proposed information collection requirements on respondents, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW., Washington, DC 20581, (202) 418–5160 or from *http://RegInfo.gov*. Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to the OMB Office of Information and Regulatory Affairs at:

• The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, *Attn:* Desk Officer of the Commodity Futures Trading Commission;

• (202) 395–6566 (fax); or

• *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Please refer to the **ADDRESSES** section of this rulemaking and the margin rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between thirty (30) and sixty (60) days after publication of the NPRM in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB (as well as the Commission) receives it within thirty (30) days of publication of this NPRM.

IV. Cost Benefit Considerations

A. Background

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions before promulgating a regulation under the CEA or issuing certain orders.[147] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In this cost benefit section, the Commission discusses the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.[148] In addition, in Appendix A to this section, the Commission, using available data, estimates the cost of the proposal to each type of SD or MSP and the overall market.

This proposed rulemaking implements the new statutory framework of Section 4s(e) of the CEA, added by Section 731 of the Dodd-Frank Act, which requires the Commission to adopt capital requirements for SDs and MSPs that do not have a prudential regulator (*i.e.,* ''covered swap entities'' or ''CSEs'') and amends Commission Regulation 1.17 to impose specific market risk and credit risk capital charges for uncleared swap and security-based swap positions held by an FCM.[149] Section 4s(e) of the CEA requires the Commission to adopt minimum capital requirements for CSEs that are designed to help ensure the CSE's safety and soundness and be appropriate for the risk associated with the uncleared swaps held by a CSE. In addition, section 4s(e)(2)(C) of the CEA, requires the Commission to set capital requirements for CSEs that account for the risks associated with the CSE's entire swaps portfolio and all other activities conducted by the CSE. Lastly, section 4s(e)(3)(D) of the CEA provides that the Commission, the prudential regulators, and the SEC, must ''to the maximum extent practicable'' establish and maintain comparable capital rules. The proposal also includes certain financial reporting requirements related to an SDs and MSPs financial condition and capital requirements.

In the following cost-benefit considerations, the Commission will discuss the costs and benefits of this proposal and some critical decisions it made in developing this proposal. The Commission will: (i) Discuss the general benefits and costs of regulatory capital; (ii) summarize the proposal; (iii) set the baseline for which the cost and benefits of this proposal will be compared; (iv) provide an overview of the different capital approaches set out in this proposal and the rationale for proposing each approach; (v) set out the costs and benefits to each type of SD and MSP under their corresponding capital approaches; (vi) discuss the proposal's liquidity and funding requirements; (vii) discuss the proposal's reporting requirements; and (viii) an analyze the proposal as it relates to each of the 15(a) factors.

B. Regulatory Capital

Regulatory capital is designed to ensure that a firm will have enough capital, in times of financial stress, to cover the risk inherent of the activities in the firm. Regulatory capital's framework can be designed differently, but its primary purpose remains the same—to meet this objective. Although a firm may mitigate its risks through other methods, including risk management techniques (*e.g.,* netting, credit limits, margin), capital is viewed as the last line of defense of an entity, ensuring its viability in times of financial stress. In designing this proposal, the Commission was cognizant of the purpose of capital and the potential trade-off between the costs of requiring additional capital and the Commission's statutory mandate of helping to ensure the safety and soundness of SDs and MSPs thereby promoting the stability of the U.S. financial system.

C. General Summary of Proposal

The Commission designed this proposal on well-established existing capital regimes. The proposal's framework, which draws upon the principles and structures of bank-based capital, broker-dealer capital, and FCM capital, provides CSEs, operating under a current capital regime, with the ability to continue to comply with that regime, with minor adjustments to account for the inherent risk of swap dealing and to mitigate regulatory arbitrage. The Commission, in developing its capital framework, provides CSEs with the flexibility to continue operating under a similar capital framework, which should result in minor disruptions to the markets and mitigate the possibility of duplicative or even conflicting rules, while helping to ensure the safety and soundness of the CSE and the stability of the U.S. financial system.

The proposal details minimum capital requirements for different ''types'' or ''categories'' of CSEs and further defines the capital computations, including various market risk and credit risk charges, whether using models or a standardized rules-based or table-based approach, to determine whether a CSE satisfies the minimum capital requirements. The Commission is proposing to permit SDs that are neither

[147] U.S.C. 19(a).

[148] The Commission notes that the costs and benefits considered in this proposal, and highlighted below, have informed the policy choices described throughout this release.

[149] *See* Section 4s(e)(2)(B).

registered as FCMs nor subject to the capital rules of a prudential regulator to elect a capital requirement that is based on existing bank holding company (''BHC'') capital rules adopted by the Federal Reserve Board (the ''bank-based capital approach'') or a capital requirement that is based on the existing FCM/BD net capital rules (the ''net liquid assets capital approach''). The Commission is also proposing to permit certain SDs that meet defined conditions designed to ensure that they are ''predominantly engaged in non-financial activities'' to compute their minimum regulatory capital based upon the firms' tangible net worth (the ''tangible net worth capital approach''). Further, the Commission is proposing to allow SDs to obtain approval from the Commission, or from an RFA of which the SDs are members, to use internal models to compute certain market risk and credit risk capital charges when calculating their capital.[150]

The Commission is proposing to require SDs that elect to use the bank-based capital approach or the net liquid assets capital approach to perform prescribed liquidity stress testing and to maintain liquid assets above defined levels. The Commission is further proposing to impose certain restrictions on the withdrawal of capital from SDs if certain defined triggers are breached.

The proposal also establishes a program of ''substituted compliance'' that would allow a CSE that is organized and domiciled in a non-U.S. jurisdiction (''non-U.S. CSE'') (or an appropriate regulatory authority in the non-U.S. CSE's home country jurisdiction) to petition the Commission for a determination that the home country jurisdiction's capital and financial reporting requirements are comparable to the CFTC's capital and financial reporting requirements for such CSE, such that the CSE may satisfy its home country jurisdiction's capital and financial reporting requirements (subject to any conditions imposed by the Commission) in lieu of the Commission's capital and financial reporting requirements (*i.e.,* ''Comparability Determination'').

Consistent with section 4s(f), the Commission is proposing to require SDs and MSPs to satisfy current books and records requirements, ''early warning'' and other notification filing requirements, and periodic and annual financial report filing requirements with the Commission and with any RFA of which the SDs and MSPs are members.

D. Baseline

In determining the costs and benefits of this proposal, the Commission's benchmark from which this proposal is compared against is the market's status quo, *i.e.,* the swap market as it exists today. As the proposal will implement capital and financial reporting on CSEs and recordkeeping requirements on SDs and MSPs, the Commission will discuss the incremental costs and benefits to each type or category of SD and MSP, as to their current capital and financial reporting and recordkeeping requirements. As each CSE or its parent holding company may be complying with current capital requirements, based on capital requirements that are a result of the entity or its parent entity registering with a financial agency, as a result of it being a financial intermediary (*e.g.,* as an BD, FCM or BHC), the Commission has set different baselines for each type or category of entity. In the case that a CSE does not have current capital requirements, the Commission considered the full cost and benefit of its proposal on the entity. The following is a list of types or categories of registered entities and their corresponding capital regimes that the CSE currently complies with, if there is any, and their corresponding financial reporting and capital requirements. Therefore, the Commission is using the status quo or baseline for this proposal for the following types or categories of CSEs:

(1) SDs That Are Bank Subsidiaries

(a) Capital. Currently U.S. CSEs that are bank subsidiaries and are not a BD or an FCM are not subject to capital requirements; however, as part of a BHC or a subsidiary of a bank, the CSE's parent entity must comply with the prudential regulators' capital requirements. In addition, certain non-U.S. CSEs that are subsidiaries within a bank holding company and are not BDs or FCMs are currently complying with a foreign jurisdiction's capital, liquidity and financial reporting requirements and these CSEs are covered below, in the Substituted Compliance section.

(b) Liquidity. Although the U.S. CSE entities do not have liquidity or funding requirements, their BHC must comply with the Federal Reserve Board's liquidity requirements.[151]

(c) Reporting. These SDs do have reporting requirements, but not for the information that is requested in this proposal; however, a BHC must report the requested information to the Federal Reserve Board, which includes certain swap and security-based swap positions held at its SD subsidiary.

(2) SDs That Are BDs (Including, OTC Derivatives Dealers) (With and Without Models)

(a) Capital. If a CSE is also registered as a BD with the SEC, the CSE is already meeting the SEC's BD capital requirements.

(b) The SEC currently imposes the net liquid assets capital approach on BDs. However, the SEC has modified certain parts of this approach to address certain types of BDs (*i.e.,* ANC Firms and OTC derivatives dealers). As discussed below, an ANC Firm is currently using SEC-approved capital models to calculate certain market and credit risk charges. In addition, OTC derivatives dealers that are registered as BDs may use SEC-approved capital models provided that they maintain a minimum of $100 million in tentative net capital and at least $20 million in net capital. Certain non-U.S. SDs are already complying with capital, liquidity and reporting requirements in other jurisdictions. Therefore, the Commission will cover these SDs in the Substituted Compliance section.

(c) Liquidity. These SDs do not have any existing regulatory liquidity requirements.

(d) Reporting. As a BD, these SDs must comply with the SEC's BD reporting requirements (the Commission's proposed reporting requirements are based on the SEC reporting requirements).

(3) SDs That Are FCMs and Not BDs (With and Without Models)

(a) Capital. For CSEs that are also registered with the Commission as FCMs, the Commission is proposing a net liquid asset capital approach that is similar to the capital requirements of a registered BD.

(b) Liquidity. These SDs do not have existing regulatory liquidity requirements.

(c) Reporting. As an FCM, these SDs must comply with the Commission's FCM reporting requirements (the

[150] Section 17 of the CEA sets forth the registration requirements for RFAs. RFAs are defined as self-regulatory organizations under Regulation 1.3(ee). The Commission recognizes that SDs that seek model approval from the Commission or from an RFA will be required to submit documentation addressing several capital models including value at risk, stressed value at risk, specific risk, comprehensive risk and incremental risk. To the extent that models are reviewed and approved by an RFA, additional costs may be incurred by the RFA which may be passed on to the SDs.

[151] The Federal Reserve Board has proposed funding requirements for certain large bank holding companies. *See Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements,* 81 FR 35123 (Jun. 1, 2016).

Commission's proposed reporting requirements are based on these).

(4) SDs That Are BDs and/or FCMs (ANC Firms With Models and One Other SD)

(a) Capital. For CSEs that are also registered as BDs/FCMs (using approved models), a significant percentage of these SDs are currently using the ANC capital approach, as discussed below. There is currently one other SD that is not an ANC Firm, but meets the requirements set out above for SD/BDs and SD/FCMs.

(b) Liquidity. These SDs must comply with the SEC's and the CFTC's reporting requirements.

(c) Reporting. As an ANC firm, these SDs must comply with the SEC's and the CFTC's ANC firm reporting requirements.

(5) Stand-Alone SDs and Commercial SDs (With and Without Models)

(a) Capital. Currently a CSE that is a stand-alone SD has no capital requirements; however, certain non-US Stand-alone SDs are complying with a foreign jurisdiction's capital, liquidity and reporting requirements and therefore, will be included in the Substituted Compliance benchmark below.

(b) Liquidity. These CSEs do not have existing liquidity requirements.

(c) Reporting. As CSEs, these entities have reporting requirements, but not for the information requested in this proposal.

(6) MSPs

(a) Capital. Although there are no MSPs at this time, it is possible that an MSP in the future may have existing capital requirements. For example, if a bank is determined to be an MSP or an insurance company, these entities may have existing capital requirements.

(b) Liquidity. These MSPs do not have existing regulatory liquidity requirements.

(c) Reporting. As MSPs, these entities have reporting requirements, but not for the information requested in this proposal.

(7) Substituted Compliance [152]

(a) Capital. As discussed above, there are certain non-U.S. CSEs that comply with a foreign jurisdiction's capital and financial reporting requirements. Commission staff understands that generally these foreign capital requirements are either a bank-based capital regime or a dealer-based regime, which, as the Commission has been informed by these foreign regulators, are similar to the net liquid assets capital approach.

(b) Liquidity. The Commission is aware that there are certain liquidity requirements that some of these non-U.S. CSEs are currently complying with. The Commission understands that some of these non-U.S. CSEs or their parent entities are complying with a bank-based liquidity requirement.

(c) Reporting. The Commission understands that some of these non-U.S. CSEs are currently complying with a foreign jurisdiction's financial reporting requirements; however, these financial reporting requirements may not be the same as the Commission is requiring in this proposal.

(8) Prudentially Regulated SDs [153]

(a) Reporting. These SDs comply with their applicable prudential regulator's reporting requirements.

E. Overview of Approaches

In developing the proposed capital approaches in this proposal, the Commission selected from well-established frameworks. As a result of the financial crisis and over the years after the crisis, each of the approaches has undergone significant analysis and changes. After conducting its analysis, BCBS and the prudential regulators acknowledged that capital alone was not enough to prevent certain financial entities from failing and, therefore, adopted requirements for banks and bank holding companies to meet defined liquidity requirements. As the financial crisis has shown, a firm can be adequately capitalized, but due to a lack of liquidity or funding in the firm, it may be unable to meet its current obligations. Accordingly, the Commission is proposing to include in its capital frameworks liquidity and funding requirements for SDs that are based upon the liquidity and funding requirements adopted by the prudential regulators and proposed by the SEC for SBSDs. As detailed above, the Commission is not including BCBS's leverage ratio, as the Commission believes that this ratio is designed to cover a consolidated entity (*i.e.,* the BHC), however, as noted above, the Commission may in the future include a similar leverage requirement. In addition, the Commission is not including a leverage ratio under the net liquid assets approach, but may consider leverage requirements in the future.

Under the proposal, the Commission is providing certain CSEs with an option to choose between a bank-based capital approach (similar to the prudential regulators' capital approach) and a net liquid assets capital approach (similar to the SEC's and CFTC's capital approach). As detailed below, the bank-based capital approach is designed to require an SD to have enough common equity tier 1 capital (as defined above) to absorb losses in a time of stress, while the net liquid assets method is designed to require an SD to hold at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities.

The following table summarizes the Commission capital proposal followed by a summary of each approach:

Approaches	SD entities	Equity type	The greatest of the following:
Bank-Based Capital	*Non-Bank Subsidiaries of BHC* *Stand-Alone SDs.* *BDs (including, OTC Derivatives Dealers and ANC Firms).*	Common Tier 1 Equity	$20 million. 8% of RWA (Basel Model or Regulation 1.17 table) plus current counterparty credit risk. 8% of the total amount of a swap dealer's margin. RFA.

[152] The Commission estimates that there are 17 SDs that may be eligible for substituted compliance under this proposal.

[153] The Commission notes that under Section 4s(e) of the CEA, these SDs must comply with the prudential regulators' capital requirements, but must comply with the Commission's reporting and recordkeeping requirements.

Approaches	SD entities	Equity type	The greatest of the following:
Net Liquid Assets Capital Regulation 1.17.	*Non-Bank Subsidiaries of BHC FCMs (SDs). Stand-Alone SDs.*	Net Discounted Assets (Assets − Liabilities = Net Capital, which is discounted (according to Regulation 1.17)).	$20 million or $100 million if approved to use capital models. 8% of the total amount of a swap dealer's margin. RFA.
Net Liquid Assets Capital SEC Rule 15c3–1.	*BDs (SDs)* *BDs (OTC Derivatives Dealers).*	Net Discounted Assets (Assets − Liabilities = Net Capital, which is discounted (according to SEA 15c3–1 or VaR based models).	$20 million. 8% of the total amount of a swap dealer's margin. RFA.
ANC	*ANC Firms*	Net Discounted Assets (Assets − Liabilities = Net Capital, which is discounted (VaR based model).	$5 billion tentative net capital (not discounted).[154] $6 billion early warning net capital (not discounted). $1 billion Net Discounted Assets. RFA.
Non-Financial Swap Dealers	*Non-financial Entities (15% test)*	Equity	$20 million plus market and credit risk charges. 8% of the total amount of a swap dealer's margin. RFA.
MSPs	*MSP*	Equity	≥$1. RFA.

1. Bank-Based Capital

Under the bank-based capital approach a CSE would need to maintain common equity tier 1 capital equal to the greatest of the following:

- $20 million;
- Eight percent of the sum of the following: (i) The amount of its risk-weighted-assets (''RWA''), which is the market risk capital charge under a VaR computation or a standardized formula table (Reg. 1.17); (ii) the amount of current counterparty credit risk (''CCR''), which is the sum of the default risk capital charge and a credit value adjustment (''CVA'') risk capital charge, which is under either a standardized formula table or a VaR method;
- Eight percent of the total amount of a swap dealer's uncleared swap margin, uncleared security-based swap margin and initial margin required for its cleared positions; or
- The amount required by its RFA.

As noted above, the Commission is proposing a $20 million fixed-dollar floor, as this is the minimum amount of required capital under all proposed approaches. The Commission is proposing this minimum level as it believes that this is the minimum amount of capital that should be required for a CSE, without regard to the volume of swaps the CSE engages in, to conduct its dealing activity. As noted above, this amount is based on the Commission's experience with other registered entities that are currently subject to capital requirements. The Commission is also proposing, however, an eight percent of margin requirement, as through its experience in supervising FCMs, it recognizes that this capital computation is a determinative condition in computing their required capital and requires an SD to maintain a higher level of capital as the risks associated with its dealing activities increases, as measured by the initial margin requirements on the swaps positions. Moreover, under the net liquid assets approach, the Commission is including the same eight percent margin requirement.

In calculating the eight percent of the total uncleared margin, the Commission is including all uncollateralized exposures from uncleared swaps (*e.g.,* inter-affiliate swaps, swaps with commercial end users, and legacy swaps), as these are exposures where no initial margin is collected and, therefore, are part of the SD's counterparty credit risk, which the Commission believes must be part of the SD's required capital. The Commission believes that not requiring capital on these uncollateralized amounts would leave a significant gap in determining a level of capital that adequately reflects the overall risk of the SD and would not help to ensure that safety and soundness of the SD.

In addition, the Commission is also requiring the inclusion of an SD's required initial margin from clearing organizations for all its cleared positions. The Commission's eight percent of margin requirement is intended to serve as a proxy for the level of risk associated with the SD's swap activities and proprietary trading. The Commission believes it is appropriate to include the margin for both cleared and uncleared products in this calculation as it provides a measure of the potential risks posed by the cleared and uncleared positions.

In addition, the Commission has proposed to include a standardized table for market risk that is currently not part of the BCBS or prudential regulator capital framework. The Commission included the standardized table in calculating an SD's market risk charges to address SDs that do not use approved models in computing market risk charges. The Commission included the Regulation 1.17 standard market risk charges, as it believes these charges result in adequate capital computations for the level of market risk inherent in these financial instruments. In addition, the Commission is currently using these standardized charges in computing an FCM's market risk charges on the same financial instruments for an FCM's required capital.

2. Net Liquid Assets

Under this proposed approach, an SD would be required to maintain minimum net capital equal to or exceeding the greatest of:

- $20 million; or
- Eight percent of the total amount of a swap dealer's uncleared swap margin,

[154] The SEC is proposing to increase the minimum capital requirements for ANC Firms to require the firms to maintain a minimum of $1 billion of net capital and $5 billion of tentative net capital. Under the SEC proposal, ANC Firms also must file a regulatory notice (*i.e.,* ''early warning notice'') with the SEC if its tentative net is below $6 billion.

uncleared security-based swap margin and initial margin required for its cleared positions.

Net capital is generally defined as an SD's current and liquid assets minus its liabilities (excluding certain qualifying subordinated debt), with the remainder discounted according to either a CFTC-approved VaR-based model or a standardized rules-based approach set out in Regulation 1.17.

As noted and discussed above, under this approach, the Commission is proposing a $20 million fixed-dollar floor. In addition, the Commission is proposing, under this approach, a net liquid assets test that is designed to allow an SD to engage in activities that are part of its swaps business (*e.g.,* holding risk inherent in swaps into its dealing inventory), but in a manner that places the SD in the position of holding at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (*e.g.,* money owed to customers, counterparties, and creditors). Further, the Commission is requiring a liquidity ratio and a funding plan under this approach. The Commission believes that the net liquid assets approach, although structurally different than the bank-based approach, helps to ensure the safety and soundness of the SD, while providing the same protections to the financial system.

As discussed above and for the same reasons, the Commission is requiring an SD to include in its eight percent of the total uncleared margin calculation all uncollateralized exposures from uncleared swaps (*e.g.,* inter-affiliate swaps, swaps with commercial end users, and legacy swaps) and with clearing organizations.

3. Alternative Net Capital (''ANC'')

Under the ANC approach, an SD would need to maintain its net capital in accordance with the following requirements:

- $1 billion net capital; [155]
- $5 billion tentative net capital; [156] and
- $6 billion early warning net capital.[157]

Under the proposal, an SD that is registered with the SEC as a BD and is approved by the SEC to use internal models to compute certain market risk and credit risk capital charges (an ''ANC Firm'') will be able to continue to use the ANC approach in calculating its SD capital; however, with enhancements to the minimum capital requirements as proposed by the SEC.

Under the proposal, an ANC Firm must maintain, at all times, tentative net capital, which is the net capital of an ANC Firm before deductions for market and credit risk, of $5 billion. In addition, an ANC Firm must maintain, at all times, early warning net capital, which is the net capital of an ANC Firm before deductions for market and credit risk, of $6 billion. Lastly, an ANC Firm must maintain, at all times, $1 billion of net capital, which is net discounted assets (discounted by VaR models for market and credit risk).

In proposing to adopt this approach, but with some amendments to the requirements, the Commission recognizes that ANC Firms are dual registrants with the Commission and SEC that offer a wide-range of financial services and act as different types of intermediaries (*e.g.,* BD, FCM, SD). As a result of the additional complexity and risk inherent in these entities, and the Commission's experience with these ANC Firms, the Commission is proposing to increase their minimum capital requirements in this proposal consistent with the SEC. In addition, as with the other approaches, the Commission is proposing to require ANC Firms to meet liquidity and funding requirements consistent with the SEC.

The Commission expects that SDs that are ANC Firms will elect to use this capital approach for its swaps transactions. The Commission believes that since this approach has been in effect for more than 10 years and it properly accounts for the inherent risk and complexity of these firms, including their swap dealing activities, that it is appropriate to propose to permit ANC Firms to continue using this approach, but with some enhancements based on the Commission's experience. As discussed above, the Commission is proposing to increase the minimum capital requirements for ANC Firms in a manner consistent with the SEC's proposed increases for ANC Firms. The Commission believes that the increases are appropriate to reflect the potential increase in swaps activities that ANC Firms may engage in, particularly if affiliates move their swaps activities into the ANC Firms to effectively use the capital held by the ANC Firms.

4. Tangible Net Worth

The Commission is proposing a tangible net worth approach for both SDs and MSPs. With respect to SDs, the proposal would require an SD to maintain minimum net capital equal to or in excess of the greater of:

- $20 million plus market and credit risk charges;
- 8 percent of the total amount of a swap dealer's uncleared swap margin, uncleared security-based swap margin and initial margin required for its cleared positions; or
- The amount required by its RFA.

The term tangible net worth is proposed to be defined to mean an SD's net worth as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets.

As noted above, the Commission is proposing this approach as it recognizes that certain SD's that are primarily engaged in non-financial activities may engage in a diverse range of business activities different from, and broader than, the dealing activities conducted by a financial entity. Under the proposal, an SD, availing itself of this approach, must meet the Commission's 15% revenue test and 15% asset test as discussed in section II.A.2.iii of this proposal to demonstrate that entity is primarily engaged in non-financial activities.

As discussed below, the Commission believes that the tangible net worth capital approach meets statutory mandate, as it is designed to help ensure the safety and soundness of the SD, while calibrated to the inherent risk of the uncleared swaps held by the SD and the overall activity of the SD. In addition, the Commission is not requiring these SDs to meet its liquidity and funding requirements. As discussed below, the Commission believes that the imposition of such requirements would result in an over-inclusive requirement, as it would include all non-financial funding requirements; likewise, if it narrowed the scope of the liquidity requirement to just swap dealing activity, the requirement would be under-inclusive as the required liquid assets would be comingled with the SD's other liquid assets, which could be used for all the entity's liabilities and not just for its swap dealing related liabilities. As the proposed tangible net worth capital approach would only be available to SDs that are primarily engaged in non-financial activities, the Commission believes that this approach has proper controls to ensure that it is not exploited by financial entities seeking a regulatory advantage.

With respect to MSPs, the Commission is proposing to require an MSP to maintain net tangible net worth in the amount equal to or in excess of

[155] *See* proposed 17 CFR 240.15c3–1(a)(7) in *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers;* Proposed Rule, 77 FR 70214, at 70228 (Nov. 23, 1012).

[156] *See Id.*

[157] *See Id.*

the greater of the MSP's positive net worth or the amount of capital required by an RFA of which the MSP is a member. There are currently no MSPs and the only previously registered MSP were required to register as a result of their legacy swaps and not any current swap activity. The Commission believes that the proposed capital requirements for MSPs are appropriate given that no entities are currently registered and the Commission is uncertain of the types of entities that may register in the future. As noted above, the Commission has taken this uncertainty into consideration by proposing to allow an RFA to establish an MSP's minimum capital requirements. Such RFA's are required under section 17 of the CEA to establish capital requirements for all members that are subject to a Commission minimum capital requirement. Accordingly, RFAs may adjust their rules going forward depending on the nature of any entities that may seek to register as MSPs, and adopt minimum capital requirements as appropriate. Such RFA rules must be submitted to the Commission for review prior to the rules becoming effective.

5. Substituted Compliance

As described above, the Commission is providing certain non-U.S. CSEs with the ability to petition the Commission for approval to comply with comparable foreign capital and financial reporting requirements in lieu of some or all of the Commission's requirements. In proposing this approach, the Commission recognizes that this may provide these CSEs with cost advantages by avoiding the costs of potentially duplicative or conflicting regulation.

In limiting the scope of substituted compliance, the Commission does not believe it should make available substituted compliance to all CSEs. The Commission is proposing substituted compliance only to non-U.S. CSEs, as it believes that it is necessary that its capital requirements apply to U.S. CSEs, as they are integral to the U.S. swaps market and critical in ensuring the stability of the U.S. financial system.

Additionally, the Commission recognizes that substituted compliance, to the extent that it puts conditions on its comparability determination, may result in additional costs to these CSEs; however, the Commission believes that providing a substituted compliance regime that allows for conditions instead of an all-or-nothing approach will benefit these CSEs and provide for a more competitive swaps market. Moreover, to the extent that a non-U.S. CSE must comply with a foreign regime and the Commission does not find that regime comparable, the Commission recognizes that these non-U.S. CSE may be burdened with additional costs and subject to conflicting and/or duplicative costs.

F. Entities

The following section discusses the related incremental costs and benefits of the proposal's capital approaches and reporting requirements on each type or category of SDs and MSPs. The Commission understands that certain SDs and MSP organized and domiciled outside of the U.S. would be included in these types or categories of entities. These non-U.S. SDs and MSPs are discussed in the Substituted Compliance section below.

1. Bank Subsidiaries

All U.S. CSEs that are subsidiaries in a BHC and are not a BD or FCM currently are not subject to capital requirements; [158] however, their parent BHC currently complies with the Federal Reserve's capital requirements. Under the Federal Reserve Board's capital requirements, which are based on Basel III requirements, a BHC must maintain adequate capital for the entire consolidated entity.[159] That is, all the assets and liabilities of the BHC's consolidated subsidiaries are consolidated into the holding company. The Federal Reserve Board's capital requirements are then imposed on the BHC, requiring the BHC to maintain capital levels according to those requirements.

As these CSEs are not currently required to be capitalized, the Commission understands that this may add incremental cost to the consolidated entity and/or the CSE as it will have to retain earnings or further capitalize the CSE to the required capital levels. However, the Commission recognizes that a consolidated entity may capitalize one of its subsidiaries in many different ways, including retaining earnings from the CSE or from within the consolidated group. Even with this proposed requirement imposing capital on the subsidiaries, as noted above, the BHC must maintain capital levels in accordance with the Federal Reserve Board's capital requirements, which are calculated on a consolidated basis; therefore, incremental costs may be mitigated, as it may be possible for the consolidated entity to keep the same level of capital within the BHC, but reallocated among its subsidiaries.[160] In addition, the Commission recognizes that earnings may now have to be retained in the CSE and may no longer be available to be reallocated to fund other more profitable activities within the consolidated group or to be returned to shareholders; however, the Commission believes that by providing these CSEs with the option of differing capital approaches, these CSEs will select the capital approach most optimal for its operations, financial structure and which will reduce duplicative or conflicting rules and the administrative costs of calculating and maintaining additional sets of books and records.

The Commission believes that although the proposed capital approaches maybe structurally different, they require a CSE to maintain adequate capital levels for its activities, which should help ensure the safety and soundness of the CSE and the stability of the U.S. financial system.

In requiring capital for a bank subsidiary that is an SD, as discussed above, the SD may incur additional costs. As a result of the additional costs, some SDs may be put at a competitive disadvantage, when compared to those dealers with lesser capital requirements or with no capital requirements. As a result of this additional cost, some swap dealing activity may become too costly—becoming a low margin activity—and, therefore, some SDs may limit their dealing activity or exit the swaps market. Additional costs may also be passed on to customers in the form of higher prices; however, if these SDs are to remain competitive in the swaps market, they must compete with competitors by matching or beating prices. In addition, as most of the largest swap dealers are part of a BHC, these SDs are already incurring capital charges at the consolidated level, and, therefore, the incremental cost and the effect on competition and pricing of

[158] The Commission acknowledges that some subsidiaries in a BHC may be an insurance company and, therefore, may have capital requirements set by its insurance regulator. Such entities are outside the scope of the Commission's proposed rulemaking, as these entities are currently not registered with the CFTC as an SD or MSP. The Commission further acknowledges that there are some non-U.S. subsidiaries that are part of a bank and those subsidiaries and/or their parent may be subject to the capital regime of a foreign regulator. The Commission believes that in such a case, the capital regime that is likely to be applicable would be either the Basel III-based approach or a version of the net liquid assets approach.

[159] *See Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule;* Final Rule, 78 FR 62018 (Oct. 11, 2013).

[160] The Commission notes that the bank or an insurance company in a BHC must maintain certain capital and as such, may not be able available to capitalize the CSE.

swaps may be mitigated. Because these SDs have the option to select the most optimal capital approach for them, they can control some of the burdens placed on them by the proposal and thereby, mitigate the proposal's effect on pricing.

2. SD/BD (Without Models)

Under the proposal, an SD that is also a BD that does not use SEC/CFTC-approved models to calculate its market and credit risk charges has the option to use either the bank-based approach or the net liquid assets approach, but with a standardized capital charges for market risk and credit risk. The Commission recognizes that although it is giving an option to these SDs to comply with either approach, these SDs must still meet the SEC's BD capital requirement.

The standardized capital charges impose significant capital requirements for uncleared swaps primarily in the form of rules-based market risk charges and credit risk charges. Therefore, these firms currently engage in limited swaps activity in the BD, and the Commission does not anticipate that SD/BDs engaging in significant swaps activity in the future absent SEC rule amendments.

3. SD/BD/OTC Derivatives Dealers (Without Models)

Under the proposal, an SD that is registered with the SEC as an OTC derivatives dealer will have the option to comply with either the bank-based capital approach or the net liquid assets capital approach. As OTC derivatives dealers, these SDs already comply with the SEC's net liquid assets capital requirements. OTC derivative dealers also may be approved by the SEC to use internal models to calculate market and credit risk charges in lieu of standardized, rules and table-based capital charges for swaps, security-based swaps and other financial instruments.

The Commission believes that since SDs that are registered OTC derivatives dealers are already complying with the SEC's net liquid assets approach, they will select this approach in meeting with the Commission SD's proposed capital requirements. The Commission believes that allowing these entities to continue using current capital requirements will reduce the possibility of duplicative or conflicting rules and administrative costs of calculating and maintaining additional sets of books and records. The Commission believes that its proposal will result in only a small incremental cost to OTC derivative dealers.

The Commission recognizes that OTC derivatives dealers already have SEC-approved models in computing their current capital requirements and, therefore, will not incur any additional costs in developing and implementing this model-based approach in computing capital charges.

4. SD/FCM (Without Models)

Under the proposal, an SD that is also registered with the Commission as an FCM that does not use Var models to calculate market and credit risk charges, must compute its capital in accordance with the rules-based approach set forth in Regulation 1.17. In the proposal, the Commission is amending certain provisions of Regulation 1.17 to reduce the burden on an FCM engaging in swaps. The amendments align the FCM capital requirements with that of new net liquid assets capital approach set out in proposed Regulation 23.101. In amending the requirements, the Commission believes that it is reducing the burden placed on SDs/FCMs, as the amount of capital on uncleared swaps would have been significantly higher under the current requirements and would have placed SD/FCMs at a competitive disadvantage. Specifically, Regulation 1.17 currently does not allow an FCM to recognize collateral held at a third-party custodian as capital. Therefore, under Regulation 1.17 an SD/FCM would have to take a 100 percent capital charge for margin posted with third-party custodians even though the Commission's uncleared margin rules require initial margin to be held at a third-party custodian. This is true even though the custodian has no ability to rehypothecate the initial margin and the SD has the ability to retrieve the initial margin back from the custodian with no encumbrance. Therefore, the Commission believes that its proposed amendments to Regulation 1.17 to allow an SD/FCM to recognize margin posted with third-party custodians in accordance with the Commission's margin rules will make it easier for an SD/FCM to meet its minimum level of required capital while also requiring an SD/FCM to maintain adequate capital levels, when considering the amount of initial margin that the SD has at its disposal in the event of a counterparty default.

As a result of the proposal's amendments, these SD/FCMs should benefit from lower capital charges and should allow these SD/FCMs to continue to comply with one capital rule, which should mitigate some of the administrative costs and reduce the possibility of duplicative or conflicting rules. The Commission is not providing these SDs with an option to use the bank-based capital approach, as the Commission believes that this option is unnecessary and costly, and the current FCM capital approach reflects that the firm acts as an intermediary for customers on futures markets. The Commission has made amendments to account for SD/FCMs' swap activities and in allowing these FCMs to change their current capital method, the Commission believes that this would add an additional layer of complexity and costs to the FCMs, as the FCMs would have to change, modify or migrate all of their current systems to a new capital regime. In addition, the Commission believes that requiring the same capital regime, with beneficial amendments, is more appropriate in transitioning the Commission's capital requirements to these entities, as it should result in fewer burdens and a simple transition in implementing the Commission's proposed capital requirements. In addition, the Commission believes that this would simplify the Commission's ability to supervise these entities, as the Commission will be able to seamlessly transition from its current capital regime to these new requirements; however, the Commission recognizes that by not providing these SDs with the option to use the bank-based capital approach it may be foreclosing the ability of these SDs to use a capital approach that may be more cost effective than the one proposed.

As a result of this proposal, the Commission recognizes that by amending Regulation 1.17 capital charges it is reducing the burden currently placed on SD/FCMs' swaps activities, which may result in greater liquidity in the swaps market, as this activity will be less costly and may incentivize these entities to engage in more swap dealing activity.

As a result of the amendments to Regulation 1.17, these SD/FCMs may be able to realize some of the cost saving of the amendments when competing with other dealers for counterparties. This cost savings may also result in more efficient pricing for their counterparties. However, the Commission notes, as stated above, that as a result of the Commission's margin requirements for uncleared swaps these benefits may be limited.

5. ANC Firms (SD/BDs and/or FCMs That Use Models)

Under the proposal, an SD that is an ANC Firm (*i.e.,* also a BD and/or FCM, with approval by the SEC/CFTC to use models in computing market risk and credit risk charges), will incur minimal additional capital charges, as a result of this proposal. The Commission is retaining this approach for these firms,

but with an increase in the capital thresholds, as noted above. The Commission is proposing these amendments based on market experience in supervising ANC Firms, and in recognition that the proposal is consistent with the SEC's proposed capital increases for ANC Firms. The Commission notes that the current ANC Firms are already maintaining more than the amended thresholds; however, by increasing these capital requirements the Commission recognizes that this may have an additional cost, as ANC Firms will now be required to maintain these capital levels, as under the current capital thresholds, these were held at their discretion.

The Commission recognizes that ANC firms already have SEC-approved models in computing their current capital requirements and, therefore, they will not incur any additional costs in developing and implementing this model-based approach in computing capital charges.

6. Stand-Alone SD (With and Without Models)

Under the proposal, a stand-alone SD is provided with an option to comply with either the bank-based capital approach or the net liquid assets capital approach. In providing this option, the Commission, as discussed above, believes that both options provide adequate capital requirements and account for the financial activities of an SD. Therefore, under the proposal, the Commission believes that these SDs will benefit, as these SDs will have the ability to select the most optimal approach, based on their organizational and operational structure and the composition of their assets. In addition, this option will also reduce the possibility of duplicative or conflicting rules and administrative costs of calculating and maintaining additional sets of books and records.

Under the proposal, a stand-alone SD that does not use models must compute their market risk and credit risk charges in accordance with rules-based requirements and a standardized table. The Commission recognizes that under the bank-based capital approach, market risk charges are calculated with a prudential regulator's approved model; however, to allow stand-alone SDs to use the bank-based capital approach without a model, the Commission is proposing to incorporate Regulation 1.17 market risk charges into the framework. In providing this alternative, the Commission is providing an option to those stand-alone SDs that do not have Commission-approved models. In doing so, the Commission is providing these SDs with a benefit, as they are still able to choose the most efficient capital approach. The Commission incorporated Regulation 1.17 market risk charges, with proposed amendments, as it believes that this is a well-established method that properly accounts for market risk charges.

However, the Commission recognizes that many of these entities are not currently subject to minimum capital requirements, and as such, will incur additional costs on all of their financial activities, including their swap activities, which may result in possible increases in costs and pricing. In addition, a stand-alone SD selecting to use models in computing its market and credit risk charges may incur additional costs in developing and implementing these models.

As a result of this proposal, the Commission recognizes that by requiring capital for SDs this may put these SDs at a competitive disadvantage, when compared to those entities with a lesser capital requirement or with no capital requirements. As a result of this additional cost, some swap activities may become too costly and, therefore, some SDs may limit their activity or exit the swaps market. This additional cost may in turn be passed on to customers in the form of higher prices; however, if these SDs are to remain competitive in the swaps market, they must compete by matching or beating prices of their competitors. If an SD decides to limit its activity or withdraw from the swaps market, this may result in a reduced level of liquidity in the swaps market.

In requiring minimum capital requirements, the Commission believes that it is complying with its statutory mandate, as these standards are calibrated to the level of risk in an SD and are designed to help ensure safety and soundness of the SD and the stability of the U.S. financial system. In addition, the Commission's proposal is modeled after two well-established capital regimes, which should help ensure safety and soundness of the SD and competition among all registered SDs.

7. Non-Financial SD (With and Without Models)

Under the proposal, an SD that is predominantly engaged in non-financial activities, as defined in proposed Regulation 23.100 (85% non-financial threshold), may use the tangible net worth capital approach. This approach is designed after GAAP's tangible net worth computation and excludes intangibles and goodwill.[161] The Commission is also requiring that the non-financial SD include in its capital requirement its market risk and credit risk charges.

The Commission believes that this approach, which is tailored to non-financial entities that are SDs, provides these entities with the flexibility to meet an appropriate capital requirement, without requiring the firms to engage in costly restructuring of their operations and business. The Commission recognizes that these SDs deal in swaps, but the Commission also recognizes that these entities are primarily engaged in commercial activities and counteract with primarily with commercial clients. BCBS, the Commission and the SEC did not fully consider this type of business model when developing the bank-based capital approach and the net liquid assets capital approach set out in this proposal. In allowing these entities to maintain their current structure, the Commission believes that its proposed approach will allow for less disruption to these SDs and in the markets, as these SDs may serve smaller clients that would not otherwise be able to participate in the swaps market without these SDs. However, the Commission, in helping to ensure the safety and soundness of these SDs, is requiring that these entities maintain a level of tangible net worth equal to or greater than the greatest of (i) $20 million plus the SD's market and credit risk charges, (ii) eight percent of its margin amount (*i.e.,* eight percent of all of the SD's uncleared swap margin, uncleared security-based swap margin and initial margin required for its cleared positions), or (iii) the amount of capital required by an RFA, as this would account for the SD's exposure (market and credit risk) to the swaps markets, without penalizes the SD's commercial activities.

In developing this approach, the Commission also recognizes that the commercial activities of a commercial SD could affect the overall financial health of the SD. That is, in the event of a substantial loss emanating from its commercial activities, this loss may have a substantial negative affect on the SD, which may find itself in financial distress. As the Commission is not accounting for the risk in the commercial activities, it is possible that the amount and type of capital that a commercial SD is required to maintain may not be adequate to prevent the failure of the SD, which then will affect

[161] Under GAAP, tangible net equity is determined by subtracting a firm's liabilities from its tangible assets.

all of its swap counterparties. However, in tailoring this method to these commercial SDs, the Commission is taking a position that is consistent with the Commission's prior positions on commercial entities, as it believes these commercial entities and their corresponding activities are less risky than a financial entity.[162] In addition, and as discussed above, an RFA will have the ability to assess capital levels at all SDs and may adopt rules to impose capital requirements that are more stringent than the Commission's capital requirements on SDs as their experience with these firms develops.

The Commission recognizes that these entities are not currently subject to minimum capital requirements, and as such, will incur additional costs on all of their swap activities, which may result in possible increases in pricing; however, as the Commission has developed its capital requirements to better target these commercial SDs, it believes that the additional cost should be mitigated by this approach.

In addition, as the Commission expects that these SDs will use models in computing its market and credit risk charges, this may also result in additional costs in developing and implementing these models; however, this cost should be mitigated by the savings that may be realized by using such models.

8. MSP

Under the proposal, an MSP must maintain capital (*i.e.,* tangible net worth) of the greater of positive tangible net worth or the amount of capital required by a registered futures association of which the MSP is a member. This approach is designed after GAAP's tangible net worth computation and excludes intangible assets and goodwill. Currently there are no MSPs. The Commission cannot determine if other entities will register in the future as MSPs, however, the Commission is required to propose a capital requirement to address potential future registrants.

In proposing the tangible net worth approach for MSPs, the Commission is allowing these entities to continue their operations if they become registered as MSPs with little to no changes to the entities' structures. In providing for this, the Commission believes that these entities if they become registered as MSPs will incur minimal additional costs to comply with the proposed requirements.

The Commission believes that the proposed capital requirements will help ensure the safety and soundness of MSPs, as these entities will typically be posting and collect margin on all of their new uncleared swaps and, therefore, as these MSPs are registered only as a result of being an end-user of swaps and not a swap dealer, the margin requirements are better tailored to cover that same risk, which is on a $1 for $1 basis, than through its capital requirements. Therefore, the Commission is only proposing to require MSPs to be solvent, while nothing that the entity may be subject to other capital requirements and hence required to comply with those capital requirements.

As the Commission's capital requirements will result in minimal additional costs to these MSPs, there should be little to no effect on competition, as they are end-users (*i.e.,* price takers) and little to no incremental effect on pricing.

9. Substituted Compliance

Under the proposal, a non-U.S. CSE that is already complying with a comparable foreign jurisdiction's capital or financial reporting regime is provided with the ability to meet the Commission's capital requirements by meeting the foreign jurisdiction's capital requirements. In providing these CSEs with the ability to continue to comply with their current capital and financial reporting regimes the Commission believes that it is limiting the potential for conflicting and duplicate capital requirements. In addition, as each foreign jurisdiction must be determined to be comparable, the possible negative effect on the U.S. financial system is mitigated.

The Commission further recognizes that non-U.S. CSEs that use conditional substituted compliance may incur additional costs; however, the Commission believes that conditional substituted compliance provides an offsetting benefit to these CSEs as it allows for a conditional substituted compliance determination instead of an all-or-nothing approach, which may result in the Commission not recognizing a foreign jurisdictions capital requirements, resulting in additional cost, including possible conflicting and/or duplicative requirements.

G. Liquidity and Funding Requirements

Under the proposal, the Commission is requiring that SDs, excluding SDs that are predominantly engaged in non-financial activities, be required to comply with a liquidity requirement and to adopt a funding plan. Depending on the capital approach that the SD is complying with, the SD must comply with the corresponding liquidity requirement. Any SD that complies with the bank-based capital approach must comply with liquidity coverage ratio (''bank-based liquidity''). Alternatively, any SD that complies with the net liquid assets capital approach must comply with the liquidity stress test requirement (''liquidity stress test'').

As discussed above, in recognizing the limitations that were highlighted by the financial crisis and acknowledged by BCBS, the Commission is adopting a liquidity requirement to enhance protection provided by its capital requirements. During the financial crisis, it was evident that although many firms had adequate capital levels they did not have enough liquidity or funding sources to cover their current obligations, which resulted in firms being adequately capitalized under the applicable regulations, but nonetheless in default on their obligations. Therefore, the Commission believes that in proposing this requirement it is enhancing the safety and soundness of SDs and thereby, helping to ensure stability of the U.S. financial system.

The Commission selected these two approaches from the prudential regulators' liquidity model and the SEC's proposed capital requirements, which contains a liquidity requirement. Each approach is designed to ensure that an SD has enough liquid assets over a stressed 30-day period to meet its obligations, over that same period. As the bank-based liquidity ratio is required under the prudential regulators' capital rules, the Commission believes that it would be consistent in tying these two requirements, as it was developed to complement its corresponding capital requirements. Alternatively, the Commission is requiring the liquidity stress test approach for those SDs that comply with the net liquid assets capital approach, as the Commission believes these two approaches complement each other, as these both focus on net liquid assets of a SD. The Commission believes that matching these two requirements will benefit SDs, as they will not have to comply with possible duplicative and/or conflicting requirements.

The Commission is also requiring these SDs to maintain a funding plan. The Commission believes that these costs are marginal and are accounted for in the proposal's PRA. As discussed above in regard to the proposal's liquidity requirements and for the same reasons, under the proposal the Commission is requiring a funding plan, as it believes that this requirement is necessary to further enhance the

[162] *See e.g.,* 17 CFR 39.6.

Commission's capital requirements and to help ensure the safety and soundness of the CSEs.

As noted above, SDs are not required by the Commission to comply with any liquidity or funding requirements. In requiring these SDs to comply with its liquidity requirements, the Commission recognizes that these SDs may have to hold more liquid assets; however, the Commission believes that this requirement increases the possibility that an SD will be able to withstand another financial crisis. As the Commission is mandated to set capital requirements to help ensure the safety and soundness of the SD, and in learning from the events of the financial crisis, the Commission believes that this requirement is necessary to ensure the viability of SDs. In addition, non-bank subsidiaries of a BHC, although not required to retain a certain level of liquid assets, are constrained on the amount of illiquid assets that they can hold on their balance sheet indirectly, as their BHC parent must meet the Federal Reserve's liquidity requirements. This will mitigate some of the costs incurred by certain SDs that select the bank-based capital requirements. Moreover, the Commission recognizes that these costs will also be mitigated to some degree, as liquidity can be moved around an organization, provided there are no legal restrictions or constraints.[163]

The Commission believes that to the extent that all of its financial SDs must comply with one of the two liquidity requirements, the competitive effects should be mitigated. In addition, as a result of a liquidity requirement being an internationally accepted requirement under BCBS, this should mitigate some of the competitive advantages that non-CFTC registered dealers may have over financial SDs. In addition, to the extent that SDs maintain liquid assets to cover their initial margin requirements and variation margin requirements (under the Commission's variation margin requirements, swaps between two CSEs require the exchange of cash or U.S. treasuries), this may also mitigate the cost of this proposed liquidity requirement.

In proposing a liquidity requirement, the Commission understands that this may have a negative effect on liquidity of the swaps market. This proposed requirement will require financial SDs to hold more liquid assets than prior to this proposal. Therefore, this may cause some of these financial SDs, to limit or withdraw from swap dealing activity, as the proposal may make swaps activity more costly, which may result in a reduction in market liquidity.

Under the proposal, the Commission is not requiring Commercial SDs to comply with its proposed liquidity and funding requirements. The Commission believes that if it were to impose liquidity and funding requirements on Commercial SDs it would result in an over-inclusive requirement, as it would include all non-financial liquidity and funding requirements. Alternatively, if the Commission narrowed the scope of the liquidity and funding requirements to just swap dealing activity, the Commission believes that it would be under-inclusive, as the required liquid assets will be comingled with the SD's other liquid assets, which could be used for all the entity's liabilities and not just for its swap dealing related liabilities. In addition, the Commission understands that if the Commercial SD defaults on any obligation, including commercial, this may have a negative impact on the entity's SD. With these two conflicting views, the Commission believes it is not appropriate at this time to propose liquidity or funding requirements on Commercial SDs.

As noted in the section F.9., the Commission is providing substituted compliance to certain non-U.S. CSEs. As discussed above and for the same reasons, the Commission believes that, in regards to its liquidity and funding requirements, providing substitute compliance to these non-U.S. CSEs should reduce the possibility of additional costs and duplicative or conflicting requirements.

H. Reporting and Recordkeeping Requirements

The recordkeeping, reporting and notification requirements set out in this proposal are intended to facilitate effective oversight and improve internal risk management, via requiring robust internal procedures for creating and retaining records central to the conduct of business as an SD or MSP. Requiring registered SDs and MSPs to comply with recordkeeping and reporting rules should help ensure more effective regulatory oversight. The proposal would help the Commission determine whether an SD or MSP is operating in compliance with the Commission's capital requirements and allow the Commission to assess the risks and exposures that these entities are managing.

As detailed above in Section II.C of this proposal, the Commission is requiring all SDs to file certain financial information pertaining to their capital requirements. Those SDs that are prudentially regulated are provided with the option to submit their financial information that is reported to their prudential regulator to the Commission. In addition, those SDs that are also FCMs may file their financial information pertaining to their capital requirements under this proposal with the Commission, including notices, in the same manner as they currently report. For those SDs that are also registered with the SEC as a BD or a SBSD, these SDs may file the same financial information to the Commission, as they file with the SEC. In filing the proposed required financial information with the Commission, these entities must file through the Winjammer electronic filing system. Alternatively, these same SDs have the option to report their financial information like stand-alone SDs, commercial SDs and MSPs report their financial information to the Commission. The Commission is providing this option, as the information reported to the Commission under this proposal and that is filed with the Commission or other financial regulatory agencies are similar, as the information provides the Commission with the ability to assess and monitor an SD's financial condition and whether the SD is currently meeting the Commission's capital requirements. In permitting these SDs to use their current required information, the Commission believes that this should mitigate some additional costs to prepare and report this information to the Commission. In addition, these SDs should already have developed policies, procedures and systems to aggregate, monitor, and track their swap dealing activities and risks. As such, this should also mitigate some of the costs incurred under the proposal.

Under the proposal, those SDs and MSPs that are not subject to current capital requirements will have to develop and establish policies, procedures and systems to monitor, track, calculate and report the required information. In developing these policies, procedures and systems, these SDs will incur costs; however, as these entities are registered with the Commission as SDs, the Commission believes that they should already have developed policies, procedures and systems to aggregate, monitor, and track their swap activities and risks, as is required under the Commission's swap dealer framework. This should mitigate some of the burdens of the proposed reporting and recordkeeping

[163] The Commission notes that Section 23A and 23B may constrain the ability of moving liquidity in a BHC. In addition, if an entity must current comply with liquidity provisions, this may also limit the ability to move liquidity among consolidated entities.

requirements. In addition, as the information that the Commission is proposing to require is based on GAAP or another accounting method, this information is already being prepared for other purposes and therefore, should again mitigate the costs in meeting these proposed requirements.

The Commission also believes that as a result of the proposed reporting and recordkeeping requirements, SDs should be able to more effectively track their trading and risk exposure in swaps and other financial activities. To the extent that these SDs can better monitor and track their risks, this should help them better manage risk.

As noted in the section F.9., the Commission is providing substituted compliance to certain non-U.S. CSEs. As discussed above and for the same reasons, the Commission believes that, in regards its reporting requirements, providing substitute compliance to these non-U.S. CSEs it should reduce the possibility of additional costs and duplicative or conflicting requirements

I. Section 15(a) Factors

The following is a discussion of the cost and benefit considerations of the proposal, as it relates to the five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

1. Protection of Market Participants and the Public

The proposed rules are intended to strengthen the swaps market by requiring all CSEs to maintain a minimum level of capital and liquidity. These minimum capital requirements should enhance the loss absorbing capacity of CSEs and reduce the probability of financial contagion in the event of a counterparty default or a financial crisis. In addition, capital functions as a risk management tool by limiting the amount of leverage that a CSE can incur. Moreover, the proposal's liquidity and funding requirements should provide CSEs with the ability, in times of financial stress, to meet their current and other obligations as they come due, which should lower the probability of a CSE defaulting. This should help mitigate the overall risk in the financial system and ultimately reduce systemic risk. Financial reporting requirements for CSEs set out in this proposal should help the Commission and investors monitor and assess the financial condition of these CSEs. As this proposal is designed to protect financial entities from default, this should have a direct benefit to the public, as the failure of these CSEs could result in a financial contagion, which could negatively impact the general public. On the other hand, the proposed capital rules may require additional capital to be raised and may increase the cost of swaps, as described above.

Request for Comment

Do proposed capital, liquidity, and financial reporting requirements properly protect market participants and the public? Please explain.

2. Efficiency, Competitiveness, and Financial Integrity of Swaps Markets

In this proposal, the Commission sought to promote efficiency and financial integrity of the swaps market, and where possible, mitigate undue competitive disparities. Most notably, the Commission aligned the proposed regulations with that of the prudential regulators', SEC's and the Commission's current capital frameworks to the greatest extent possible. Doing so should promote greater operational efficiencies for those SDs that are part of a BHC or are also registered with the SEC as a BD or the Commission as an FCM, as they may be able to avoid creating duplicative compliance and operational infrastructures and instead, rely on the infrastructure supporting the other registered entities. In addition, this approach should also enhance efficiency and limit conflicting rules, as these entities can continue to operate under their current regimes. Moreover, the proposal permits CSEs to calculate credit and market risk charges under a standardized or model-based approach, which allows them to choose the methodology that is the most suitable for their asset composition.

The Commission notes that the proposed capital rule, like other requirements under the Dodd-Frank Act, could have a substantial impact on competition in the swaps market. As the Commission's proposal will result in additional costs to certain CSEs that do not have current capital requirements, these CSEs may either limit their swap activities or withdraw from the swaps market. In this event, it is possible that this may result in less competition and increases in prices of swaps. Depending on the relative cost of the Commission's capital and liquidity requirements compared with corresponding requirements under prudential regulators' regime, SEC's regime or in other jurisdictions, certain CSEs may have a competitive advantage or disadvantage; however, the Commission, in developing the proposal, harmonized the proposal with those of the prudential regulators and the SEC to the maximum extent practicable.

As noted above, the Commission, recognizing that SDs are critical to the financial integrity of the financial markets, designed their capital requirements to help ensure the safety and soundness of these SDs. In doing so, this should protect an SD in the event of a default by its counterparty or a financial crisis, which should reduce the probability of financial contagion.

Request for Comment

Is market integrity adversely affected by the proposed rules? If so, how might the Commission mitigate any harmful impact?

3. Price Discovery

As noted above, the proposal may have a negative effect on competition, as a result of increasing costs, which may result in some SDs limiting or withdrawing from the swaps markets. In that event, this negative effect on competition could result in a less liquid swaps market, which will have a negative effect on price discovery. However, as discussed above, most of the larger SDs or their parent entities are already subject to capital requirements that impose capital charges for their swap activities and, therefore, the proposal's effect on competition, liquidity and price discovery should be limited.

Request for Comment

How might this proposal affect price discovery? Please explain.

4. Sound Risk Management Practices

A well-designed risk management system helps to identify, evaluate, address, and monitor the risks associated with a firm's business. As discussed above, capital plays an important risk management function and limits the amount of leverage an entity can incur. In addition, capital serves as the last line of defensive in the event of a counterparty default or severe losses at a firm. The Commission's proposal is developed from two well-established capital regimes. In addition, the Commission is requiring certain liquidity standards and a funding requirement. Therefore, the Commission's proposal should promote increase risk management practices within a CSE. Moreover, the Commission believes that as a result of the proposed reporting and recordkeeping requirements, SDs may

more effectively track their trading and risk exposure in swaps and other financial activities. To the extent that these SDs can better monitor and track their risks, this should help them better manage risk within the entity.

Request for Comment

How might this proposal affect sound risk management practices? Please explain.

5. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations related to the costs and benefits of the proposed rule.

Request for Comment

Are there other public interest considerations that the Commission should consider? Please explain.

Appendix to Cost Benefit Considerations

The Commission generally requests comments about its analysis of the general costs and benefits of the proposed rule. The Commission requests data to quantify and estimate the costs and the value of the benefits of the proposals. Are there additional costs and benefits that the Commission should consider? Has the Commission misidentified any costs or benefits? Commenters are encouraged to include both quantitative and qualitative assessments of benefits as well as data, or other information of support for such assessments.

i. Minimum Capital Requirement

The Commission focuses its analysis on cost arising from minimum capital requirement, due to data availability. As discussed above, this proposal would prescribe capital requirements for SDs and MSPs, and proposed amendments to existing capital rules for FCMs would prescribe capital requirement for FCMs that are also registered as SDs and increase capital requirement for FCMs to account for risk arising from their swaps and security-based swaps. The Commission first discusses cost at the entity level, and then quantifies cost at the industry level using SDR data.

As of Nov. 9, 2016, there are approximately 104 SDs and no MSPs provisionally registered with the Commission. The Commission estimates that out of the 104 provisionally registered SDs, 15 U.S. Prudential Regulated Registrants SDs are exempt from the Commission's capital requirement; 36 SDs which are Non-U.S. Registrants Overseen by the FRB are also exempt from the Commission's capital requirement. For the rest 53 provisionally registered SDs, eight SDs are currently also registered with the Commission as FCMs, while the other 45 SDs currently are not FCMs.[164]

Discussing Capital Requirement Cost at Entity Level

The Commission collects monthly financial and capital information from FCMs. There are currently eight SDs which are also registered as FCMs. The Commission proposed following amendments to existing FCM capital rule to increase capital requirement to account for risk arising from swaps.

TABLE 1—MINIMUM CAPITAL REQUIREMENT FOR SDS THAT ARE ALSO FCMS

	Tentative net capital	Adjusted net capital	
	Fixed dollar (million)	Fixed dollar (million)	Financial ratio
FCM SD (not using models)	N/A	$20	8% of risk margin plus "uncleared swap margin".
FCM SD (using models)	$100	$20	8% of risk margin plus "uncleared swap margin".

The Commission expects most if not all entities would use models. For the purpose of discussing cost of complying with these proposed minimum capital requirements, the Commission further separates these SDs that are also FCMs into two categories: SDs that are also SEC registered ANC firms, and FCMs that are not ANC firms registered with the SEC.

1. SDs That Are FCMs and ANC Firms With the SEC

TABLE 2—CAPITAL FOR SDS THAT ARE ALSO FCMS AND ANC FIRMS AS OF APRIL 30, 2016

Name of swap dealers	Registered as	Adjusted net capital	Net capital requirement	Excess net capital
CITIGROUP GLOBAL MARKETS INC	FCM BD SD	7,378,708,335	1,449,570,569	5,929,137,766
GOLDMAN SACHS & CO	FCM BD SD	16,978,669,484	2,553,867,535	14,424,801,949
JP MORGAN SECURITIES LLC	FCM BD SD	13,539,160,236	2,542,050,203	10,997,110,033
MORGAN STANLEY & CO LLC	FCM BD SD	10,906,187,328	1,818,426,660	9,087,760,668

Source: FCM financial data as of April 30, 2016.

The Commission estimates that four SDs are already registered as ANC broker-dealers with SEC. ANC firms registered with the SEC are currently required to maintain a minimum of five billion dollars of tentative net capital and a minimum of one billion dollars of net capital. In addition, all ANC firms use models for risk charge computations. These required minimum capital for ANC firms by the SEC are much higher than the proposed minimum capital requirement by the Commission, thus are more likely the binding constraints for these firms. Based on financial information reported by these SDs in their monthly reports filed with the Commission, these four SDs maintain a significant amount of net capital in excess of SEC's requirement and the Commission's proposal. Therefore, the Commission expects that incremental costs from this

[164] CAs of Nov. 9, 2016, one SD has filed a request with the Commission to withdraw its SD registration.

proposed capital requirement may not be significant for these firms.

2. SDs That Are FCMs but Currently Are Not ANC Firms Registered With SEC

The Commission estimates that there are four SDs in this category with one SD withdrawn pending. Based on the FCM Financial data provided to the Commission, three SDs currently have excess net capital ranging from $26.4 million to $312 million.[165] The Commission expects that smaller SDs with less than 100 million adjusted net capital might need to raise additional capital and might incur significant cost to comply with this proposal. The Commission would like to request comments on (1) how much capital these SDs might need to raise? (2) Is it feasible for these SDs to raise capital? (3) If these SDs would raise capital through retained earnings, what would be the estimated ratio of required capital as percent of their current retained earnings?

TABLE 3—CAPITAL FOR SDS THAT ARE FCMS BUT NOT ANC FIRMS AS OF APRIL 30, 2016

Name of swap dealers	Registered as	Adjusted net capital	Net capital requirement	Excess net capital
FOREX CAPITAL MARKETS LLC	FCMRFD SD	58,264,892	31,858,770	26,406,122
MIZUHO SECURITIES USA INC	FCM BD SD	575,181,123	263,266,797	311,914,326
RJ OBRIEN ASSOCIATES LLC	FCM SD	209,084,814	138,749,913	70,334,901
IBFX INC *				

IBFX INC * withdrawn pending.
Source: FCM financial data as of April 30, 2016.

For SDs that are not FCMs, the Commission prescribes following minimum capital requirements depending whether SDs use models to compute credit and market risk charges and whether SDs are financial entities or commercial entities. In addition, the Commission proposes positive tangible net worth requirement for MSPs. The Commission expects that most, if not all, stand-alone SDs would use models. For the purpose of discussing the cost of complying with minimum capital requirement, the Commission separates stand-alone SDs into following categories.

TABLE 4—MINIMUM CAPITAL REQUIREMENT FOR STAND-ALONE SDS/MSPS

Type of registrant	Net liquid asset approach			Bank-based capital approach			Tangible net worth approach	
	Tentative net capital	Adjusted net capital		Common equity tier 1			Tangible net worth	
	Fixed dollar (million)	Fixed dollar (million)	Financial ratio	Fixed dollar (million)	Financial ratios		Fixed dollar	Financial ratio
U.S. SD (Financial Entity not using internal models).	N/A	$20	8% of the total amount of margin.	$20	8% of the total amount of margin.	8% of risk weighted asset.	N/A	N/A.
U.S. SD (Financial Entity using internal models).	$100	$20	8% of the total amount of margin.	$20	8% of the total amount of margin.	8% of risk weighted asset.	N/A	N/A.
U.S. SD (Not predominantly engaged in financial activities).	N/A	N/A	N/A	N/A	N/A	N/A	$20 million plus credit risk charge and market risk charge.	8% of the total amount of margin.
U.S. MSP	N/A	N/A	N/A	N/A	N/A	N/A	Positive	N/A.
Non-U.S. SDs	Substituted Compliance Eligible, Capital Comparability Determination Required.							

3. Nonbank Subsidiaries of U.S. Bank Holding Companies (BHCs)

The Commission estimates that 12 SDs are nonbank subsidiaries of U.S. BHC. These SDs currently do not have any capital requirement, and the proposed capital requirement may increase cost to these SDs as it may have to retain earnings to capitalize to the required level. However, their parents are currently subject to Federal Reserve's capital requirements on a consolidated basis, including U.S. Basel III capital requirement and also are participants of the Comprehensive Capital Analysis and Review (CCAR) and Dodd-Frank Act Stress Test (DFAST). CCAR evaluates the capital planning process and capital adequacy of the largest U.S.-based BHCs, including the firms' planned capital actions. The Dodd-Frank Act stress tests are a forward-looking component to help assess whether firms have sufficient capital to absorb losses and have the ability to lend to households and businesses even in times of financial and economic stress. The parent BHCs of these nonbank SDs below are well capitalized due to these requirements, as indicated by their common equity tier 1 capital ratio at consolidated level is much higher than eight percent in the table below. Therefore, the additional cost from the Commission's proposed capital requirement may not be significant, as it may be possible for the consolidated entity to keep the same level of capital within the BHC, but just reallocate among its subsidiaries. In addition, the Commission recognizes that earnings

[165] Selected FCM Financial Data as of April 30, 2016. *http://www.cftc.gov/idc/groups/public/@financialdataforfcms/documents/file/fcmdata0416.pdf.*

will now have to retain in the SD and will no longer be available to be reallocated to fund other more profitable activities within the consolidated group or to be returned to shareholders. The Commission understands that capital is not additive, *i.e.,* the sum of capital at individual subsidiary level may be more than the amount of capital required at the parent level for all its subsidiaries, due to the loss of netting benefits. The Commission requests comments on whether it is reasonable to assume that SDs would be able to comply with the proposal while consolidated group of these SDs would not be able to keep the current level of capital. If not, please provide specific comments and estimates the additional cost of complying with the proposal.

TABLE 5—SD'S PARENT BHC'S COMMON EQUITY TIER 1 CAPITAL RATIO AS OF FIRST QUARTER 2016

Name of swap dealers	Common equity tier 1 capital ratio of parent BHC	SEC registered BD
CITIGROUP ENERGY INC	Citigroup Inc. 12.3% [166]	N
GOLDMAN SACHS FINANCIAL MARKETS LP	Goldman Sachs 13.4% [167]	Y
GOLDMAN SACHS MITSUI MARINE DERIVATIVE PRODUCTS LP.	Goldman Sachs 13.4%	N
J ARON & COMPANY	Goldman Sachs 13.4%	N
JP MORGAN VENTURES ENERGY CORPORATION	JP Morgan Chase & Co. 11.7% [168]	N
MERRILL LYNCH CAPITAL SERVICES INC	Bank of America 11% [169]	N
MERRILL LYNCH COMMODITIES INC	Bank of America 11%	N
MERRILL LYNCH FINANCIAL MARKETS INC	Bank of America 11%	Y
MORGAN STANLEY CAPITAL GROUP INC	Morgan Stanley 14.5% [170]	N
MORGAN STANLEY CAPITAL SERVICES LLC	Morgan Stanley 14.5%	N
MORGAN STANLEY DERIVATIVE PRODUCTS INC	Morgan Stanley 14.5%	N
MORGAN STANLEY CAPITAL PRODUCTS LLC	Morgan Stanley 14.5%	N

As discussed above, the Commission expects all SDs would use models to calculate market risk and credit risk charges. Their parents BHCs most likely are already using their risk models to calculate capital for the positions of these wholly owned subsidiaries (including uncleared swaps) to measure the credit and market risk exposures of these positions.

4. U.S. SDs That Are Not Part of U.S. BHCs

The Commission estimates that there are 15 U.S. SDs not part of U.S. BHCs. These SDs currently do not have any capital requirement. However, out of these 15 SDs, six SDs are subsidiaries of foreign BHCs or a foreign financial holding company (FHC) which already comply with Basel III risk-based capital requirements and having common equity tier 1 capital ratio at consolidated level exceeding eight percent. Specifically, two SDs are wholly-owned subsidiaries of Japanese BHCs, two SDs are subsidiaries of a Japanese Financial Holding Company, one SD is subsidiary of Netherlands BHC, and one SD is subsidiary of Australian investment bank. For the 9 SDs that are not subsidiaries of foreign holding companies that comply with Basel III, six SDs are part of groups that are subject to the CFTC's or the SEC's net capital requirements. Specifically, four SDs are subsidiaries of FCMs, and two SDs are also SEC registered BDs. These SDs' consolidated group has excess net capital ranging from $14.8 million to $1.2 billion.[171] As it is possible for the consolidated entity to keep the same level of capital within the group, but just reallocate among its subsidiaries, the additional cost of complying with the Commission's proposed capital requirement may not be too burdensome. However, for those SDs or their consolidated groups that currently have smaller amount of excess net capital, they might need to raise additional capital and thus might incur significant cost to comply with this proposal. The Commission would like to request comments on (1) how much capital these SDs might need to raise? (2) Is it feasible for these SDs to raise capital? (3) If these SDs would raise capital through retained earnings, what would be the estimated ratio of required capital as percent of their current retained earnings?

The Commission estimates that three SDs do not belong to consolidated entities that have excess capital (either common equity tier 1 or net capital). The Commission, therefore, expects that these three SDs may incur significant additional costs to comply with this proposal and maintain their current business model. However, the Commission does not have data to precisely estimate the possible capital costs for these three SDs.

TABLE 6—CURRENT CAPITAL REQUIREMENT (COMMON EQUITY TIER 1 CAPITAL RATIO OR EXCESS NET CAPITAL) AT THE SD OR ITS PARENT LEVEL

Name of swap dealers	Common equity tier 1 capital ratio at parent level	Excess net capital at entity or its parent level	SEC registered BD
BTIG LLC		[172] 50,043,660	Y
GAIN GTX LLC		[173] 14,821,951	N

[166] *http://www.citigroup.com/citi/investor/data/qer116.pdf?ieNocache=23.*

[167] *http://www.goldmansachs.com/investor-relations/creditor-information/creditor-Website-presentation.pdf*

[168] *https://www.jpmorganchase.com/corporate/investor-relations/document/1Q16_Earnings_Presentation.pdf*

[169] *http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=quarterly earnings#fbid=ECX9ZgSZ-Oq.*

[170] *https://www.morganstanley.com/about-us-ir/shareholder/1q2016.pdf.*

[171] Selected FCM Financial Data as of April 30, 2016. *http://www.cftc.gov/idc/groups/public/@financialdataforfcms/documents/file/fcmdata0416.pdf.*

TABLE 6—CURRENT CAPITAL REQUIREMENT (COMMON EQUITY TIER 1 CAPITAL RATIO OR EXCESS NET CAPITAL) AT THE SD OR ITS PARENT LEVEL—Continued

Name of swap dealers	Common equity tier 1 capital ratio at parent level	Excess net capital at entity or its parent level	SEC registered BD
ING CAPITAL MARKETS LLC [174]	ING bank—11.6% [175]		N
INTL FCSTONE MARKETS LLC		60,582,006	Y
JEFFERIES FINANCIAL PRODUCTS LLC		[176] 1,204,270,344	N
MACQUARIE ENERGY LLC	Macquarie Bank—9.9% [177]		N
MIZUHO CAPITAL MARKETS CORPORATION	Mizuho Financial Group—10.5% [178]		N
NOMURA DERIVATIVE PRODUCTS INC	Nomura Holdings, Inc.—15.1%		N
NOMURA GLOBAL FINANCIAL PRODUCTS INC	Nomura Holdings, Inc.—15.1%		Y
SMBC CAPITAL MARKETS INC	SMFG—11.81% [179]		N
JEFFERIES FINANCIAL SERVICES INC		1,204,270,344	N
CANTOR FITZGERALD SECURITIES		[180] 232,219,010	N
SHELL TRADING RISK MANAGEMENT LLC			N
BP ENERGY COMPANY			N
CITADEL SECURITIES SWAP DEALER LLC			N

5. Non-Financial/Commercial SDs

This proposal would require Non-Financial/Commercial SDs to maintain tangible net worth in an amount equal to or in excess of the minimum capital level ($20 million plus market risk charges and credit risk charges). Currently there is no capital requirement for commercial SDs. The Commission estimates that currently only one SD would be in this category, and believes that its tangible net worth greatly exceeds the Commission's proposed requirement.[181] Therefore, the costs of this proposal are not expected to be material because it is not expected that this firm would have to alter its existing business practice in any substantial way to comply with minimum tangible net worth requirement.

6. Non-U.S. SDs Not Subject to a Prudential Regulator

The Commission is proposing to allow a ''substituted compliance'' program for capital requirements for SDs that are: (1) Not organized under the laws of the U.S., and (2) not domiciled in the U.S. The Commission estimates that there are 17 non-U.S. provisionally registered SDs not subject to U.S. prudential regulators that would be eligible to apply for substituted compliance. Out of these 18 non-U.S. SDs, approximately 10 SDs are domiciled in the U.K., three SDs are domiciled in Japan, two SDs are domiciled in Mexico, one SD is domiciled in Singapore, and one SD is domiciled in Australia. The Commission would permit these non-U.S. SDs (or regulatory authorities in the non-U.S. SD's home country jurisdictions) to petition the Commission to satisfy the Commission's capital requirements through a program of substituted compliance with the SD's home country capital requirements. U.K., Japan, Mexico, Singapore, and Australia are members of Basel Committee on Banking Supervision and have adopted Basel III risk-based capital.[182] Thus, the Commission does not expect significant additional cost arising from this proposal for these entities.

Estimated Capital Requirement for IRS Positions of the SDs Subject to the Commission's Capital Requirement

The Commission focuses its analysis on IRS as it covers the majority of swaps' notional reported to SDRs. Table below shows that IRS positons reported to SDR on June 24, 2016 account for about $312 trillion. Cleared IRS positions are roughly $165 trillion, accounting for 53% of all IRS positions; while uncleared IRS positions are roughly $147 trillion, accounting for the rest 47%. Of the $147 trillion uncleared IRS positions, the Commission estimates that about 39% are inter-affiliate swaps [183] and 61% are outward-facing swaps.

TABLE 7—GROSS NOTIONAL OF IRS BILLION $ REPORTED TO SDR ON POSITIONS

[June 24, 2016]

	Uncleared	Cleared	Total
Outward-facing [184]	90,117	164,646	254,763

[172] *https://www.sec.gov/Archives/edgar/vprr/1600/16001826.pdf.*

[173] GAIN GTX LLC is a wholly owned subsidiary of GAIN Capital Holdings, Inc., a global provider of online trading services. GAIN Capital Group LLC (a CFTC registered FCM and RFD) is also subsidiary of GAIN Capital Holdings, Inc. and has excess net capital of 14,821,951.

[174] ING Bank was designated by the Basel Committee and the FSB as one of the global systemically important banks 'G–SIBs' and by the Dutch Central Bank and the Dutch Ministry of Finance as a domestic SIFI. See ''ING Group Annual Report on Form 20–F 2015''.

[175] *http://www.ing.com/About-us/Profile-Fast-facts/Fast-facts.htm.*

[176] Excess net capital of Jefferies LLC, parent of Jefferies Derivative Products LLC, Jefferies Financial Products LLC, and Jefferies Financial Services LLC.

[177] *http://www.macquarie.com/us/about/newsroom/2015/agm-2015.*

[178] *http://www.mizuho-fg.co.jp/english/faq/kessan.html.*

[179] *http://www.smfg.co.jp/english/investor/financial/latest_statement/2016_3/h2803_e1_01.pdf.*

[180] Excess net capital at Cantor Fitzgerald & CO. (FCM and Broker-Dealer), which is owned by Cantor Fitzgerald Securities (94% ownership).

[181] *http://www.cargill.com/company/financial/five-year/index.jsp.*

[182] *http://www.bis.org/bcbs/publ/d338.pdf.*

[183] An inter-affiliate swap is identified if the ultimate parent of both counterparties is the same entity, using the Commission's internal legal entity hierarchy database.

[184] These numbers are roughly the same numbers of CFTC Weekly Swap Report posted on *http://www.cftc.gov/MarketReports/SwapsReports/L1GrossExpCS.* The small discrepancies may be due to the fact that the table above is generated using the new automated weekly swaps report process.

TABLE 7—GROSS NOTIONAL OF IRS BILLION $ REPORTED TO SDR ON POSITIONS—Continued

[June 24, 2016]

	Uncleared	Cleared	Total
Inter-affiliate	57,222	2	57,224
Total	147,339	164,648	311,987

For the purpose of capital estimates, we double the notional amounts listed above since both counterparties to a swap position may be subject to the capital rules and therefore need to hold capital. Table below shows that of roughly $295 trillion uncleared IRS position on June 24, 2016 (double counting $147 trillion of uncleared notional), the Commission estimates that about 46% of uncleared swaps are held by SDs that are subject to the prudential regulators' capital requirement and, therefore, are exempt from this proposal, 30% of uncleared swaps are held by SDs that are subject to the Commission's capital requirement, while the rest 24% are held by institutions not subject to prudential regulators or the Commission's capital requirement.[185] About 88 trillion of uncleared IRS positions (with double counting) are held by SDs subject to the Commission's capital requirement. Of the 88 trillion uncleared IRS swap positions (double counting), 38% are outward-facing swaps while 62% are inter-affiliate swaps. The Commission assumes that these uncleared swaps will require margin of about 0.2% to two percent of gross notional amount.[186] The upper bound two percent margin rate based on average of table-based approach and is a conservative assumption because margin estimates from models tend to be on a much lower side. The initial margin amount required for these uncleared swaps (including inter-affiliate swaps) is 177 billion to 1.77 trillion. Assuming capital required is eight percent of margin amount, the capital required for the uncleared swaps held by SDs subject to CFTC's capital requirement would range from $14 billion to $140 billion. The Commission believes that most institutions, if not all institutions, will use models to calculate initial margin amount. If that is the case, the estimated capital required may be close to the lower bound of $14 billion. This estimated capital required here assumes that covered SDs currently do not hold capital for these swap positions. This is also a conservative assumption, because many SDs or their parent entities may already be holding capital against these uncleared swap positions. The Commission estimates that SDs may have significant amount of excess capital and in the case that SDs do not hold capital themselves, their parents may hold significant amount of excess capital. It may be possible for the consolidated entity (their parents) to keep the same level of capital within the group, but just reallocate among its subsidiaries and therefore, the additional cost of complying with the Commission's proposed capital requirement may not be too burdensome.

TABLE 8—GROSS NOTIONAL OF UNCLEARED IRS POSITIONS (BILLION $) REPORTED TO SDR ON JUNE 24, 2016

[Double counting as both Counterparties may need to hold capital]

Gross notional in billion $ for uncleared IRS position (double counting)	Outward-facing	Inter-affiliate	Total
Held by SDs subject to CFTC capital requirement	33,627	54,742	88,369
Held by SDs subject to Prudential Regulator (PR)'s capital requirement	89,062	46,689	135,751
Held by institutions not subject to CFTC or PR capital requirement	57,546	13,013	70,558
Total	180,234	114,443	294,677

The table below shows that of $329 trillion cleared IRS position on June 24, 2016 (double counting $216 trillion as both counterparties may need to hold capital against the same position), the Commission estimates that about 31% of cleared swaps are held by SDs that are already subject to prudential regulators' capital requirement and exempt from this proposal, nine percent of cleared swaps are held by SDs that are subject to the Commission's capital requirement, while the remaining 60% are held by institutions not subject to prudential regulators or the Commission's capital requirement. Roughly $29 trillion of outward-facing cleared IRS positions (with double counting) are held by SDs subject to the Commission's capital requirement. The Commission assumes that cleared swaps requires margin of about 0.14% (which is, 0.2%/√2) to 1.4% (2%/√2) of gross notional, because margin period of risk is five days for cleared swaps compared to ten days for uncleared swaps. The initial margin required for cleared swaps held by SDs subject to CFTC requirement is about 40 billion to 400.6 billion. Assuming capital required is eight percent of initial margin, the capital required for the cleared swaps held by SDs subject to CFTC's proposed capital requirement is about $4.84 billion to $48.4 billion. As discussed earlier, estimated capital required for covered SDs is most likely to be close to the lower bound of $4.84 billion. Therefore, the total capital required for both cleared and uncleared IRS positions held by SDs subject to the Commission's proposed rule would range from $18.84 billion to $188.4 billion. As discussed earlier, the estimated capital for IRS swaps held by SDs subject to the Commission's requirement is most likely to be $18.84 billion. As discussed earlier, many SDs

[185] These estimates are based on SDs registered with Commission on June 24, 2016. Since then, three SDs withdrew their registration with the Commission.

[186] The upper bound 2% is based on standardized approach, while the lower bound 0.2% is based on surveys that show model-based margin numbers could be as low as 10% of standardized margin requirement.

already hold significant amount of excess capital. In the case that SDs do not hold capital themselves, their parents hold significant amount of excess capital. It may be possible for the consolidated entity to keep the same level of capital within the group, but just reallocate among its subsidiaries and therefore, the additional cost of complying with the Commission's proposed capital requirement may not be too burdensome.

TABLE 9—GROSS NOTIONAL OF CLEARED IRS POSITIONS (BILLION $) REPORTED TO SDR ON JUNE 24, 2016

[Double counting as both Counterparties may need to hold capital]

Gross notional in billion $ for uncleared IRS position (double counting)	Outward-facing	Inter-affiliate	Total
Held by SDs subject to CFTC capital requirement	28,612	0	28,612
Held by SDs subject to Prudential Regulator (PR)'s capital requirement	102,221	0	102,221
Held by institutions not subject to CFTC or PR capital requirement	198,458	5	198,463
Total	329,291	5	329,296

Request for Comment

The Commission does not have sufficient financial information about these SDs to estimate precise costs of these proposed requirements and would welcome comments on how the proposed rule would impact the capital structure and the cost of doing business.

1. Would the minimum capital requirements represent a barrier to entry to firms that may otherwise seek to trade swaps as SDs? If so, which types of firms would be foreclosed?

2. Is it correct to assume that firms part of U.S. BHCs that are subject to Basel III and stress testing requirements would be readily able to meet the proposed capital requirement?

3. Is it correct to assume that ANC firms would be readily able to meet the proposed capital requirement?

4. Is it correct to assume that it would not be too costly for firms or their parents already subject to SEC current BD and/or proposed SBSD capital requirement or CFTC's current FCM capital requirement to comply with the capital requirement?

5. Is it correct to assume that proposed capital requirements would not be too burdensome for firms that are part of foreign BHCs subject to Basel?

6. Would it be too costly for the smaller SDs and SDs that are not subject to Basel or SEC or CFTC capital requirements to comply?

7. What restrictions would smaller firms be willing to accept for a lower capital requirement?

8. What alternative capital requirements might achieve the same policy goal?

ii. Margin vs. Capital

The Commission's proposal also would require an SD to include the initial margin for all swaps that would otherwise fall below the $50 million initial margin threshold amount or the $500,000 minimum transfer amount, as defined in Regulation 23.151, for purposes of computing the uncleared swap margin amount. As such, the uncleared swap margin amount would be the amount that an SD would have to collect from a counterparty, assuming that the exclusions and exemptions for collecting initial margin for uncleared swaps set forth in Regulations 23.150–161 would not apply, and also assuming that the thresholds under which initial margin and/or variation margin would not need to be exchanged would not apply. Accordingly, swaps that are not subject to the margin requirement such as those executed prior to the compliance date for margin requirements (''legacy swaps''), inter-affiliate swaps, and swaps with counterparties that would qualify for the exception or exemption under section 2(h)(7)(A) would have to be taken into account in determining the capital requirement.

The Commission is proposing this approach as it believes that it would be appropriate to require an SD to maintain capital for uncollateralized swap exposures to counterparties to cover the ''residual'' risk of a counterparty's uncleared swaps positions. The Commission's proposed approach regarding the inclusion of uncollateralized swap exposures in the SD's capital requirements is consistent with the approach adopted by the prudential regulators in setting capital requirements for SDs subject to their jurisdiction and is consistent with the approach proposed by the SEC for SBSDs.

The Commission provides certain exemptions from initial margin requirements for uncleared trades between affiliates. However, for the proposed capital rule inter-affiliate swaps would require capital to be held against them. The Commission requests comments on how the proposed capital rule would impact the competitiveness between different SDs based on the legal entity structure of the firm. The Commission understands that SDs may have different organizational structures due to various reasons. These reasons include, among others, centralized risk management for consolidation of balance-sheet, asset-liability and liquidity risk management; taxation benefits; funds transfer pricing; merger and acquisition; and subsidiaries in different jurisdictions. An arms-length swap may be offset by swap transaction with an affiliated SD because of any of the reasons listed above and possibly others. Centralization of risk within different entities of a firm in the same jurisdiction provides risk reduction benefits somewhat similar to the CCP and is encouraged.

As per the proposed rule, both parties to a swap transaction may be required to hold capital even if they both are part of the same parent institution. In that sense, there may be double (or more) counting of capital at the parent level for a given outward facing swap based on the legal structure of the entity. This may lead to an uneven playing field between SDs if for a given swap, different swap dealers are required to hold different amount of capital based on the number of inter-affiliate trades that they execute for the same client facing trade.

iii. Model vs. Table

The proposal would allow an SD to apply to the Commission or an RFA of which it is a member for approval to use internal models when calculating its market risk exposure and credit risk exposure. The proposal would also allow an FCM that is also an SD to apply in writing to the Commission or an RFA of which it is a member for approval to compute deductions for market risk and credit risk using internal models in lieu of the standardized deductions otherwise required.

As discussed above, there are approximately 107 SDs and no MSPs provisionally registered with the

Commission. Of these, the Commission estimates that approximately 55 SDs and no MSPs would be subject to the Commission's capital rules as they are not subject to those of a prudential regulator. The Commission further estimates conservatively that most of these SDs and MSPs would seek to obtain Commission approval to use models for computing their market and credit risk capital charges. These entities would incur cost to develop, maintain, document, audit models, and seek model approval. The possibility of using models to calculate credit risk and market risk charges may allow SDs to more efficiently deploy capital in other parts of its operations, because models could reduce capital charges and thereby could make additional capital available. This reduced capital requirement due to model use could improve returns of SDs and make them more competitive.

Although the Commission expects that SDs would use models for calculating market risk and credit risk charges, it is possible that some entities, particularly potential new entrants, may not have the risk management capabilities of which the models are an integral part, and, therefore, have to rely on the standardized haircut approach. The benefit of the standardized haircut approach for measuring market risk is its inherent simplicity. Therefore, this approach may improve customer protections and reduce systemic risk. In addition, a standardized haircut approach may reduce costs for the SD related to the risk of failing to observe or correct a problem with the use of models that could adversely impact the firm's financial conditions, because the use of models would require the allocation by the SD of additional firm resources and personnel. Conversely, if the proposed standardized haircuts are too conservative, they could make conducting swap business too costly, preventing or impairing the ability of the firms to engage in swaps, increasing transaction costs, reducing liquidity, and reducing the availability of swaps for risk mitigation by end users.

Request for Comment

Does the proposed capital requirement reflect the increased risk associated with the use of models and trading in a portfolio of swaps?

iv. Liquidity Requirement and Equity Withdrawal Restrictions

The Commission proposes additional liquidity requirements and equity withdrawal restrictions on certain eligible SDs. For SDs that elect a bank-based capital approach, the Commission is proposing to require the SD to maintain each day an amount of high quality liquid assets (''HQLAs''), that is no less than 100 percent of the SDs total net cash outflows over a prospective 30 calendar-day period. The HQLAs could be converted quickly into cash without reasonably expecting to incur losses in excess of the applicable haircuts during a stress period. Total net cash outflow amount are calculated by applying outflow and inflow rates, which reflect certain standardized stressed assumptions, against the balances of an SD's funding sources, obligations, transactions, and assets over a prospective 30 day period.

For SDs that elect a net liquid assets capital approach, the Commission is proposing a liquidity stress test to be conducted by SDs that elect a net liquid assets capital approach at least monthly that takes into account certain assumed stressed conditions lasting for 30 consecutive days. The proposed minimum elements are designed to ensure that SDs employ a stress test that is severe enough to produce an estimate of a potential funding loss of a magnitude that might be expected in a severely stressed market.

TABLE 10—MINIMUM LIQUIDITY REQUIREMENT

	Liquidity reserve requirement	Contingency funding plan	Risk management	Transferring approval
SDs that elect a bank-based capital approach.	Liquidity Coverage Ratio (LCR) >=1; HQLAs >= total net cash outflows over a prospective 30 calendar-day period.	Strategies to address liquidity shortfalls in emergency.	Review LCR quarterly by senior management overseeing risk management, annually by senior management.	Approval prior to transferring HQLAs if, after transferring, LCR <1.
SDs that elect a net liquid asset capital approach.	Liquidity Stress Test; Unencumbered cash + U.S. government securities >= a potential funding loss of a magnitude that might be expected in a severely stressed market for 30 consecutive days.	Strategies to address liquidity shortfalls in emergency..	.....	
SDs that elect a tangible net worth approach.	None		.....	

The benefit of the proposed liquidity requirement is an additional level of protection against disruptions in the ability to obtain funding for a firm. This requirement intends to increase the likelihood that a firm could withstand a general loss of confidence in the firm itself, or the markets more generally and stay solvent for up to 30 days, during which time it could either regain the ability to obtain funding in the ordinary course or else better position itself for resolution, with less impact on other market participants and the financial system. Therefore, this requirement may reduce the likelihood and severity of a fire sale and thus mitigate spillover effects and lower systemic risk. This, in turn, may increase confidence in swap markets and may lead to an increase in the use of swaps.

However, this requirement would impose additional cost of capital and other costs directly related to the amount of the required liquidity reserve because an SD would be unable to deploy the assets that are maintained for the liquidity reserve in other, potentially more profitable ways. In addition, some firms may incur more implementation costs, because, firms (or their parent holding companies) that are

already complying with Basel III or SEC's liquidity requirements may already run stress tests, maintain liquidity reserves based on those tests, and/or have a written contingency funding plan.

Request for Comment

How much additional cost would SDs incur resulting from the proposed liquidity requirements given their current practice? The Commission requests that commenters quantify the extent of the additional cost the proposed minimum liquidity requirement would incur based on its portfolios and financials, and provide the Commission with such data. The Commission also requests comments on alternative approaches to liquidity requirements to achieve the same policy goal.

v. Other Considerations

The proposed requirements should reduce the risk of a failure of any major market participant in the swap market, which in turn reduces the possibility of a general market failure, and thus promotes confidence for market participants to transact in swaps for investment and hedging purposes. The proposed capital requirements are designed to promote confidence in SDs among customers, counterparties, and the entities that provide financing to SDs, thereby, lessen the potential that these market participants may seek to rapidly withdraw assets and financing from SDs during a time of market stress. This heightened confidence is expected to increase swap transactions and promote competition among dealers. A more competitive swap market may promote a more efficient capital allocation.

However, to the extent that costs associated with the proposed rules are high, they may negatively affect competition within the swap markets. This may, for example, lead smaller dealers or entities for whom dealing is not a core business to exit the market because compliance with the proposed minimum capital, liquidity, and reporting requirements is not feasible due to its cost. The same costs might also deter the entry of new SDs into the market, and if sufficiently high, increase concentration among SDs.

The proposals ultimately adopted could have a substantial impact on domestic and international commerce and the relative competitive position of SDs operating under different requirements of various jurisdictions. Specifically, SDs subject to a particular regulatory regime may be advantaged or disadvantaged if corresponding requirements in other regimes are substantially more or less stringent. This could affect the ability of U.S. SDs to compete in the domestic and global markets, the ability of non-U.S. to compete in U.S. markets. Substantial differences between the U.S. and foreign jurisdictions in the costs of complying with these requirements for swaps between U.S. and foreign jurisdictions could reduce cross-border capital flows and hinder the ability of global firms to most efficiently allocate capital among legal entities to meet the demands of their customers/counterparties.

The willingness of end users to trade with an SD dealer will depend on their evaluation of the counterparty credit risks of trading with that particular SD compared to alternative SDs, and their ability to negotiate favorable price and other terms. The proposed capital, liquidity, and risk management requirements would in general reduce the likelihood of SDs' defaulting or failing, and therefore may increase the willingness of end users to trade with more SDs that have strong capital and liquidity reserves. End users of covered swaps are mostly made up of sophisticated participants such as hedge fund, asset management, other financial firms, and large commercial corporations. Many of these entities trade substantial volume of swaps and are relatively well-positioned to negotiate price and other terms with competing dealers. To the extent that the proposals result in increased competition, participants should be able to take advantage of this increased competition and negotiate improved terms. On the other hand, SDs may pass on additional capital, liquidity, and operational costs resulting from the proposal to end users in the form of higher fees or wider spreads. Thus end users may experience increased cost of using swaps for hedging and investing purposes.

In addition, benefits may arise when SDs consolidate with other affiliated SDs, FCMs, and/or broker-dealers. This may yield efficiencies for clients conducting business in swaps, including netting benefits, reduced number of account relationships, and reduced number of governing agreements. These potential benefits, however, may be offset by reduced competition from a smaller number of competing SDs. Further, the proposals would permit conducting swap business in an entity jointly registered as an FCM, or SBSD, or broker-dealer, which may offer the potential for these firms to offer portfolio margining for a variety of positions. From a holding company's perspective, aggregating swap business in a single entity, could help simplify and streamline risk management, allow more efficient use of capital, as well as operational efficiencies, and avoid the need for multiple netting and other agreements.

The proposed rules may create the potential for regulatory arbitrage to the extent that they differ from corresponding rules other regulators adopt. Also, to the extent that the proposed requirements are overly stringent, they may prevent or discourage new entrants into swap markets and thereby may either increase spreads and trading costs or even reduce the availability of swaps. In these cases, end users would face higher cost or be forced to use less effective financial instruments to meet their business needs.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 23

Capital and margin requirements, Major swap participants, Swap dealers, Swaps.

17 CFR Part 140

Authority delegations (Government agencies).

For the reasons discussed in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

■ 1. The authority citation for part 1 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 9a, 12, 12a, 16, 18, 19, 21, and 23.

■ 2. In § 1.10, revise paragraph (f)(1) introductory text; paragraphs (f)(1)(i)(B), (f)(1)(ii)(B), and (g)(1); paragraph (g)(2) introductory text; and paragraph (h) to read as follows:

§ 1.10 Financial reports of futures commission merchants and introducing brokers.

* * * * *

(f) *Extension of time for filing uncertified reports.* (1) In the event a registrant finds that it cannot file its Form 1–FR, or, in accordance with paragraph (h) of this section, its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, part II,

part IIA, part II CSE (FOCUS report), or a Form SBS, for any period within the time specified in paragraphs (b)(1)(i) or (b)(2)(i) of this section without substantial undue hardship, it may request approval for an extension of time, as follows:

(i) * * *

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17a–5(m) of this title, for an extension of time to file its FOCUS report or Form SBS. The registrant must also promptly file with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1).

* * * * *

(ii) * * *

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association copies of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17a–5(m) of this title, for an extension of time to file its FOCUS report or Form SBS. The registrant also must promptly file with the National Futures Association copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon the receipt by the National Futures Association of a copy of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(ii).

* * * * *

(g) *Public availability of reports.* (1) Forms 1–FR filed pursuant to this section, and FOCUS reports or Forms SBS filed in lieu of Forms 1–FR pursuant to paragraph (h) of this section, will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter, except for the information described in paragraph (g)(2) of this section.

(2) The following information in Forms 1–FR, and the same or equivalent information in FOCUS reports or Forms SBS filed in lieu of Forms 1–FR, will be publicly available:

* * * * *

(h) *Filing option available to a futures commission merchant or an introducing broker that is also a securities broker or dealer.* Any applicant or registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer, a security-based swap dealer, or a major security-based market participant may comply with the requirements of this section by filing (in accordance with paragraphs (a), (b), (c), and (j) of this section) a copy, as applicable, of its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE (FOCUS Report), or Form SBS, in lieu of Form 1–FR; *Provided, however,* That all information which is required to be furnished on and submitted with Form 1–FR is provided with such FOCUS Report or Form SBS; and *Provided, further,* That a certified FOCUS Report or Form SBS filed by an introducing broker or applicant for registration as an introducing broker in lieu of a certified Form 1–FR–IB must be filed according to National Futures Association rules, either in paper form or electronically, in accordance with procedures established by the National Futures Association, and if filed electronically, a paper copy of such filing with the original manually signed certification must be maintained by such introducing broker or applicant in accordance with § 1.31.

* * * * *

■ 3. Amend § 1.12 as follows:

■ a. Revise paragraph (a) introductory text and paragraphs (a)(1), (b)(3), and (b)(4); and

■ b. Add paragraph (b)(5).

The revisions and addition to read as follows:

§ 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

(a) Each person registered as a futures commission merchant or who files an application for registration as a futures commission merchant, and each person registered as an introducing broker or who files an application for registration as an introducing broker (except for an introducing broker or applicant for registration as an introducing broker operating pursuant to, or who has filed concurrently with its application for registration, a guarantee agreement and who is not also a securities broker or dealer), who knows or should have known that its adjusted net capital at any time is less than the minimum required by § 1.17 or by the capital rule of any self-regulatory organization to which such person is subject, or the minimum net capital requirements of the Securities and Exchange Commission if the applicant or registrant is registered with the Securities and Exchange Commission, must:

(1) Give notice, as set forth in paragraph (n) of this section that the applicant's or registrant's capital is below the applicable minimum requirement. Such notice must be given immediately after the applicant or registrant knows or should have known that its adjusted net capital or net capital, as applicable, is less than minimum required amount; and

* * * * *

(b) * * *

(3) 150 percent of the amount of adjusted net capital required by a registered futures association of which it is a member, unless such amount has been determined by a margin-based capital computation set forth in the rules of the registered futures association, and such amount meets or exceeds the amount of adjusted net capital required under the margin-based capital computation set forth in § 1.17(a)(1)(i)(B), in which case the required percentage is 110 percent;

(4) For securities brokers or dealers, the amount of net capital specified in Rule 17a–11(b) of the Securities and Exchange Commission (§ 240.17a–11(b) of this title); or

(5) For security-based swap dealers or major security-based swap participants, the amount of net capital specified in Rule 18a–8(b) of the Securities and Exchange Commission (§ 240.18a–8(b) of this title), must file notice to that effect, as soon as possible and no later than twenty-four (24) hours of such event.

* * * * *

■ 4. In § 1.16, revise paragraphs (f)(1)(i)(B) and (f)(1)(ii)(B) to read as follows:

§ 1.16 Qualifications and reports of accountants.

* * * * *

(f)(1) * * *

(i) * * *

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer, a security-based swap dealer, or a major security-based swap participant, may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining

authority, pursuant to § 240.17a–5(m) of this title, for an extension of time to file audited annual financial statements. The registrant must also promptly file with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(i).

* * * * *

(ii) * * *

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer, a security-based swap dealer, or a major security-based swap participant may file with the National Futures Association copies of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17a–5(m) of this title, for an extension of time to file audited annual financial statements. The registrant must also file promptly with the National Futures Association copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon the receipt by the National Futures Association of a copy of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(ii).

* * * * *

■ 5. Amend § 1.17 as follows:

■ a. Revise paragraphs (a)(1)(i)(A), (a)(1)(i)(B), (a)(1)(ii), (b)(9), and (b)(10);

■ b. Add paragraph (b)(11);

■ c. Revise paragraphs (c)(1)(i), (c)(2)(i), (c)(2)(ii)(B), and (c)(2)(ii)(D);

■ d. Add paragraphs (c)(2)(ii)(G) and (c)(5)(iii);

■ e. Revise paragraphs (c)(5)(viii), (c)(5)(ix), (c)(5)(x), and (c)(5)(xiv);

■ f. Add paragraph (c)(5)(xv);

■ g. Revise paragraph (c)(6) introductory text and paragraphs (c)(6)(i) and (c)(6)(iv)(A);

■ h. Add paragraphs (c)(6)(v) and (c)(6)(vi); and

■ i. Revise paragraph (g)(1).

The revisions and additions to read as follows:

§ 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.

(a)(1)(i) * * *

(A) $1,000,000, *Provided, however,* that if the futures commission merchant also is a swap dealer, the minimum amount shall be $20,000,000;

(B) The futures commission merchant's risk-based capital requirement, computed as eight percent of the sum of:

(*1*) The total risk margin requirement (as defined in paragraph (b)(8) of this section) for positions carried by the futures commission merchant in customer accounts and noncustomer accounts;

(*2*) The total initial margin that the futures commission merchant is required to post with a clearing agency or broker for security-based swap positions carried in customer and noncustomer accounts;

(*3*) The total uncleared swaps margin, as that term is defined in § 23.100 of this chapter;

(*4*) The total initial margin that the futures commission merchant is required to post with a broker or clearing organization for all proprietary cleared swaps positions carried by the futures commission merchant;

(*5*) The total initial margin computed pursuant to Rule 18a–3(c)(1)(i)(B) (§ 240.18a–3(c)(1)(B) of this title) of the Securities and Exchange Commission for all uncleared security-based swap positions carried by the futures commission merchant without regard to any initial margin exemptions or exclusions that the rules of the Securities and Exchange Commission may provide to such security-based swap positions; and

(*6*) the total initial margin that the futures commission merchant is required to post with a broker or clearing agency for proprietary cleared security-based swaps;

* * * * *

(ii) A futures commission merchant that is registered as a swap dealer and has received approval from the Commission, or from a registered futures association of which the futures commission merchant is a member, to use internal models to compute market risk and credit risk charges for uncleared swaps must maintain net capital equal to or in excess of $100 million and adjusted net capital equal to or in excess of $20 million.

* * * * *

(b) * * *

(9) *Cleared over the counter derivative positions* means a swap cleared by a derivatives clearing organization or a clearing organization exempted by the Commission from registering as a derivatives clearing organization, and further includes positions cleared by any organization permitted to clear such positions under the laws of the relevant jurisdiction.

(10) *Cleared over the counter customer* means any person that is not a proprietary person as defined in § 1.3(y) and for whom the futures commission merchant carries on its books one or more accounts for the cleared over the counter derivative positions of such person.

(11) *Uncleared swap margin.* This term means the amount of initial margin that would be required to be collected by a swap dealer, as set out in § 23.152(a) of this chapter for each outstanding swap (including the swaps that are exempt from the scope of § 23.152 of this chapter by § 23.150 of this chapter), exempt foreign exchange swaps or foreign exchange forwards, or netting set of swaps or foreign exchange swaps, for each counterparty, as if that counterparty was an unaffiliated swap dealer. In computing the uncleared swap margin amount, a swap dealer may not exclude the initial margin threshold amount or minimum transfer amount as such terms are defined in § 23.151 of this chapter.

(c) * * *

(1) * * *

(i) Unrealized profits shall be added and unrealized losses shall be deducted in the accounts of the applicant or registrant, including unrealized profits and losses on fixed price commitments, uncleared swaps, and forward contracts;

* * * * *

(2) * * *

(i) Exclude any unsecured commodity futures, options, cleared swaps, or other Commission regulated account containing a ledger balance and open trades, the combination of which liquidates to a deficit or containing a debit ledger balance only: *Provided, however,* deficits or debit ledger balances in unsecured customers', non-customers', and proprietary accounts, which are the subject of calls for margin or other required deposits may be included in current assets until the close of business on the business day following the date on which such deficit or debit ledger balance originated providing that the account had timely satisfied, through the deposit of new funds, the previous day's debit or deficits, if any, in its entirety.

(ii) * * *

(B)(*1*) Interest receivable, floor brokerage receivable, commissions receivable from other brokers or dealers (other than syndicate profits), mutual fund concessions receivable and management fees receivable from registered investment companies and commodity pools that are not outstanding more than thirty (30) days from the date they are due;

(*2*) Dividends receivable that are not outstanding more than thirty (30) days from the payable date; and

(*3*) Commissions or fees receivable, including from other brokers or dealers, resulting from swap transactions that are not outstanding more than sixty (60) days from the month end accrual date provided they are billed promptly after the close of the month of their inception;

* * * * *

(D) Receivables from registered futures commission merchants or brokers, resulting from commodity futures, options, cleared swaps, foreign futures or foreign options transactions, except those specifically excluded under paragraph (c)(2)(i) of this section;

* * * * *

(G) Receivables from third-party custodians that represent the futures commission merchant's initial margin deposits associated with uncleared swap transactions pursuant to § 23.158 of this chapter or uncleared security-based swap transactions under the rules of the Securities and Exchange Commission.

* * * * *

(5) * * *

(iii) *Swaps*—(A) *Uncleared swaps that are credit-default swaps referencing broad-based securities indices*—(*1*) *Short positions (selling protection).* In the case of an uncleared short credit default swap that references a broad-based securities index, deducting the percentage of the notional amount based upon the current basis point spread of the credit default swap and the maturity of the credit default swap in accordance with the following table:

Length of time to maturity of CDS contract	Basis point spread (%)					
	100 or less	101–300	301–400	401–500	501–699	700 or more
12 months or less	0.67	1.33	3.33	5.00	6.67	10.00
13 months to 24 months	1.00	2.33	5.00	6.67	8.33	11.67
25 months to 36 months	1.33	3.33	6.67	8.33	10.00	13.33
37 months to 48 months	2.00	4.00	8.33	10.00	11.67	15.00
49 months to 60 months	2.67	4.67	10.00	11.67	13.33	16.67
61 months to 72 months	3.67	5.67	11.67	13.33	15.00	18.33
73 months to 84 months	4.67	6.67	13.33	15.00	16.67	20.00
85 months to 120 months	5.67	10.00	15.00	16.67	18.33	26.67
121 months and longer	6.67	13.33	16.67	18.33	20.00	33.33

(*2*) *Long positions (purchasing protection).* In the case of an uncleared swap that is a long credit default swap referencing a broad-based securities index, deducting 50 percent of the deduction that would be required by paragraph (c)(5)(iii)(A)(*1*) of this section if the swap was a credit default swap.

(*3*) *Long and short positions*—(*i*) *Long and short uncleared credit default swaps referencing the same broad-based security index.* In the case of uncleared swaps that are long and short credit default swaps referencing the same broad-based security index, have the same credit events which would trigger payment by the seller of protection, have the same basket of obligations which would determine the amount of payment by the seller of protection upon the occurrence of a credit event, that are in the same or adjacent maturity spread category and have a maturity date within three months of the other maturity category, deducting the percentage of the notional amounts specified in the higher maturity category under paragraph (c)(5)(iii)(A)(*1*) or (c)(5)(iii)(A)(*2*) of this section on the excess of the long or short position.

(*ii*) *Long basket of obligors and uncleared long credit default swap referencing a broad-based securities index.* In the case of an uncleared swap that is a long credit default swap referencing a broad-based securities index and the futures commission merchant is long a basket of debt securities comprising all of the components of the securities index, deducting 50 percent of the amount specified in § 240.15c3–1(c)(2)(vi) of this title for the component of securities, provided the futures commission merchant can deliver the component securities to satisfy the obligation of the futures commission merchant on the credit default swap.

(*iii*) *Short basket of obligors and uncleared short credit default swap referencing a broad-based securities index.* In the case of an uncleared swap that is a short credit default swap referencing a broad-based securities index and the futures commission merchant is short a basket of debt securities comprising all of the components of the securities index, deducting the amount specified in § 240.15c3–1(c)(2)(vi) of this title for the component securities.

(B) *Interest rate swaps.* In the case of an uncleared interest rate swap, deducting the percentage deduction specified in § 240.15c3–1(c)(2)(vi)(A) of this title based on the maturity of the interest rate swap, provided that the percentage deduction must be no less than 0.5 percent;

(C) *All other uncleared swaps.* (*1*) In the case of any uncleared swap that is not a credit default swap or interest rate swap, deducting the amount calculated by multiplying the notional value of the swap by:

(*i*) The percentage specified in § 240.15c3–1 of this title applicable to the reference asset if § 240.15c3–1 of this title specifies a percentage deduction for the type of asset and this section does not specify a percentage deduction;

(*ii*) Six percent in the case of a currency swap that references euros, British pounds, Canadian dollars, Japanese yen, or Swiss francs, and twenty percent in the case of currency swaps that reference any other foreign currencies; or

(*iii*) In the case of over-the-counter swap transactions involving commodities, 20 percent of the market value of the amount of the underlying commodities; and

(*iv*) In the case of security-based swaps as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), the percentage as specified in § 240.15c3–1 of this title.

* * * * *

(viii) In the case of a futures commission merchant, for undermargined customer accounts, the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements,

clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding no more than one business day. If there are no such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary, after application of calls for margin or other required deposits outstanding no more than one business day, to restore original margin when the original margin has been depleted by 50 percent or more: *Provided,* to the extent a deficit is excluded from current assets in accordance with paragraph (c)(2)(i) of this section such amount shall not also be deducted under this paragraph. In the event that an owner of a customer account has deposited an asset other than cash to margin, guarantee or secure his account, the value attributable to such asset for purposes of this subparagraph shall be the lesser of:

(A) The value attributable to the asset pursuant to the margin rules of the applicable board of trade, or

(B) The market value of the asset after application of the percentage deductions specified in paragraph (c)(5) of this section;

(ix) In the case of a futures commission merchant, for undermargined noncustomer and omnibus accounts the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding no more than one business day. If there are no such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary after application of calls for margin or other required deposits outstanding no more than one business day to restore original margin when the original margin has been depleted by 50 percent or more: *Provided,* to the extent a deficit is excluded from current assets in accordance with paragraph (c)(2)(i) of this section such amount shall not also be deducted under this paragraph. In the event that an owner of a noncustomer or omnibus account has deposited an asset other than cash to margin, guarantee or secure his account the value attributable to such asset for purposes of this paragraph shall be the lesser of the value attributable to such asset pursuant to the margin rules of the applicable board of trade, or the market value of such asset after application of the percentage deductions specified in paragraph (c)(5) of this section;

(x) In the case of open futures contracts, cleared swaps, and granted (sold) commodity options held in proprietary accounts carried by the applicant or registrant which are not covered by a position held by the applicant or registrant or which are not the result of a ''changer trade'' made in accordance with the rules of a contract market:

(A) For an applicant or registrant which is a clearing member of a clearing organization for the positions cleared by such member, the applicable margin requirement of the applicable clearing organization;

(B) For an applicant or registrant which is a member of a self-regulatory organization, 150 percent of the applicable maintenance margin requirement of the applicable board of trade, or clearing organization, whichever is greater;

(C) For all other applicants or registrants, 200 percent of the applicable maintenance margin requirements of the applicable board of trade or clearing organization, whichever is greater; or

(D) For open contracts or granted (sold) commodity options for which there are no applicable maintenance margin requirements, 200 percent of the applicable initial margin requirement: *Provided,* the equity in any such proprietary account shall reduce the deduction required by this paragraph (c)(5)(x) if such equity is not otherwise includable in adjusted net capital;

* * * * *

(xiv) For securities brokers and dealers, all other deductions specified in § 240.15c3–1 of this title;

(xv) In the case of a futures commission merchant, the amount of the uncleared swap margin that the futures commission merchant has not collected from a swap counterparty, less any amounts owed by the futures commission merchant to the swap counterparty for uncleared swap transactions.

(6)(i) *Election of alternative capital deductions that have received approval of Securities and Exchange Commission pursuant to § 240.15c3–1(a)(7) of this title.* Any futures commission merchant that is also registered with the Securities and Exchange Commission as a securities broker or dealer, and who also satisfies the other requirements of this paragraph (c)(6), may elect to compute its adjusted net capital using the alternative capital deductions that, under § 240.15c3–1(a)(7) of this title, the Securities and Exchange Commission has approved by written order in lieu of the deductions that would otherwise be required under this section.

* * * * *

(iv) * * *

(A) Information that the futures commission merchant files on a monthly basis with its designated examining authority or the Securities and Exchange Commission, whether by way of schedules to its FOCUS reports or by other filings, in satisfaction of § 240.17a–5(a)(5) of this title;

* * * * *

(v) *Election of alternative market risk and credit risk capital deductions for a futures commission merchant that is registered as a swap dealer and has received approval of the Commission or a registered futures association for which the futures commission merchant is a member.* For purposes of this paragraph (c)(6)(v) only, all references to futures commission merchant means a futures commission merchant that is also registered as a swap dealer.

(A) A futures commission merchant may apply in writing to the Commission or a registered futures association of which it is a member for approval to compute deductions for market risk and credit risk using internal models in lieu of the standardized deductions otherwise required under this section. The futures commission merchant must file the application in accordance with instructions approved by the Commission and specified on the Web site of the registered futures association.

(B) A futures commission merchant's application must include the information set forth in Appendix A to § 23.102 of this chapter and the market risk and credit risk charges must be computed in accordance with § 23.102 of this chapter.

(vi) A futures commission merchant that is also registered as a swap dealer must comply with the liquidity requirements in § 23.104(b)(1) of this chapter as though it were a swap dealer that elected to follow § 23.101(a)(1)(ii) of this chapter in computing its minimum capital requirement.

* * * * *

(g)(1) The Commission may by order restrict, for a period of up to twenty business days, any withdrawal by a futures commission merchant of equity capital, or any unsecured advance or loan to a stockholder, partner, limited liability company member, sole proprietor, employee or affiliate if the Commission, based on the facts and information available, concludes that

any such withdrawal, advance or loan may be detrimental to the financial integrity of the futures commission merchant, or may unduly jeopardize its ability to meet customer obligations or other liabilities that may cause a significant impact on the markets.

* * * * *

■ 6. In § 1.65, revise paragraph (b) introductory text and paragraphs (d) and (e) to read as follows:

§ 1.65 Notice of bulk transfers and disclosure obligations to customers.

* * * * *

(b) *Notice to the Commission.* Each futures commission merchant or introducing broker shall file with the Commission, at least ten business days in advance of the transfer, notice of any transfer of customer accounts carried or introduced by such futures commission merchant or introducing broker that is not initiated at the request of the customer, where the transfer involves the lesser of:

* * * * *

(d) The notice required by paragraph (b) of this section shall be considered filed when submitted to the Director of the Division of Swap Dealer and Intermediary Oversight, in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission.

(e) In the event that the notice required by paragraph (b) of this section cannot be filed with the Commission at least ten days prior to the account transfer, the Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight, or such other employee or employees as the Director may designate from time to time, the authority to accept a lesser time period for such notification at the Director's or designee's discretion. In any event, however, the transferee futures commission merchant or introducing broker shall file such notice as soon as practicable and no later than the day of the transfer. Such notice shall include a brief statement explaining the circumstances necessitating the delay in filing.

* * * * *

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 7. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 8. Revise subpart E of part 23 to read as follows:

Subpart E—Capital and Margin Requirements for Swap Dealers and Major Swap Participants

Sec.
23.100 Definitions applicable to capital requirements.
23.101 Minimum financial requirements for swap dealers and major swap participants.
23.102 Calculation of market risk exposure requirement and credit risk exposure requirement using internal models.
23.103 Calculation of market risk exposure requirement and credit risk exposure requirement when models are not approved.
23.104 Liquidity requirements and equity withdrawal restrictions.
23.105 Financial recordkeeping, reporting and notification requirements for swap dealers and major swap participants.
23.106 Comparability determination for substituted compliance.
23.107–23.149 [Reserved]

Subpart E—Capital and Margin Requirements for Swap Dealers and Major Swap Participants

§ 23.100 Definitions applicable to capital requirements.

For purposes of §§ 23.101 through 23.108 of subpart E of this part, the following terms are defined as follows:

Actual daily net trading profit and loss. This term is used in assessing the performance of a swap dealer's VaR measure and refers to changes in the swap dealer's portfolio value that would have occurred were end-of-day positions to remain unchanged (therefore, excluding fees, commissions, reserves, net interest income, and intraday trading).

Credit risk. This term refers to the risk that the counterparty to an uncleared swap transaction could default before the final settlement of the transaction's cash flows.

Credit risk exposure requirement. This term refers to the amount that the swap dealer is required to compute under § 23.102 if approved to use internal credit risk models, or to compute under § 23.103 if not approved to use internal credit risk models.

Exempt foreign exchange swaps and foreign exchange forwards are those foreign exchange swaps and foreign exchange forwards that were exempted from the definition of a swap by the U.S. Department of the Treasury.

Market risk exposure. This term means the risk of loss in a position or portfolio of positions resulting from movements in market prices and other factors. Market risk exposure is the sum of:

(1) General market risks including changes in the market value of a particular assets that result from broad market movements, such as a changes in market interest rates, foreign exchange rates, equity prices, and commodity prices;

(2) Specific risk, which includes risks that affect the market value of a specific instrument, such as the credit risk of the issuer of the particular instrument, but do not materially alter broad market conditions;

(3) Incremental risk, which means the risk of loss on a position that could result from the failure of an obligor to make timely payments of principal and interest; and

(4) Comprehensive risk, which is the measure of all material price risks of one or more portfolios of correlation trading positions.

Market risk exposure requirement. This term refers to the amount that the swap dealer is required to compute under § 23.102 if approved to use internal market risk models, or § 23.103 if not approved to use internal market risk models.

Predominantly engaged in non-financial activities. A swap dealer is predominantly engaged in non-financial activities if:

(1) The swap dealer's consolidated annual gross financial revenues in either of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's consolidated gross revenue in that fiscal year (''15% revenue test''), and

(2) The consolidated total financial assets of the swap dealer at the end of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's consolidated total assets as of the end of the fiscal year (''15% asset test''). For purpose of computing the 15% revenue test or the 15% asset test, a swap dealer's activities shall be deemed financial activities if such activities are defined as financial activities under 12 CFR 242.3 and Appendix A of 12 CFR part 242, including lending, investing for others, safeguarding money or securities for others, providing financial or investment advisory services, underwriting or making markets in securities, providing securities brokerage services, and engaging as principal in investing and trading activities; *provided, however,* a swap dealer may exclude from its financial activities accounts receivable resulting from non-financial activities.

Prudential regulator. This term has the same meaning as set forth in section

1a(39) of the Act, and includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency, as applicable to a swap dealer or major swap participant.

Regulatory capital. This term shall mean the amount of tier 1 capital or ratio based capital, tangible net worth, or calculated net capital of a swap dealer or major swap participant relevant to the associated applicable regulatory capital requirement.

Regulatory capital requirement. This term refers to each of the capital requirements that § 23.101 applies to a swap dealer or major swap participant.

Tangible net worth. This term means the net worth of a swap dealer or major swap participant as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets. In determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value. A swap dealer or major swap participant must include in its computation of tangible net worth all liabilities or obligations of a subsidiary or affiliate that the swap dealer or major swap participant guarantees, endorses, or assumes either directly or indirectly.

Uncleared swap margin. This term means the amount of initial margin, computed in accordance with § 23.154, that a swap dealer would be required to collect from each counterparty for each outstanding swap position of the swap dealer. A swap dealer must include all swap positions in the calculation of the uncleared margin amount, including swaps that are exempt from the scope of the Commission's margin for uncleared swaps rules pursuant to § 23.150, exempt foreign exchange swaps or foreign exchange forwards, or netting set of swaps or foreign exchange swaps, for each counterparty, as if that counterparty was an unaffiliated swap dealer. Furthermore, in computing the uncleared swap margin amount, a swap dealer may not exclude the *initial margin threshold amount* or *minimum transfer amount* as such terms are defined in § 23.151.

§ 23.101 Minimum financial requirements for swap dealers and major swap participants.

(a)(1) Except as provided in paragraphs (a)(2) through (a)(5) of this section, each swap dealer must elect to be subject to the minimum capital requirements set forth in either paragraphs (a)(1)(i) or (a)(1)(ii) of this section:

(i) A swap dealer that elects to meet the capital requirements in this paragraph (a)(1)(i) must maintain regulatory capital that equals or exceeds the greatest of the following:

(A) $20 million of common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR 217.20, as if the swap dealer itself were a bank holding company subject to 12 CFR part 217;

(B) Common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR 217.20, equal to or greater than eight percent of the swap dealer's risk-weighted assets computed under the bank holding company regulations in 12 CFR part 217, as if the swap dealer itself were a bank-holding company subject to 12 CFR part 217; *provided, however,* that the swap dealer must add to its risk-weighted assets market risk capital charges computed in accordance with § 1.17 of this chapter if the swap dealer has not obtained the approval of the Commission or of a registered futures association to use internal capital models under § 23.102;

(C) Common equity tier 1 capital, as defined under 12 CFR 217.20, equal to or greater than eight percent of the sum of:

(*1*) The amount of uncleared swap margin, as that term is defined in § 23.100, for each uncleared swap position open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 23.154;

(*2*) The amount of initial margin that would be required for each uncleared security-based swap position open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 240.18a–3(c)(1)(i)(B) of this title without regard to any initial margin exemptions or exclusions that the rules of the Securities and Exchange Commission may provide to such security-based swap positions; and

(*3*) The amount of initial margin required by clearing organizations for cleared proprietary futures, foreign futures, swaps, and security-based swaps positions open on the books of the swap dealer; or,

(D) The amount of capital required by a registered futures association of which the swap dealer is a member.

(ii) A swap dealer that elects to meet the capital requirements in this paragraph (a)(1)(ii) must maintain regulatory capital that equals or exceeds the greatest of the following:

(A) The amount of tentative net capital and net capital required by, and computed in accordance with, § 240.18a–1 of this title as if the swap dealer were a security-based swap dealer registered with the Securities and Exchange Commission and subject to § 240.18a–1 of this title; *Provided, however,* that the swap dealer's computation is subject to the following adjustments:

(*1*) In computing its minimum capital requirement, a swap dealer shall adjust the ''risk margin amount'' subject to the eight percent computation under § 240.18a–1(a)(1) and (2) of this title to be the sum of:

(*i*) The amount of uncleared swap margin, as that term is defined in § 23.100, for each uncleared swap position open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 23.154;

(*ii*) The amount of initial margin that would be required for each uncleared security-based swap position open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 240.18a–3(c)(1)(i)(B) of this title without regard to any initial margin exemptions or exclusions that the rules of the Securities and Exchange Commission may provide to such security-based swap positions;

(*iii*) The amount of risk margin, as defined in § 1.17(b)(8) of this chapter, required by a clearing organization for proprietary futures, swaps, and foreign futures positions open on the books of the swap dealer; and

(*iv*) The amount of initial margin required by a clearing organization for proprietary security-based swaps open on the books of the swap dealer;

(*2*) A swap dealer that uses internal models to compute market risk for its proprietary positions under § 240.18a–1(d) of this title must calculate the total market risk as the sum of the VaR measure, stressed VaR measure, specific risk measure, comprehensive risk measure, and incremental risk measure of the portfolio of proprietary positions in accordance with § 23.102 and Appendix A of § 23.102;

(*3*) A swap dealer that has obtained approval from the Commission or from a registered futures association of which it is a member to uses internal models to compute credit risk capital charges for receivables resulting from uncleared swap and security-based swap transactions may use such models in computing the credit risk charge for receivables resulting from swap and security-based swap transactions under § 240.18a–1(d) of this title from all counterparties, including commercial end users as defined in § 240.18a–3(b)(2) of this title;

(*4*) A swap dealer may recognize as a current asset, receivables from third-

party custodians that maintain the swap dealer's initial margin deposits associated with uncleared swap transactions under § 23.152 and the swap dealer's initial margin deposits associated with uncleared security-based swap transactions under § 240.18a–1(c)(1) of this title; and

(*5*) A swap dealer may not deduct the margin difference as that term is defined in § 240.18a–1(c)(1)(viii) of this title for swap and security-based swap transactions in lieu of collecting margin on such transactions; or

(B) The amount of capital required by a registered futures association of which the swap dealer is a member.

(2)(i) A swap dealer that is ''predominantly engaged in non-financial activities'' as defined in § 23.100 may elect to meet the minimum capital requirements in this paragraph (a)(2) in lieu of the capital requirements in paragraph (a)(1) of this section.

(ii) A swap dealer that satisfies the requirements of paragraph (a)(2)(i) of this section and elects to meet the requirements of this paragraph (a)(2) must maintain tangible net worth, as defined in § 23.100, equal to or in excess of the greatest of the following:

(A) $20 million plus the amount of the swap dealer's market risk exposure requirement (as defined in § 23.100) and its credit risk exposure requirement (as defined in § 23.100) associated with the swap dealer's swap and related hedge positions that are part of the swap dealer's swap dealing activities. The swap dealer shall compute its market risk exposure requirement and credit risk exposure requirement for its swap positions in accordance with § 23.102 if the swap dealer has obtained the approval of the Commission or a registered futures association of which it is a member to use internal capital models. The swap dealer shall compute its market risk exposure requirement and credit risk exposure requirement in accordance with the standardized approach of paragraphs (b)(1) and (c)(1) of § 23.103 if it has not been approved by the Commission or a registered futures association to use internal capital models;

(B) Eight percent of the sum of:

(*1*) The amount of uncleared swap margin, as that term is defined in § 23.100, for each uncleared swap positions open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 23.154;

(*2*) The amount of initial margin that would be required for each uncleared security-based swap position open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 240.18a–3(c)(1)(i)(B) of this title without regard to any initial margin exemptions or exclusions that the rules of the Securities and Exchange Commission may provide to such security-based swap positions; and

(*3*) The amount of initial margin required by clearing organizations for cleared proprietary futures, foreign futures, swaps, security-based swaps positions on the books of the swap dealer; or,

(C) The amount of capital required by a registered futures association of which the swap dealer is a member.

(3) A swap dealer that is subject to minimum capital requirements established by the rules or regulations of a prudential regulator pursuant to section 4s(e) of the Act is not subject to the regulatory capital requirements set forth in paragraph (a)(1) or (2) of this section.

(4) A swap dealer that is a futures commission merchant is subject to the minimum capital requirements of § 1.17 of this chapter, and is not subject to the regulatory capital requirements set forth in paragraph (a)(1) or (2) of this section.

(5) A swap dealer that is organized and domiciled outside of the United States, including a swap dealer that is an affiliate of a person organized and domiciled in the United States, may satisfy its requirements for capital adequacy under paragraphs (a)(1) or (2) of this section by substituted compliance with the capital adequacy requirement of its home country jurisdiction. In order to qualify for substituted compliance, a swap dealer's home country jurisdiction must receive from the Commission a Capital Comparability Determination under § 23.106, and the swap dealer must obtain a confirmation to rely on the Capital Comparability Determination from a registered futures association as provided under § 23.106.

(6) A swap dealer that elects to meet the capital requirements of paragraph (a)(1)(i), (a)(1)(ii), or (a)(2) of this section may not subsequently change its election without the prior written approval of the Commission. A swap dealer that wishes to change its election must submit a written request to the Commission and must provide any additional information and documentation requested by the Commission.

(b)(1) Every major swap participant for which there is not a prudential regulator must at all time have and maintain positive tangible net worth.

(2) Notwithstanding paragraph (b)(1) of this section, each major swap participant for which there is no prudential regulator must meet the minimum capital requirements established by a registered futures association of which the major swap participant is a member.

(c)(1) Before any applicant may be registered as a swap dealer or major swap participant, the applicant must demonstrate to the satisfaction of a registered futures association of which it is a member, or applying for membership, one of the following:

(i) That the applicant complies with the applicable regulatory capital requirements in paragraph (a)(1), (a)(2), (b)(1) or (b)(2) of this section;

(ii) That the applicant is a futures commission merchant that complies with § 1.17 of this chapter;

(iii) That the applicant is subject to minimum capital requirements established by the rules or regulations of a prudential regulator under paragraph (a)(3) of this section;

(iv) That the applicant is organized and domiciled in a non-U.S. jurisdiction and is regulated in a jurisdiction for which the Commission has issued a Capital Comparability Determination under § 23.106, and the non-U.S. person has obtained confirmation from a registered futures association of which it is a member that it may rely upon the Commission's Comparability Determination under § 23.106.

(2) Each swap dealer and major swap participant subject to the minimum capital requirements set forth in paragraphs (a) and (b) of this section must be in compliance with such requirements at all times, and must be able to demonstrate such compliance to the satisfaction of the Commission and to the registered futures association of which the swap dealer or major swap dealer is a member.

§ 23.102 Calculation of market risk exposure requirement and credit risk exposure requirement using internal models.

(a) A swap dealer may apply to the Commission, or to a registered futures association of which the swap dealer is a member, for approval to use internal models under terms and conditions required by the Commission and by these regulations, or under the terms and conditions required by the registered futures association of which the swap dealer is a member, when calculating the swap dealer's market risk exposure and credit risk exposure under § 23.101(a)(1)(i)(B), (a)(1)(ii)(A), or (a)(2)(ii)(A).

(b) The swap dealer's application to use internal models to compute market risk exposure and credit risk exposure must be in writing and must be filed with the Commission and with the registered futures association of which

the swap dealer is a member. The swap dealer must file the application in accordance with instructions established by the Commission and the registered futures association.

(c) A swap dealer's application must include the information set forth in Appendix A of this section.

(d) The Commission or the registered futures association may approve or deny the application, or approve an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or registered futures association may require, if the Commission or registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the applicant has met the requirements of this section, and the appendices to this section. A swap dealer that has received Commission or registered futures association approval to compute market risk exposure requirements and credit risk exposure requirements pursuant to internal models must compute such charges in accordance with Appendix A of this section.

(e) A swap dealer must cease using internal models to compute its market risk exposure requirement and credit risk exposure requirement, upon the occurrence of any of the following:

(1) The swap dealer has materially changed a mathematical model described in the application or materially changed its internal risk management control system without first submitting amendments identifying such changes and obtaining the approval of the Commission or the registered futures association for such changes;

(2) The Commission or the registered futures association of which the swap dealer is a member determines that the internal models are no longer sufficient for purposes of the capital calculations of the swap dealer as a result of changes in the operations of the swap dealer;

(3) The swap dealer fails to come into compliance with its requirements under this section, after having received from the Director of the Commission's Division of Swap Dealer and Intermediary Oversight, or from the registered futures association of which the swap dealer is a member, written notification that the swap dealer is not in compliance with its requirements, and must come into compliance by a date specified in the notice; or

(4) The Commission by written order finds that permitting the swap dealer to continue to use the internal models is no longer appropriate.

Appendix A to § 23.102—Application for Internal Models To Compute Market Risk Exposure Requirement and Credit Risk Exposure Requirement

(a) A swap dealer that is requesting the approval of the Commission, or the approval of a registered futures association of which the swap dealer is a member, to use internal models to compute its market risk exposure requirement and credit risk exposure requirement under § 23.102 must include the following information as part of its application:

(1) An executive summary of the information within its application and, if applicable, an identification of the ultimate holding company of the swap dealer;

(2) A list of the categories of positions that the swap dealer holds in its proprietary accounts and a brief description of the methods that the swap dealer will use to calculate deductions for market risk and credit risk on those categories of positions;

(3) A description of the mathematical models used by the swap dealer under this Appendix A to compute the VaR of the swap dealer's positions; the stressed VaR of the swap dealer's positions; the specific risk of the swap dealer's positions subject to specific risk; comprehensive risk of the swap dealer's positions; and the incremental risk of the swap dealer's positions, and deductions for credit risk exposure. The description should encompass the creation, use, and maintenance of the mathematical models; a description of the swap dealer's internal risk management controls over the models, including a description of each category of persons who may input data into the models; if a mathematical model incorporates empirical correlations across risk categories, a description of the process for measuring correlations; a description of the backtesting procedures the swap dealer will use to backtest the mathematical models; a description of how each mathematical model satisfies the applicable qualitative and quantitative requirements set forth in this Appendix A and a statement describing the extent to which each mathematical model used to compute deductions for market risk exposures and credit risk exposures will be used as part of the risk analyses and reports presented to senior management;

(4) If the swap dealer is applying to the Commission or a registered futures association for approval to use scenario analysis to calculate deductions for market risk for certain positions, a list of those types of positions, a description of how those deductions will be calculated using scenario analysis, and an explanation of why each scenario analysis is appropriate to calculate deductions for market risk on those types of positions;

(5) A description of how the swap dealer will calculate current exposure;

(6) A description of how the swap dealer will determine internal credit ratings of counterparties and internal credit risk weights of counterparties, if applicable;

(7) For each instance in which a mathematical model to be used by the swap dealer to calculate a deduction for market risk exposure or to calculate maximum potential exposure for a particular product or counterparty differs from the mathematical model used by the swap dealer's ultimate holding company or the swap dealer's affiliates (if applicable) to calculate an allowance for market risk exposure or to calculate maximum potential exposure for that same product or counterparty, a description of the difference(s) between the mathematical models;

(8) A description of the swap dealer's process of re-estimating, re-evaluating, and updating internal models to ensure continued applicability and relevance; and

(9) Sample risk reports that are provided to management at the swap dealer who are responsible for managing the swap dealer's risk.

(b) The application of the swap dealer shall be supplemented by other information relating to the internal risk management control system, mathematical models, and financial position of the swap dealer that the Commission or a registered futures association may request to complete its review of the application.

(c) A person who files an application pursuant to this section for which it seeks confidential treatment may clearly mark each page or segregable portion of each page with the words ''Confidential Treatment Requested.'' All information submitted in connection with the application will be accorded confidential treatment, to the extent permitted by law.

(d) If any of the information filed with the Commission or a registered futures association as part of the application of the swap dealer is found to be or becomes inaccurate before the Commission or a registered futures association approves the application, the swap dealer must notify the Commission or registered futures association promptly and provide the Commission or registered futures associations with a description of the circumstances in which the information was found to be or has become inaccurate along with updated, accurate information.

(e) The Commission or registered futures association may approve the application or an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or the registered futures association may require if the Commission or the registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the swap dealer has met all the requirements of this Appendix A.

(f) A swap dealer shall amend its application under this Appendix A and submit the amendment to the Commission and the registered futures association for approval before it may materially change a mathematical model used to calculate market risk exposure requirements or credit risk exposure requirements or before it may materially change its internal risk management control system with respect to such model.

(g) As a condition for a swap dealer to use internal models to compute deductions for market risk exposure and credit risk exposure under this Appendix A, the swap dealer agrees that:

(1) It will notify the Commission and registered futures association 45 days before it ceases to use internal models to compute deductions for market risk exposure and credit risk exposure under this Appendix A; and

(2) The Commission or the registered futures association may determine that the notice will become effective after a shorter or longer period of time if the swap dealer consents or if the Commission or the registered futures association determines that a shorter or longer period of time is appropriate in the public interest.

(h) The Commission may by written order, or the registered futures association by written notice, revoke a swap dealer's approval to use internal models to compute market risk exposures and credit risk exposures on certain credit exposures arising from transactions in derivatives instruments if the Commission or the registered futures association of which the swap dealer is a member finds that such approval is no longer appropriate in the public interest. In making its finding, the Commission or the registered futures association will consider the compliance history of the swap dealer related to its use of models and the swap dealer's compliance with its internal risk management controls. If the Commission or registered futures association withdraws all or part of a swap dealer's approval to use internal models, the swap dealer shall compute market risk exposure requirements and credit risk exposure requirements in accordance with § 23.103.

(i) *VaR models.* A value-at-risk (''VaR'') model must meet the following minimum requirements in order to be approved:

(1) *Qualitative requirements.*

(i) The VaR model used to calculate market risk exposure or credit risk exposure for a position must be integrated into the daily internal risk management system of the swap dealer;

(ii) The VaR model must be reviewed both periodically and annually. The periodic review may be conducted by personnel of the swap dealer that are independent from the personnel that perform the VaR model calculations. The annual review must be conducted by a qualified third party service. The review must include:

(A) An evaluation of the conceptual soundness of, and empirical support for, the internal models;

(B) An ongoing monitoring process that includes verification of processes and the comparison of the swap dealer's model outputs with relevant internal and external data sources or estimation techniques; and

(C) An outcomes analysis process that includes backtesting. This process must include a comparison of the changes in the swap dealer's portfolio value that would have occurred were end-of-day positions to remain unchanged (therefore, excluding fees, commissions, reserves, net interest income, and intraday trading) with VaR-based measures during a sample period not used in model development.

(iii) For purposes of computing market risk, the swap dealer must determine the appropriate multiplication factor as follows:

(A) Beginning three months after the swap dealer begins using the VaR model to calculate the market risk exposure, the swap dealer must conduct monthly backtesting of the model by comparing its actual daily net trading profit or loss with the corresponding VaR measure generated by the VaR model, using a 99 percent, one-tailed confidence level with price changes equivalent to a one business-day movement in rates and prices, for each of the past 250 business days, or other period as may be appropriate for the first year of its use;

(B) On the last business day of each quarter, the swap dealer must identify the number of backtesting exceptions of the VaR model using actual daily net trading profit and loss, as that term is defined in § 23.100. An exception has occurred when for a business day the actual net trading loss, if any, exceeds the corresponding VaR measure. The counting period shall be for the prior 250 business days except that during the first year of use of the model another appropriate period may be used; and

(C) The swap dealer must use the multiplication factor indicated in Table 1 of this Appendix A in determining its market risk until it obtains the next quarter's backtesting results;

TABLE 1—MULTIPLICATION FACTOR BASED ON THE NUMBER OF BACKTESTING EXCEPTIONS OF THE VAR MODEL

Number of exceptions	Multiplication factor
4 or fewer	3.00
5	3.40
6	3.50
7	3.65
8	3.75
9	3.85
10 or more	4.00

(iv) For purposes of computing the credit equivalent amount of the swap dealer's exposures to a counterparty, the swap dealer must determine the appropriate multiplication factor as follows:

(A) Beginning three months after it begins using the VaR model to calculate maximum potential exposure, the swap dealer must conduct backtesting of the model by comparing, for at least 80 counterparties (or the actual number of counterparties if the swap dealer does not have 80 counterparties) with widely varying types and sizes of positions with the firm, the ten business day change in its current exposure to the counterparty based on its positions held at the beginning of the ten-business day period with the corresponding ten-business day maximum potential exposure for the counterparty generated by the VaR model;

(B) As of the last business day of each quarter, the swap dealer must identify the number of backtesting exceptions of the VaR model, that is, the number of ten-business day periods in the past 250 business days, or other period as may be appropriate for the first year of its use, for which the change in current exposure to a counterparty, assuming the portfolio remains static for the ten-business day period, exceeds the corresponding maximum potential exposure; and

(C) The swap dealer will propose, as part of its application, a schedule of multiplication factors, which must be approved by the Commission, or a registered futures association of which the swap dealer is a member, based on the number of backtesting exceptions of the VaR model. The swap dealer must use the multiplication factor indicated in the approved schedule in determining the credit equivalent amount of its exposures to a counterparty until it obtains the next quarter's backtesting results, unless the Commission or the registered futures association determines, based on, among other relevant factors, a review of the swap dealer's internal risk management control system, including a review of the VaR model, that a different adjustment or other action is appropriate.

(2) *Quantitative requirements.* (i) For purposes of determining market risk exposure, the VaR model must use a 99 percent, one-tailed confidence level with price changes equivalent to a ten business-day movement in rates and prices;

(ii) For purposes of determining maximum potential exposure, the VaR model must use a 99 percent, one-tailed confidence level with price changes equivalent to a one-year movement in rates and prices; or based on a review of the swap dealer's procedures for managing collateral and if the collateral is marked to market daily and the swap dealer has the ability to call for additional collateral daily, the Commission, or the registered futures association of which the swap dealer is a member, may approve a time horizon of not less than ten business days;

(iii) The VaR model must use an effective historical observation period of at least one year. The swap dealer must consider the effects of market stress in its construction of the model. Historical data sets must be updated at least monthly and reassessed whenever market prices or volatilities change significantly or portfolio composition warrant; and

(iv) The VaR model must take into account and incorporate all significant, identifiable market risk factors applicable to positions in the accounts of the swap dealer, including:

(A) Risks arising from the non-linear price characteristics of derivatives and the sensitivity of the fair value of those positions to changes in the volatility of the derivatives' underlying rates, prices, or other material risk factors. A swap dealer with a large or complex portfolio with non-linear derivatives (such as options or positions with embedded optionality) must measure the volatility of these positions at different maturities and/or strike prices, where material;

(B) Empirical correlations within and across risk factors provided that the swap dealer validates and demonstrates the reasonableness of its process for measuring correlations, if the VaR-based measure does not incorporate empirical correlations across risk categories, the swap dealer must add the separate measures from its internal models used to calculate the VaR-based measure for the appropriate risk categories (interest rate risk, credit spread risk, equity price risk, foreign exchange rate risk, and/or commodity

price risk) to determine its aggregate VaR-based measure, or, alternatively, risk factors sufficient to cover all the market risk inherent in the positions in the proprietary or other trading accounts of the swap dealer, including interest rate risk, equity price risk, foreign exchange risk, and commodity price risk; and

(C) Spread risk, where applicable, and segments of the yield curve sufficient to capture differences in volatility and imperfect correlation of rates along the yield curve for securities and derivatives that are sensitive to different interest rates. For material positions in major currencies and markets, modeling techniques must incorporate enough segments of the yield curve—in no case less than six—to capture differences in volatility and less than perfect correlation of rates along the yield curve.

(j) *Stressed VaR-based Measure.* A stressed VaR model must meet the following minimum requirements in order to be approved:

(1) *Requirements for stressed VaR-based measure.* (i) A swap dealer must calculate a stressed VaR-based measure for its positions using the same model(s) used to calculate the VaR-based measure under paragraph (i) of this appendix, subject to the same confidence level and holding period applicable to the VaR-based measure, but with model inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the swap dealer's current portfolio.

(ii) The stressed VaR-based measure must be calculated at least weekly and be no less than the swap dealer's VaR-based measure.

(iii) A swap dealer must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the swap dealer's stressed VaR-based measure under this section and must be able to provide empirical support for the period used. The swap dealer must obtain the prior approval of the Commission, or a registered futures association of which the swap dealer is a member, if the swap dealer makes any material changes to these policies and procedures. The policies and procedures must address:

(A) How the swap dealer links the period of significant financial stress used to calculate the stressed VaR-based measure to the composition and directional bias of its current portfolio; and

(B) The swap dealer's process for selecting, reviewing, and updating the period of significant financial stress used to calculate the stressed VaR-based measure and for monitoring the appropriateness of the period to the swap dealer's current portfolio.

(iv) Nothing in this appendix prevents the Commission or the registered futures association of which the swap dealer is a member from requiring a swap dealer to use a different period of significant financial stress in the calculation of the stressed VaR-based measure.

(k) *Specific Risk.* A specific risk model must meet the following minimum requirements in order to be approved:

(1) *General requirement.* A swap dealer must use one of the methods in this paragraph (k) to measure the specific risk for each of its debt, equity, and securitization positions with specific risk.

(2) *Modeled specific risk.* A swap dealer may use models to measure the specific risk of its proprietary positions. A swap dealer must use models to measure the specific risk of correlation trading positions that are modeled under paragraph (m) of this appendix.

(i) *Requirements for specific risk modeling.*

(A) If a swap dealer uses internal models to measure the specific risk of a portfolio, the internal models must:

(*1*) Explain the historical price variation in the portfolio;

(*2*) Be responsive to changes in market conditions;

(*3*) Be robust to an adverse environment, including signaling rising risk in an adverse environment; and

(*4*) Capture all material components of specific risk for the debt and equity positions in the portfolio. Specifically, the internal models must:

(*i*) Capture name-related basis risk;

(*ii*) Capture event risk and idiosyncratic risk; and

(*iii*) Capture and demonstrate sensitivity to material differences between positions that are similar but not identical and to changes in portfolio composition and concentrations.

(B) If a swap dealer calculates an incremental risk measure for a portfolio of debt or equity positions under paragraph (l) of this appendix, the swap dealer is not required to capture default and credit migration risks in its internal models used to measure the specific risk of those portfolios.

(C) A swap dealer shall validate a specific risk model through backtesting.

(ii) *Specific risk fully modeled for one or more portfolios.* If the swap dealer's VaR-based measure captures all material aspects of specific risk for one or more of its portfolios of debt, equity, or correlation trading positions, the swap dealer has no specific risk add-on for those portfolios.

(3) *Specific risk not modeled.*

(i) If the swap dealer's VaR-based measure does not capture all material aspects of specific risk for a portfolio of debt, equity, or correlation trading positions, the swap dealer must calculate a specific-risk add-on for the portfolio under the standardized measurement method as described in 12 CFR 217.210.

(ii) A swap dealer must calculate a specific risk add-on under the standardized measurement method as described in 12 CFR 217.200 for all of its securitization positions that are not modeled under this paragraph (k).

(l) *Incremental Risk.* An incremental risk model must meet the following minimum requirements in order to be approved:

(1) *General requirement.* A swap dealer that measures the specific risk of a portfolio of debt positions under paragraph (k) of this appendix using internal models must calculate at least weekly an incremental risk measure for that portfolio according to the requirements in this section. The incremental risk measure is the swap dealer's measure of potential losses due to incremental risk over a one-year time horizon at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions. With the prior approval of the Commission or a registered futures association of which the swap dealer is a member, a swap dealer may choose to include portfolios of equity positions in its incremental risk model, provided that it consistently includes such equity positions in a manner that is consistent with how the swap dealer internally measures and manages the incremental risk of such positions at the portfolio level. If equity positions are included in the model, for modeling purposes default is considered to have occurred upon the default of any debt of the issuer of the equity position. A swap dealer may not include correlation trading positions or securitization positions in its incremental risk measure.

(2) *Requirements for incremental risk modeling.* For purposes of calculating the incremental risk measure, the incremental risk model must:

(i) Measure incremental risk over a one-year time horizon and at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions.

(A) A constant level of risk assumption means that the swap dealer rebalances, or rolls over, the swap dealer's trading positions at the beginning of each liquidity horizon over the one-year horizon in a manner that maintains the swap dealer's initial risk level. The swap dealer must determine the frequency of rebalancing in a manner consistent with the liquidity horizons of the positions in the portfolio. The liquidity horizon of a position or set of positions is the time required for a swap dealer to reduce its exposure to, or hedge all of its material risks of, the position(s) in a stressed market. The liquidity horizon for a position or set of positions may not be less than the shorter of three months or the contractual maturity of the position.

(B) A constant position assumption means that the swap dealer maintains the same set of positions throughout the one-year horizon. If a swap dealer uses this assumption, it must do so consistently across all portfolios.

(C) A swap dealer's selection of a constant position or a constant risk assumption must be consistent between the swap dealer's incremental risk model and its comprehensive risk model described in paragraph (m) of this appendix, if applicable.

(D) A swap dealer's treatment of liquidity horizons must be consistent between the swap dealer's incremental risk model and its comprehensive risk model described in paragraph (m) of this appendix, if applicable.

(ii) Recognize the impact of correlations between default and migration events among obligors.

(iii) Reflect the effect of issuer and market concentrations, as well as concentrations that can arise within and across product classes during stressed conditions.

(iv) Reflect netting only of long and short positions that reference the same financial instrument.

(v) Reflect any material mismatch between a position and its hedge.

(vi) Recognize the effect that liquidity horizons have on dynamic hedging strategies. In such cases, a swap dealer must:

(A) Choose to model the rebalancing of the hedge consistently over the relevant set of trading positions;

(B) Demonstrate that the inclusion of rebalancing results in a more appropriate risk measurement;

(C) Demonstrate that the market for the hedge is sufficiently liquid to permit rebalancing during periods of stress; and

(D) Capture in the incremental risk model any residual risks arising from such hedging strategies.

(vii) Reflect the nonlinear impact of options and other positions with material nonlinear behavior with respect to default and migration changes.

(viii) Maintain consistency with the swap dealer's internal risk management methodologies for identifying, measuring, and managing risk.

(m) *Comprehensive Risk.* A comprehensive risk model must meet the following minimum requirements in order to be approved:

(1) *General requirement.*

(i) Subject to the prior approval of the Commission or a registered futures association of which the swap dealer is a member, a swap dealer may use the method in this paragraph to measure comprehensive risk, that is, all price risk, for one or more portfolios of correlation trading positions.

(ii) A swap dealer that measures the price risk of a portfolio of correlation trading positions using internal models must calculate at least weekly a comprehensive risk measure that captures all price risk according to the requirements of this paragraph (m). The comprehensive risk measure is either:

(A) The sum of:

(*1*) The swap dealer's modeled measure of all price risk determined according to the requirements in paragraph (m)(2) of this appendix; and

(*2*) A surcharge for the swap dealer's modeled correlation trading positions equal to the total specific risk add-on for such positions as calculated under paragraph (k) of this appendix multiplied by 8.0 percent; or

(B) With approval of the Commission, or the registered futures association of which the swap dealer is member, and provided the swap dealer has met the requirements of this paragraph (m) for a period of at least one year and can demonstrate the effectiveness of the model through the results of ongoing model validation efforts including robust benchmarking, the greater of:

(*1*) The swap dealer's modeled measure of all price risk determined according to the requirements in paragraph (b) of this appendix; or

(*2*) The total specific risk add-on that would apply to the swap dealer's modeled correlation trading positions as calculated under paragraph (k) of this appendix multiplied by 8.0 percent.

(2) *Requirements for modeling all price risk.* If a swap dealer uses an internal model to measure the price risk of a portfolio of correlation trading positions:

(i) The internal model must measure comprehensive risk over a one-year time horizon at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions.

(ii) The model must capture all material price risk, including but not limited to the following:

(A) The risks associated with the contractual structure of cash flows of the position, its issuer, and its underlying exposures;

(B) Credit spread risk, including nonlinear price risks;

(C) The volatility of implied correlations, including nonlinear price risks such as the cross-effect between spreads and correlations;

(D) Basis risk;

(E) Recovery rate volatility as it relates to the propensity for recovery rates to affect tranche prices; and

(F) To the extent the comprehensive risk measure incorporates the benefits of dynamic hedging, the static nature of the hedge over the liquidity horizon must be recognized. In such cases, a swap dealer must:

(*1*) Choose to model the rebalancing of the hedge consistently over the relevant set of trading positions;

(*2*) Demonstrate that the inclusion of rebalancing results in a more appropriate risk measurement;

(*3*) Demonstrate that the market for the hedge is sufficiently liquid to permit rebalancing during periods of stress; and

(*4*) Capture in the comprehensive risk model any residual risks arising from such hedging strategies;

(iii) The swap dealer must use market data that are relevant in representing the risk profile of the swap dealer's correlation trading positions in order to ensure that the swap dealer fully captures the material risks of the correlation trading positions in its comprehensive risk measure in accordance with this section; and

(iv) The swap dealer must be able to demonstrate that its model is an appropriate representation of comprehensive risk in light of the historical price variation of its correlation trading positions.

(3) *Requirements for stress testing.*

(i) A swap dealer must at least weekly apply specific, supervisory stress scenarios to its portfolio of correlation trading positions that capture changes in:

(A) Default rates;

(B) Recovery rates;

(C) Credit spreads;

(D) Correlations of underlying exposures; and

(E) Correlations of a correlation trading position and its hedge.

(ii) *Other requirements.* (A) A swap dealer must retain and make available to the Commission and to the registered futures association of which the swap dealer is a member the results and all assumptions and parameters of the supervisory stress testing, including comparisons with the capital requirements generated by the swap dealer's comprehensive risk model.

(B) A swap dealer must report promptly to the Commission and to the registered futures association of which it is a member promptly any instances where the stress tests indicate any material deficiencies in the comprehensive risk model.

(n) *Securitization Exposures.* (1) To use the simplified supervisory formula approach (SSFA) to determine the specific risk-weighting factor for a securitization position, a swap dealer must have data that enables it to assign accurately the parameters described in paragraph (n)(2) of this appendix. Data used to assign the parameters described in paragraph (n)(2) of this appendix must be the most currently available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (n)(2) of this appendix must be no more than 91 calendar days old. A swap dealer that does not have the appropriate data to assign the parameters described in paragraph (n)(2) of this appendix must assign a specific risk-weighting of 100 percent to the position.

(2) *SSFA parameters.* To calculate the specific risk-weighting factor for a securitization position using the SSFA, a swap dealer must have accurate information on the five inputs to the SSFA calculation described in paragraphs (n)(2)(i) through (n)(2)(v) of this appendix.

(i) K_G is the weighted-average (with unpaid principal used as the weight for each exposure) total capital requirement of the underlying exposures calculated for a swap dealer's credit risk. K_G is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent presents a value of K_G equal to 0.08).

(ii) Parameter W is expressed as a decimal value between zero and one. Parameter W is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (n)(2)(ii)(A) through (F) of this appendix to the balance, measured in dollars, of underlying exposures:

(A) Ninety days or more past due;

(B) Subject to a bankruptcy or insolvency proceeding;

(C) In the process of foreclosure;

(D) Held as real estate owned;

(E) Has contractually deferred payments for 90 days or more, other than principal or interest payments deferred on;

(*1*) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(*2*) Consumer loans, including non-federally guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(F) Is in default.

(iii) Parameter A is the attachment point for the position, which represents the threshold at which credit losses will first be allocated to the position. Except as provided in 12 CFR 217.210(b)(2)(vii)(D) for n^{th} to default derivatives, parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the position of the swap dealer to the current dollar amount of underlying exposures. Any reserve account funded by

the accumulated cash flows from the underlying exposures that is subordinated to the position that contains the swap dealer's securitization exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a decimal value between zero and one.

(iv) Parameter D is the detachment point for the position, which represents the threshold at which credit losses of principal allocated to the position would result in a total loss of principal. Except as provided in 12 CFR 217.210(b)(2)(vii)(D) for n^{th}-to-default credit derivatives, parameter D equals parameter A plus the ratio of the current dollar amount of the securitization positions that are pari passu with the position (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a decimal value between zero and one.

(v) A supervisory calibration parameter, p, is equal to 0.5 for securitization positions that are not resecuritization positions and equal to 1.5 for resecuritization positions.

(3) *Mechanics of the SSFA.* K_G and W are used to calculate K_A, the augmented value of K_G, which reflects the observed credit quality of the underlying exposures. K_A is defined in paragraph (n)(4) of this section. The values of parameters A and D, relative to K_A determine the specific risk-weighting factor assigned to a securitization position, or portion of a position, as appropriate, is the larger of the specific risk-weighting factor determined in accordance with paragraphs (n)(3) and (n)(4) of this appendix, and a specific risk-weighting factor of 1.6 percent.

(i) When the detachment point, parameter D, for a securitization position is less than or equal to K_A, the position must be assigned a specific risk-weighting factor of 100 percent.

(ii) When the attachment point, parameter A, for a securitization position is greater than or equal to K_A, the swap dealer must calculate the specific risk-weighting factor in accordance with paragraph (n)(4) of this section.

(iii) When A is less than K_A and D is greater than K_A, the specific risk-weighting factor is a weighted-average of 1.00 and K_{SSFA} calculated under paragraphs (n)(3)(iii)(A) and (3)(iii)(B) of this appendix. For the purpose of this calculation:

(A) The weight assigned to 1.00 equals

(B) The weight assigned to K_{SSFA} equals $\frac{D-K_A}{D-A}$. The specific risk-weighting factor is equal to: SRWF = $100 \cdot [(\frac{K_A-A}{D-A}) \cdot 1.00] + [(\frac{D-K_A}{D-A}) \cdot K_{SSFA}]$

(4) <u>SSFA equation</u>.

(i) The swap dealer must define the following parameters:

$$K_A = (1 - W) \cdot K_G + (0.5 \cdot W)$$

$$a = -\frac{1}{p \cdot K_A}$$

$$u = D - K_A$$

$$l = \max(A - K_A, 0)$$

$e = 2.71828$, the base of the natural logarithms

(ii) Then the swap dealer must calculate K_{SSFA} according to the following formula:

$$K_{SSFA} = \frac{e^{a \cdot u} - e^{a \cdot l}}{a \cdot (u - l)}$$

(iii) The specific risk-weighting factor for the position (expressed as a percent) is equal to K_{SSFA} X 100.

(o) *Additional conditions.* As a condition for the swap dealer to use this Appendix A to calculate certain of its capital charges, the Commission, or registered futures association of which the swap dealer is a member, may impose additional conditions on the swap dealer, which may include, but are not limited to restricting the swap dealer's business on a product-specific, category-specific, or general basis; submitting to the Commission or registered futures association a plan to increase the swap dealer's regulatory capital; filing more frequent reports with the Commission or registered futures association; modifying the swap dealer's internal risk management control procedures; or computing the swap dealer's deductions for market and credit risk in accordance with § 23.102 as appropriate. If the Commission or registered futures association finds it is necessary or appropriate in the public interest, the Commission or registered futures association may impose additional conditions on the swap dealer, if:

(1) The swap dealer is required to provide notice to the Commission or a registered

futures association that the swap dealer's regulatory capital is less than $100 million;

(2) The swap dealer fails to meet the reporting requirements set forth in § 23.105;

(3) Any event specified in § 23.105 occurs;

(4) There is a material deficiency in the internal risk management control system or in the mathematical models used to price securities or to calculate deductions for market and credit risk or allowances for market and credit risk, as applicable, of the swap dealer;

(5) The swap dealer fails to comply with this Appendix A; or

(6) The Commission finds that imposition of other conditions is necessary or appropriate in the public interest.

§ 23.103 Calculation of market risk exposure requirement and credit risk requirement when models are not approved.

(a) *Non-model approach.* A swap dealer that has not received approval from the Commission, or from a registered futures association of which the swap dealer is a member, to compute its market risk exposure requirement and/or credit risk exposure requirement pursuant to internal models under § 23.102, or a swap dealer that has had its approval to compute its market risk exposure requirement and/or credit risk exposure requirement pursuant to internal models under § 23.102 revoked by the Commission or the registered futures association, must compute its market risk exposure requirements and/or credit risk exposure requirements pursuant to paragraphs (b) and (c) of this section.

(b) *Market risk exposure requirements.* (1) A swap dealer that computes its regulatory capital under § 23.101(a)(1)(i), (a)(1)(ii), or (a)(2) shall compute a market risk capital charge for the positions that the swap dealer holds in its proprietary accounts using the applicable standardized market risk charges set forth in § 240.18a-1 of this title and § 1.17 of this chapter for such positions.

(2) In computing its regulatory capital under § 23.101(a)(1)(i), a swap dealer shall increase its risk-weighted assets by an amount equal to 1250 percent of the sum of the market risk capital charges computed under paragraph (b)(1) of this section.

(3) In computing its net capital under § 23.101(a)(1)(ii), a swap dealer shall deduct from its tentative net capital the sum of the market risk capital charges computed under paragraph (b)(1) of this section.

(4) In computing its minimum capital requirement under § 23.101(a)(2), a swap dealer must add the amount of the market risk capital charge computed under this section to the $20 million minimum capital requirement.

(c) *Credit risk charges.* (1) A swap dealer that computes its regulatory capital under § 23.101(a)(1)(i) shall compute counterparty credit risk capital charges in accordance with subpart D of 12 CFR part 217. A swap dealer that computes regulatory capital under § 23.101(a)(1)(ii) shall compute counterparty credit risk capital charges using the applicable standardized credit risk charges set forth in § 240.18a–1 of this title and § 1.17 of this chapter for such positions; *Provided, however,* that a swap dealer may reduce the counterparty credit risk for a particular counterparty by the amount of margin deposited by such counterparty for its uncleared swap positions that is maintained with a third party custodian in accordance with § 23.157 and by the amount of margin deposited by such counterparty for its uncleared security-based swap positions that is maintained with a third party custodian in accordance with § 240.18a–3 of this title.

(2) In computing its regulatory capital under § 23.101(a)(1)(i), a swap dealer shall increase its risk-weighted assets by the sum of the counterparty credit risk capital charges computed under paragraph (c)(1) of this section.

(3) In computing its net capital under § 23.101(a)(1)(ii), a swap dealer shall reduce its tentative net capital by the sum of the counterparty credit risk capital charges computed under paragraph (c)(1) of this section.

(4) In computing its minimum capital requirement under § 23.101(a)(2), a swap dealer must add the amount of the credit risk capital charge computed under this section to the $20 million minimum capital requirement.

§ 23.104 Liquidity requirements and equity withdrawal restrictions.

(a)(1) *Liquidity coverage ratio.* A swap dealer that is subject to the minimum capital requirements of § 23.101(a)(1)(i) must meet the liquidity coverage ratio as defined in 12 CFR part 249 as if the swap dealer were regulated by the Federal Reserve Board and subject to the provisions of 12 CFR part 249; *Provided, however,* that a swap dealer may include cash deposited with banks that is readily available for withdrawal as level 1 assets under 12 CFR 249.20, and a swap dealer organized and domiciled outside of the U.S. may include high quality liquid assets maintained in its home country jurisdiction, in meeting its minimum liquidity coverage ratio.

(2) *Notification of senior management.* The senior management of the swap dealer that is responsible for risk management must be promptly informed if the swap dealer's liquidity coverage ratio falls below 1.0. In addition, the assumptions underlying the calculation of the liquidity coverage ratio must be reviewed at least quarterly by senior management of the swap dealer that is responsible for risk management, and at least annually by the full senior management of the swap dealer.

(3) *Restrictions on the disposition or transfer of high quality liquid assets.* A swap dealer may not dispose of, or transfer to an affiliate, a high quality liquid asset (as that term is defined in 12 CFR 249.20) without prior notice to and approval by the Commission if such disposition or transfer would result in the swap dealer failing to meet the liquidity coverage ratio in paragraph (a)(1) of this section.

(4) *Contingency funding plan.* The swap dealer must have a written contingency funding plan that addresses the swap dealer's policies and the roles and responsibilities of relevant personnel for meeting the liquidity needs of the swap dealer and communications with the public and other market participants during a liquidity stress event.

(b)(1) *Liquidity stress test.* A swap dealer that computes regulatory capital under paragraph (a)(1)(ii) of § 23.101 must perform a liquidity stress test at least monthly, the results of which must be provided within ten business days to senior management that has responsibility to oversee risk management at the swap dealer. The assumptions underlying the liquidity stress test must be reviewed at least quarterly by senior management that has responsibility to oversee risk management at the swap dealer and at least annually by senior management of the swap dealer. The liquidity stress test must include, at a minimum, the following assumed conditions lasting for 30 consecutive days:

(i) A stress event includes a decline in creditworthiness of the swap dealer severe enough to trigger contractual credit-related commitment provisions of counterparty agreements;

(ii) The loss of all existing unsecured funding at the earlier of its maturity or put date and an inability to acquire a material amount of new unsecured funding, including intercompany advances and unfunded committed lines of credit;

(iii) The potential for a material net loss of secured funding;

(iv) The loss of the ability to procure repurchase agreement financing for less liquid assets;

(v) The illiquidity of collateral required by and on deposit at clearing agencies or other entities which is not

deducted from net worth or which is not funded by customer assets;

(vi) A material increase in collateral required to be maintained at registered clearing agencies of which it is a member; and

(vii) The potential for a material loss of liquidity caused by market participants exercising contractual rights and/or refusing to enter into transactions with respect to the various businesses, positions, and commitments of the swap dealer.

(2) *Stress test of consolidated entity.* If applicable, the swap dealer must justify and document any differences in the assumptions used in the liquidity stress test of the swap dealer from those used in the liquidity stress test of the consolidated entity of which the swap dealer is a part.

(3) *Liquidity reserves.* The swap dealer must maintain at all times liquidity reserves based on the results of the liquidity stress test. The liquidity reserves used to satisfy the liquidity stress test must be:

(i) Cash, obligations of the United States, or obligations fully guaranteed as to principal and interest by the United States; and

(ii) Unencumbered and free of any liens at all times.

(4) *Contingency funding plan.* The swap dealer must have a written contingency funding plan that addresses the swap dealer's policies and the roles and responsibilities of relevant personnel for meeting the liquidity needs of the swap dealer and communications with the public and other market participants during a liquidity stress event.

(c) *Equity withdrawal restrictions.* The capital of a swap dealer, including the capital of any affiliate or subsidiary whose liabilities or obligations are guaranteed, endorsed, or assumed by the swap dealer may not be withdrawn by action of the swap dealer or its equity holders, or by redemption of shares of stock by the swap dealer or by such affiliates or subsidiaries, or through the payment of dividends or any similar distribution, nor may any unsecured advance or loan be made to an equity holder or employee if, after giving effect thereto and to any other such withdrawals, advances, or loans which are scheduled to occur within six months following such withdrawal, advance or loan, the swap dealer's regulatory capital is less than 120 percent of the minimum regulatory capital required under § 23.101. The equity withdrawal restrictions, however, do not preclude a swap dealer from making required tax payments or from paying reasonable compensation to equity holders. The Commission may, upon application by the swap dealer, grant relief from this paragraph (c) if the Commission deems such relief to be in the public interest.

(d) *Temporary equity withdrawal restrictions by Commission order.* (1) The Commission may by order restrict, for a period of up to twenty business days, any withdrawal by a swap dealer of capital or any unsecured loan or advance to a stockholder, partner, member, employee or affiliate under such terms and conditions as the Commission deems appropriate in the public interest if the Commission, based on the information available, concludes that such withdrawal, loan or advance may be detrimental to the financial integrity of the swap dealer, or may unduly jeopardize the swap dealer's ability to meet its financial obligations to counterparties or to pay other liabilities which may cause a significant impact on the markets or expose the counterparties and creditors of the swap dealer to loss.

(2) An order temporarily prohibiting the withdrawal of capital shall be rescinded if the Commission determines that the restriction on capital withdrawal should not remain in effect. A hearing on an order temporarily prohibiting withdrawal of capital will be held within two business days from the date of the request in writing by the swap dealer.

§ 23.105 Financial recordkeeping, reporting and notification requirements for swap dealers and major swap participants.

(a) *Scope.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, a swap dealer or major swap participant must comply with the applicable requirements set forth in paragraphs (b) through (q) of this section.

(2) The requirements in paragraphs (b) through (o) of this section do not apply to any swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator.

(3) The requirements in paragraph (p) of this section do not apply to any swap dealer or major swap participant that is subject to the capital requirements of the Commission.

(4) The requirements of paragraph (q) of this section apply to swap dealers or major swap participants that are subject to the capital requirements of the Commission or of a prudential regulator.

(b) *Current books and records.* A swap dealer or major swap participant shall prepare and keep current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting its asset, liability, income, expense and capital accounts, and in which all its asset, liability and capital accounts are classified in accordance with U.S. generally accepted accounting principles, and as otherwise may be necessary for the capital calculations required under § 23.101: *Provided, however,* that a swap dealer or major swap participant that is not organized under the laws of a state or other jurisdiction in the United States, and is not otherwise required to prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare and keep records required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board. Such records must be maintained in accordance with § 1.31 of this chapter.

(c) *Notices.* (1) A swap dealer or major swap participant subject to minimum regulatory capital requirements under § 23.101 and who knows or should have known that its regulatory capital at any time is less than the minimum required by § 23.101, must:

(i) Provide immediate written notice that the swap dealer's or major swap participant's regulatory capital is less than that required by § 23.101; and

(ii) Provide together with such notice, documentation in such form as necessary to adequately reflect the swap dealer's or major swap participant's regulatory capital condition as of any date such person's regulatory capital is less than the minimum required. The swap dealer or major swap participant must provide similar documentation for other days as the Commission may request.

(2) A swap dealer or major swap participant who is subject to the minimum regulatory capital requirements under § 23.101 and who knows or should have known that its regulatory capital at any time is less than 120 percent of its minimum regulatory capital requirement as determined under § 23.101, must provide written notice to that effect within 24 hours of such event.

(3) If a swap dealer or major swap participant at any time fails to make or to keep current the books and records required by these regulations, such swap dealer or major swap participant must, on the same day such event occurs, provide notice of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(4) Each swap dealer that fails to comply with the liquidity requirements set forth in § 23.104 must file written notice within 24 hours of when it knows or should have known that the swap dealer is not in compliance.

(5) A swap dealer or major swap participant must provide notice of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to this section. The notice shall be provided if the swap dealer or major swap participant experiences a 30 percent or more decrease in the amount of capital that the swap dealer or major swap participant holds in excess of its regulatory capital requirement as computed under § 23.101.

(6) A swap dealer must provide the Commission with notice two business days prior to the withdrawal of capital by action of the equity holders of the swap dealer where the withdrawal exceeds 30 percent of the swap dealer's excess regulatory capital as computed under § 23.101.

(7) A swap dealer or major swap participant that is registered with the Securities and Exchange Commission as a security-based swap dealer or as a major security based swap participant and files a notice with the Securities and Exchange Commission under § 240.18a–8 of this title, must file a copy of such notice with the Commission at the time the swap dealer or major security-based swap participant files the notice with the Securities and Exchange Commission.

(8) A swap dealer or major swap participant must submit a notice to the Commission within 24 hours of the occurrence of any of the following events:

(i) A single counterparty or group of counterparties that are under common ownership or control fails to post initial margin or pay variation margin to the swap dealer or major swap participant for swap positions in compliance with § 23.152 and security-based swap positions in compliance with proposed § 240.18a–3(c)(1)(i)(b) of this title and such initial margin and variation margin, in the aggregate, is equal to or greater than 25 percent of the swap dealer's minimum capital requirement or 25 percent of the major swap participant's tangible net worth;

(ii) Counterparties fail to post initial margin or pay variation margin to the swap dealer or major swap participant for swap positions in compliance with § 23.152 and security-based swap positions in compliance with proposed § 240.18a–3(c)(1)(i)(B) in an amount that, in the aggregate, exceeds 50 percent of the swap dealer's minimum capital requirement or 50 percent of the major swap participant's tangible net worth;

(iii) A swap dealer or major swap participant fails to post initial margin or pay variation margin to a single counterparty or group of counterparties under common ownership and control for swap positions in compliance with § 23.152 and security-based swap positions in compliance with proposed § 240.18a–3(c)(1)(i)(B) of this title and such initial margin and variation margin, in the aggregate, exceeds 25 percent of the swap dealer's minimum capital requirement or 25 percent of the major swap participant's tangible net worth; or

(iv) A swap dealer or major swap participant fails to post initial margin or pay variation margin to counterparties for swap positions in compliance with § 23.152 and security-based swap positions in compliance with proposed § 240.18a–3(c)(1)(i)(B) in an amount that, in the aggregate, exceeds 50 percent of the swap dealer's s minimum capital requirement or 50 percent of the major swap participants tangible net worth.

(d) *Monthly unaudited financial reports.* (1) A swap dealer or major swap participant shall file monthly financial reports meeting the requirements in paragraph (d)(2) of this section as of the close of business each month. Such financial reports must be filed no later than 17 business days after the date for which the report is made.

(2) The monthly financial reports must be prepared in the English language and be denominated in United States dollars. The monthly financial reports shall include a statement of financial condition, a statement of income/loss, a statement of cash flows, a statement of changes in ownership equity, a statement demonstrating compliance with and calculation of the applicable regulatory capital requirement under § 23.101, and such further material information as may be necessary to make the required statements not misleading. The monthly report and schedules must be prepared in accordance with generally accepted accounting principles as established in the United States: *Provided, however,* that a swap dealer or major swap participant that is not organized under the laws of a state or other jurisdiction in the United States, and does not otherwise prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare the monthly report and schedules required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board.

(3) A swap dealer or major swap participant that is also registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant and files a monthly Form SBS with the Securities and Exchange Commission pursuant to § 240.18a–7 of this title, may file such Form SBS with the Commission in lieu of the financial reports required under paragraphs (d)(1) and (2) of this section. The swap dealer or major swap participant must file the Form SBS with the Commission when it files the Form SBS with the Securities and Exchange Commission, *provided, however,* that the swap dealer or major swap participant must file the Form SBS with the Commission no later than 17 business days from the date the report is made.

(4) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant may file a Form 1–FR–FCM in lieu of the monthly financial reports required under paragraphs (d)(1) and (2) of this section.

(e) *Annual audited financial reports.* (1) A swap dealer and major swap participant shall file an annual audited financial report as of the close of its fiscal year, certified in accordance with paragraph (e)(2) of this section, and including the information specified in paragraph (e)(3) of this section no later than 60 days after the close of the swap dealer's and major swap participant's fiscal year-end.

(2) The annual certified financial report shall be audited and reported upon with an opinion expressed by an independent certified public accountant or independent licensed accountant that is in good standing in the accountant's home jurisdiction.

(3) The annual audited financial reports shall be prepared in accordance with generally accepted accounting principles as established in the United States, be prepared in the English language, and denominated in United States dollars: *Provided, however,* that a swap dealer or major swap participant that is not organized under the laws of a state or other jurisdiction in the United States, and does not otherwise prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare the annual audited financial reports required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board.

(4) The annual audited financial report must include the following:

(i) A statement of financial condition as of the date for which the report is made;

(ii) Statements of income (loss), cash flows, and changes in ownership equity for the period between the date of the most recent certified statement of financial condition filed with the Commission and the date for which the report is made;

(iii) Appropriate footnote disclosures;

(iv) A statement demonstrating the swap dealer's or major swap participant's compliance with and calculation of the applicable regulatory capital requirement under § 23.101;

(v) A reconciliation of any material differences from the monthly unaudited financial report prepared as of the swap dealer's or major swap participant's year-end date and the swap dealer's or major swap participant's annual financial report prepared under this paragraph (e); and

(vi) Such further material information as may be necessary to make the required statements not misleading.

(5) A swap dealer or major swap participant that is also registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant and files an annual financial report with the Securities and Exchange Commission pursuant to § 240.18a–7 of this title, may file such annual report with the Commission in lieu of the annual financial report required under this paragraph (e). The swap dealer or major swap participant must file its annual report with the Commission at the same time that it files the annual report with the Securities and Exchange Commission, provided that the annual report is filed with the Commission no later than 60 days from the swap dealer's or major swap participant's fiscal year-end date.

(6) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant may file an audited Form 1–FR–FCM in lieu of the annual financial reports required under this paragraph (e).

(f) *Oath or affirmation.* Attached to each financial report, or other filing made pursuant to this section, must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the financial report is true and correct. The individual making such oath or affirmation must be: If the swap dealer or major swap participant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(g) *Change of fiscal year-end.* A swap dealer or major swap participant may not change the date of its fiscal year-end from that used in its most recent annual report filed under paragraph (e) of this section unless the swap dealer or major swap participant has requested and received written approval for the change from a registered futures association of which it is a member.

(h) *Additional information requirements.* From time to time the Commission may, by written notice, require any swap dealer or major swap participant to file financial or operational information on a daily basis or at such other times as may be specified by the Commission. Such information must be furnished in accordance with the requirements included in the written Commission notice.

(i) *Public disclosure and nonpublic treatment of reports.* (1) A swap dealer or major swap participant must no less than quarterly make publicly available on its Web site the following information:

(i) The statement of financial condition; and

(ii) A statement disclosing the amount of the swap dealer's or major swap participant's regulatory capital as of the end of the quarter and the amount of its minimum regulatory capital requirement, computed in accordance with § 23.101.

(2) A swap dealer or major swap participant must no less than annually make publicly available on its Web site the following information:

(i) The statement of financial condition from the swap dealer or major swap participant's audited financial statements including applicable footnotes; and

(ii) A statement disclosing the amount of the swap dealer's or major swap participant's regulatory capital as of the fiscal year end and its minimum regulatory capital requirement, computed in accordance with § 23.101.

(3) Financial information required to be made publicly available pursuant to this section must be posted within 10 business days after the firm is required to file applicable financial reports with the Commission pursuant to paragraph (d) or (e) of this section.

(4) Financial information required to be filed pursuant to this section, and not otherwise publicly available, will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter; *Provided, however,* that all information that is exempt from mandatory public disclosure will be available for official use by any official or employee of the United States or any State, by the National Futures Association and by any other person to whom the Commission believes disclosure of such information is in the public interest.

(j) *Extension of time to file financial reports.* A swap dealer or major swap participant may file a request with the registered futures association of which it is a member for an extension of time to file a monthly unaudited financial report or an annual audited financial report required under paragraphs (d) and (e) of this section. Such request will be approved, conditionally or unconditionally, or disapproved by the registered futures association.

(k) *Additional reporting requirements for swap dealers approved to use models to calculate market risk and credit risk for computing capital requirements.* (1) A swap dealer that has received approval under § 23.102(d) from the Commission, or from a registered futures association of which the swap dealer is a member, to use internal models to compute its market risk exposure requirement and credit risk exposure requirement in computing its regulatory capital under § 23.101 must file with the Commission and with the registered futures association of which the swap dealer is a member the following information within 17 business days of the end of each month:

(i) For each product for which the swap dealer calculates a deduction for market risk other than in accordance with a model approved pursuant to § 23.102(d), the product category and the amount of the deduction for market risk;

(ii) A graph reflecting, for each business line, the daily intra-month VaR;

(iii) The aggregate VaR for the swap dealer;

(iv) For each product for which the swap dealer uses scenario analysis, the product category and the deduction for market risk;

(v) Credit risk information on swap, mixed swap and security-based swap exposures including:

(A) Overall current exposure;

(B) Current exposure (including commitments) listed by counterparty for the 15 largest exposures;

(C) The 10 largest commitments listed by counterparty;

(D) The swap dealer's maximum potential exposure listed by counterparty for the 15 largest exposures;

(E) The swap dealer's aggregate maximum potential exposure;

(F) A summary report reflecting the swap dealer's current and maximum potential exposures by credit rating category; and

(G) A summary report reflecting the swap dealer's current exposure for each of the top ten countries to which the swap dealer is exposed (by residence of the main operating group of the counterparty); and

(vi) The results of the liquidity stress test required by § 23.104.

(2) A swap dealer that has received approval under § 23.102(d) from the Commission or from a registered futures association of which the swap dealer is a member to use internal models to compute its market risk exposure requirement and credit risk exposure requirement in computing its regulatory capital under § 23.101 must file with the Commission and with the registered futures association of which the swap dealer is member the following information within 17 business days of the end of each calendar quarter:

(i) A report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR; and

(ii) The results of backtesting of all internal models used to compute allowable capital, including VaR, and credit risk models, indicating the number of backtesting exceptions.

(l) *Additional position and counterparty reporting requirements.* A swap dealer or major swap participant must provide on a monthly basis to the Commission and to the registered futures association of which the swap dealer or major swap participant is a member the specific information required in Appendix A to this section.

(m) *Margin reporting.* A swap dealer or major swap participant must file with the Commission and with the registered futures association of which the swap dealer or major swap participant is member the following information as of the end of each month within 17 business days of the end of each month:

(1) The name and address of each custodian holding initial margin or variation margin collected by the swap dealer or major swap participant for uncleared swap transactions pursuant to §§ 23.152 and 23.153;

(2) The amount of initial margin and variation margin collected by the swap dealer or major swap participant that is held by each custodian listed in paragraph (m)(1) of this section;

(3) The aggregate amount of initial margin that the swap dealer or major swap participant is required to collect from swap counterparties pursuant to § 23.152(a);

(4) The name and address of each custodian holding initial margin or variation margin posted by the swap dealer or major swap participant for uncleared swap transaction pursuant to §§ 23.152 and 23.153;

(5) The amount of initial margin and variation margin posted by the swap dealer or major swap participant that is held by each custodian listed in paragraph (m)(4) of this section; and

(6) The aggregate amount of initial margin that the swap dealer or majors swap participant is required to post to its swap counterparties pursuant to § 23.152(b).

(n) *Electronic filing.* All filings of financial reports, notices and other information required to be submitted to the Commission under paragraphs (b) through (m) of this section must be filed in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission. A swap dealer or major swap participant must provide the Commission with the means necessary to read and to process the information contained in such report. Any such electronic submission must clearly indicate the swap dealer or major swap participant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer. In the case of a financial report required under paragraphs (d), (e), or (h) of this section and filed via electronic transmission in accordance with procedures established by or approved by the Commission, such transmission must be accompanied by the user authentication assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in paragraph (f) of this section.

(o) *Comparability determination for certain financial reporting.* A swap dealer or major swap participant that is subject to the monthly financial reporting requirements of paragraph (d) of this section and the annual financial reporting requirements of paragraph (e) of this section may petition the Commission for a Comparability Determination under § 23.106 to file monthly financial reports and/or annual financial reports prepared in accordance with the rules a foreign regulatory authority in lieu of the requirements contained in this section.

(p) *Quarterly financial reporting and notification provisions for swap dealers and major swap participants that are subject to the capital requirements of a prudential regulator.*

(1) *Scope.* A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator must comply with the requirements of this paragraph.

(2) *Financial report and position information.* A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator shall file on a quarterly basis with the Commission the financial reports and specific position information set forth in Appendix B of this section. The swap dealer or major swap participant must file Appendix B with the Commission within 17 business days of the date of the end of the swap dealer's fiscal quarter.

(3) *Notices.* A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator must comply with the following notice provisions:

(i) A swap dealer or major swap participant that files a notice of adjustment of its reported capital category with the Federal Reserve Board, the Office of the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or files a similar notice with its home country supervisor(s), must give notice of this fact that same day by transmitting a copy of the notice of the adjustment of reported capital category, or the similar notice provided to its home country supervisor(s), to the Commission.

(ii) A swap dealer or major swap participant must provide immediate written notice that the swap dealer's or major swap participant's regulatory capital is less than the applicable minimum capital requirements set forth in 12 CFR 217.10, 12 CFR 3.10, or 12 CFR 324.10, or the minimum capital requirements established by its home country supervisor(s).

(iii) A swap dealer or major swap participant must submit a notice to the Commission within 24 hours of the occurrence of any of the following events:

(A) A single counterparty or group of counterparties that are under common ownership or control fails to post initial margin or pay variation margin to the swap dealer for swap positions and security-based swap positions and such initial margin and variation margin, in the aggregate, is equal to or greater than 25 percent of the swap dealer's minimum capital requirement;

(B) Counterparties fail to post initial margin or pay variation margin to the swap dealer for swap positions and security-based swap positions in an amount that, in the aggregate, exceeds 50 percent of the swap dealer's minimum capital requirement;

(C) A swap dealer fails to post initial margin or pay variation margin to a single counterparty or group of counterparties under common ownership and control for swap positions and security-based swap positions and such initial margin and variation margin, in the aggregate, exceeds 25 percent of the swap dealer's minimum capital requirement; or

(D) A swap dealer fails to post initial margin or pay variation margin to counterparties for swap positions and security-based swap positions in an amount that, in the aggregate, exceeds 50 percent of the swap dealer's s minimum capital requirement.

(iv) If a swap dealer or major swap participant at any time fails to make or to keep current the books and records required by these regulations, such swap dealer or major swap participant must, on the same day such event occurs, provide notice of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(4) *Additional information.* From time to time the Commission may, by written notice, require a swap dealer or major swap participant that is subject to the capital rules of a prudential regulator to file financial or operational information on a daily basis or at such other times as may be specified by the Commission. Such information must be furnished in accordance with the requirements included in the written Commission notice.

(5) *Oath or affirmation.* Attached to each financial report, notice filing, or other filing made pursuant to this paragraph (p) must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the filing is true and correct. With respect to financial reports, the individual making such oath or affirmation must be: If the swap dealer or major swap participant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(6) *Electronic filing.* All filings of financial reports, notices, and other information made pursuant to this paragraph (p) must be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission. Each swap dealer and major swap participant must provide the Commission with the means necessary to read and to process the information contained in such report. Any such electronic submission must clearly indicate the swap dealer or major swap participant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer. In the case of a financial report required under this paragraph (p) and filed via electronic transmission in accordance with procedures established by or approved by the Commission, such transmission must be accompanied by the user authentication assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in paragraph (p)(5) of this section. Every notice or report required to be transmitted to the Commission pursuant to this paragraph (p) must also be filed with the Securities and Exchange Commission if the swap dealer or major swap participant also is registered with the Securities and Exchange Commission.

(7) *Public disclosure and nonpublic treatment of reports.* (i) A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator must no less than quarterly make publicly available on its Web site the following information:

(A) The statement of financial condition; and

(B) A statement disclosing the amount of the swap dealer's or major swap participant's regulatory capital as of the end of the quarter and the amount of its minimum regulatory capital requirement.

(ii) Financial information required to be made publicly available pursuant to this section must be posted within 10 business days after the firm is required to file applicable financial reports with the Commission pursuant to paragraph (p)(2) of this section.

(iii) Financial information required to be filed pursuant to this section, and not otherwise publicly available, will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter; *Provided, however,* that all information that is exempt from mandatory public disclosure will be available for official use by any official or employee of the United States or any State, by the National Futures Association and by any other person to whom the Commission believes disclosure of such information is in the public interest.

(q) *Weekly position and margin reporting*—(1) *Positions.* On the first business day of every week, a swap dealer or major swap participant shall file with the Commission a report showing, in a format specified by the Commission, all open uncleared swap positions as of the close of business on the last business day of the previous week, sorted as follows:

(i) By counterparty, and

(ii) For each counterparty, by the following asset classes—commodity, credit, equity, and foreign exchange or interest rate.

(2) *Margin.* On the first business day of every week, a swap dealer or major swap participant shall file with the Commission a report showing, in a format specified by the Commission, for open uncleared swap positions as of the close of business on the last business day of the previous week:

(i) The total initial margin posted by the swap dealer or major swap participant with each counterparty;

(ii) The total initial margin collected by the swap dealer or major swap participant from each counterparty; and

(iii) The net variation margin paid or collected over the previous week with each counterparty.

Appendix A to § 23.105—Swap Dealer and Major Swap Participant Position Information

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Appendix A

SCHEDULE 1 - AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS

Items on this page to be Reported by: Swap Dealers
Major Swap Participants

Aggregate Securities, Commodities, Swaps Positions	LONG	SHORT
1. U.S. treasury securities	$	$
2. U.S. government agency and U.S. government-sponsored enterprises	$	$
A. Mortgage-backed securities issued by U.S. government agency and U.S. government-Sponsored enterprises	$	$
B. Debt securities issued by U.S. government agency and U.S. government-sponsoredenterprises	$	$
3. Securities issued by states and political subdivisions in the U.S	$	$
4. Foreign securities		
A. Debt securities	$	$
B. Equity securities	$	$
5. Money market instruments	$	$
6. Private label mortgage backed securities	$	$
7. Other asset-backed securities	$	$
8. Corporate obligations	$	$
9. Stocks and warrants (other than arbitrage positions)	$	$
10. Arbitrage	$	$
11. Spot commodities	$	$
12. Security-based swaps		
A. Debt security-based swaps (other than credit default swaps)		
1. Cleared	$	$
2. Non-cleared	$	$
B. Equity security-based swaps		
1. Cleared	$	$
2. Non-cleared	$	$
C. Credit default security-based swaps		
1. Cleared	$	$
2. Non-cleared	$	$
D. Other security-based swaps		
1. Cleared	$	$
2. Non-cleared	$	$
13. Mixed swaps		
1. Cleared	$	$
2. Non-cleared	$	$

Reg. 23.105(l) Appendix A	SCHEDULE 1 (cont'd) - AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS
	Items on this page to be Reported by: Swap Dealers Major Swap Participants

	LONG	SHORT
14. Swaps		
A. Interest rate swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
B. Foreign exchange swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
C. Commodity swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
D. Debt index swaps (other than credit default swaps)		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
E. Equity index swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
F. Credit default swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
G. Other swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
15. Other derivatives and options	$ _____	$ _____
16. Securities with no ready market		
A. Equity	$ _____	$ _____
B. Debt	$ _____	$ _____
C. Other (include limited partnership interests)	$ _____	$ _____
17. Other securities and commodities	$ _____	$ _____
18. Total (sum of Lines 1-17)	$ _____	$ _____

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Appendix A

SCHEDULE 2 – CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES

Items on this page to be Reported by: Swap Dealers
Major Swap Participants

I. By Current Net Exposure

Counterparty Identifier	Internal Credit Rating	Gross Replacement Value: Receivable (Gross Gain)	Gross Replacement Value: Payable (Gross Loss)	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
2.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
3.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
4.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
5.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
6.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
7.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
8.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
9.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
10.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
11.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
12.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
13.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
14.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
15.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
All other counterparties		N/A	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
	Totals:		$					

II. By Total Exposure

Counterparty Identifier	Internal Credit Rating	Gross Replacement Value: Receivable (Gross Gain)	Gross Replacement Value: Payable (Gross Loss)	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
2.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
3.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
4.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
5.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
6.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
7.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
8.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
9.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
10.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
11.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
12.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
13.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
14.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
15.	9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
All other counterparties		N/A	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
	Totals:		$					

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Appendix A

SCHEDULE 3 – PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING

Items on this page to be Reported by: Swap Dealers
Major Swap Participants

Internal Credit Rating	Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
2.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
3.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
4.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
5.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
6.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
7.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
8.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
9.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
10.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
11.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
12.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
13.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
14.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
15.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
16.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
17.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
18.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
19.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
20.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
21.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
22.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
23.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
24.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
25.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
26.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
27.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
28.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $
29.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
30.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
31.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
32.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
33.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
34.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
35.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
36.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
Unrated.	9999 $	9999 $	9999 $	9999 $	9999 $	9999
Totals.	9999 $	9999 $	9999 $	9999 $	9999 $	9999

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Appendix A

SCHEDULE 4 – GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES

Items on this page to be Reported by: Swap Dealers
Major Swap Participants

I. **By Current Net Exposure**

Country	Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
2.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
3.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
4.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
5.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
6.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
7.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
8.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
9.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
10.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
Totals.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999

II. **By Total Exposure**

Country	Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
2.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
3.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
4.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
5.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
6.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
7.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
8.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
9.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
10.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999
Totals.	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999	9999 $ 9999

Appendix B to § 23.105 – Financial Reports and Specific Position Information for Swap Dealers and Major Swap Participants Subject to the Capital Requirements of a Prudential Regulator

Reg.23.105(o)	BALANCE SHEET
Appendix B	Items on this page to be reported by a: Bank SD Bank MSP

Assets	Totals
1. Cash and balances due from depository institutions	
A. Noninterest-bearing balances and currency and coin	$ _____
B. Interest-bearing balances	$ _____
2. Securities	
A. Held-to-maturity securities	$ _____
B. Available-for-sale securities	$ _____
3. Federal funds sold and securities purchased under agreements to resell	
A. Federal funds sold in domestic offices	$ _____
B. Securities purchased under agreements to resell	$ _____
4. Loans and lease financing receivables	
A. Loans and leases held for sale	$ _____
B. Loans and leases, net of unearned income	$ _____
C. LESS: Allowance for loan and lease losses	$ _____
D. Loans and leases, net of unearned income and allowance	$ _____
5. Trading Assets	$ _____
6. Premises and fixed assets (including capitalized leases)	$ _____
7. Other real estate owned	$ _____
8. Investment in unconsolidated subsidiaries and associated companies	$ _____
9. Direct and indirect investments in real estate ventures	$ _____
10. Intangible assets	
A. Goodwill	$ _____
B. Other intangible assets	$ _____
11. Other assets	$ _____
12. Total assets (sum of Lines 1 through 11)	$ _____

Reg.23.105(o)	BALANCE SHEET
Appendix B	Items on this page to be reported by a: Bank SD Bank MSP

Liabilities	Totals
13. Deposits	
A. In domestic offices	$
1. Noninterest-bearing	$
2. Interest-bearing	$
B. In foreign offices, Edge and Agreement subsidiaries, and IBFs	$
1. Noninterest-bearing	$
2. Interest-bearing	$
14. Federal funds purchased and securities sold under agreements to repurchase	
A. Federal funds purchased in domestic offices	$
B. Securities sold under agreements to repurchase	$
15. Trading liabilities	$
16. Other borrowed money (includes mortgage indebtedness and obligations under capitalized leases)	$
17. Subordinated notes and debentures	$
18. Other liabilities	$
19. Total liabilities	$
Equity Capital	
20. Perpetual preferred stock and related surplus	$
21. Common stock	$
22. Surplus (exclude all surplus related to preferred stock)	$
23 A. Retained earnings	$
B. Accumulated other comprehensive income	$
C. Other equity capital components	$
24 A. Total bank equity capital (sum of Lines 20 through 23.C)	$
B. Non-controlling (minority) interests in consolidated subsidiaries	$
25. Total equity capital (sum of Lines 24A and 24B)	$
26. Total liabilities and equity capital (sum of Lines 19 and 25)	$

Reg.23.105(o)	REGULATORY CAPITAL
Appendix B	Items on this page to be reported by a: Bank SD Bank MSP

Capital	Totals
1. Total bank equity capital	$ _____
2. Tier 1 capital	$ _____
3. Tier 2 capital	$ _____
4. Tier 3 capital allocated for market risk	$ _____
5. Total risk-based capital	$ _____
6. Total risk-weighted assets	$ _____
7. Total assets for leverage capital purposes	$ _____

Capital Ratios (Column B is to be completed by all banks. Column A is to be completed by banks with financial subsidiaries.)	Column A	Column B
8. Tier 1 Leverage ratio	$_____	$ _____
9. Tier 1 risk-based capital ratio	$_____	$ _____
10. Total risk-based capital ratio	$_____	$ _____

Reg.23.105(o) Appendix B	SCHEDULE 1 – AGGREGATE SWAP POSITIONS
	Items to be Reported by: Bank SDs Bank MSPs

Aggregate Positions	LONG	SHORT
1. Security-based swaps		
A. Debt security-based swaps (other than credit default swaps)		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
B. Equity security-based swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
C. Credit default security-based swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
D. Other security-based swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
2. Mixed swaps		
A. Cleared	$ _____	$ _____
B. Non-cleared	$ _____	$ _____
3. Swaps		
A. Interest rate swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
B. Foreign exchange swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
C. Commodity swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
D. Debt index swaps (other than credit default swaps)		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
E. Equity index swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
F. Credit default swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____

Reg.23.105(o) Appendix B	SCHEDULE 1 (cont'd) – AGGREGATE SWAP POSITIONS
	Items to be Reported by: Bank SDs Bank MSPs

G. Other swaps		
1. Cleared	$ _____	$ _____
2. Non-cleared	$ _____	$ _____
3. Other derivatives	$ _____	$ _____
4. Total (sum of Lines 1-3)	$ _____	$ _____

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§ 23.106 Comparability determination for substituted compliance.

(a)(1) *Eligibility requirements.* The following persons may, either individually or collectively, request a Capital Comparability Determination with respect to the Commission's capital adequacy and financial reporting requirements for swap dealers or major swap participants:

(i) A swap dealer or major swap participant that is eligible for substituted compliance under § 23.101; or

(ii) A foreign regulatory authority that has direct supervisory authority over one or more swap dealers or major swap participants that are eligible for substituted compliance under § 23.101, and such foreign regulatory authority is responsible for administering the relevant foreign jurisdiction's capital adequacy and financial reporting requirements over the swap dealer or major swap participant.

(2) *Submission requirements.* A person requesting a Capital Comparability Determination must electronically submit to the Commission:

(i) A description of the objectives of the relevant foreign jurisdiction's capital adequacy and financial reporting requirements over entities that are subject to the Commission's capital adequacy and financial reporting requirements in this part;

(ii) A description (including specific legal and regulatory provisions) of how the relevant foreign jurisdiction's capital adequacy and financial reporting requirements address the elements of the Commission's capital adequacy and financial reporting requirements for swap dealers and major swap participants, including, at a minimum, the methodologies for establishing and calculating capital adequacy requirements and whether such methodologies comport with any international standards, including Basel-based capital requirements for banking institutions; and

(iii) A description of the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements. Such description should discuss the powers of the foreign regulatory authority or authorities to supervise, investigate, and discipline entities for compliance with capital adequacy and financial reporting requirements, and the ongoing efforts of the regulatory authority or authorities to detect and deter violations, and ensure compliance with capital adequacy and financial reporting requirements. The description should address how foreign authorities and foreign laws and regulations address situations where a swap dealer or major swap participant is unable to comply with the foreign jurisdictions capital adequacy or financial reporting requirements.

(iv) Upon request, such other information and documentation that the Commission deems necessary to evaluate the comparability of the capital adequacy and financial reporting requirements of the foreign jurisdiction.

(v) All supplied documents shall be provided in English, or provided translated to the English language, with currency amounts stated in or converted to USD (conversions to be noted with applicable date).

(3) *Standard of Review.* The Commission will issue a Capital Comparability Determination to the extent that it determines that some or all of the relevant foreign jurisdiction's capital adequacy and financial reporting requirements and related financial recordkeeping and reporting requirements for swap dealing financial intermediaries are comparable to the Commission's corresponding capital adequacy and financial recordkeeping and reporting requirements. In determining whether the requirements are comparable, the Commission will consider all relevant factors, including:

(i) The scope and objectives of the foreign jurisdiction's capital adequacy and financial reporting requirements;

(ii) How and whether the relevant foreign jurisdiction's capital adequacy requirements compare to international Basel capital standards for banking institutions or to other standards such as those used for securities brokers or dealers;

(iii) Whether the relevant foreign jurisdiction's capital adequacy and financial reporting requirements achieve comparable outcomes to the Commission's corresponding capital adequacy and financial reporting requirements for swap dealers and major swap participants;

(iv) The ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements; and

(v) Any other facts or circumstances the Commission deems relevant.

(4) *Reliance.* (i) A swap dealer or major swap participant that is subject to the supervision of a foreign jurisdiction that has received a Capital Comparability Determination from the Commission must file a notice of its intent to comply with the capital adequacy and financial reporting requirements of the foreign jurisdiction with the registered futures association of which the swap dealer or major swap participant is a member. The registered futures association will determine the information that the swap dealer or major swap participant must include in the notice. A swap dealer or major swap participant must obtain a confirmation from the registered futures association that it may comply with the capital

adequacy and financial reporting requirements of the foreign jurisdiction in lieu of some or all of the capital adequacy and financial reporting requirements in the part.

(ii) Any swap dealer or major swap participant that has obtained a confirmation from a registered futures association and, in accordance with a Capital Comparability Determination, complies with a foreign jurisdiction's capital adequacy and financial reporting requirements will be deemed to be in compliance with the Commission's corresponding capital adequacy and financial reporting requirements. Accordingly, the failure of such a swap dealer or major swap participant to comply with the foreign jurisdictions capital adequacy and financial reporting requirements may constitute a violation of the Commission's capital adequacy and financial reporting requirements. All swaps dealer and major swap participants, regardless of whether they rely on a Capital Comparability Determination, remain subject to the Commission's examination and enforcement authority.

(5) *Conditions.* In issuing a Capital Comparability Determination, the Commission may impose any terms and conditions it deems appropriate, including certain capital adequacy and financial reporting requirements on swap dealers or major swap participants. The violation of such terms and conditions may constitute a violation of the Commission's capital adequacy or financial reporting requirements and/or result in the modification or revocation of the Capital Comparability Determination.

(6) *Modifications.* The Commission reserves the right to further condition, modify, suspend or terminate or otherwise restrict a Capital Comparability Determination in the Commission's discretion.

§§ 23.107–23.149 [Reserved]

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 9. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

■ 10. Amend § 140.91 as follows:

■ a. Redesignate paragraph (a)(12) as paragraph (a)(13);

■ b. Redesignate paragraph (a)(11) as paragraph (a)(12);

■ c. Add new paragraph (a)(11).

The addition to read as follows:

§ 140.91 Delegation of authority to the Director of the Division of Clearing and Risk and to the Director of the Division of Swap Dealer and Intermediary Oversight.

(a) * * *

(11) All functions reserved to the Commission in §§ 23.100 through 23.107 of this chapter, except for those related to the revocation of a swap dealer's or major swap participant's approval to use internal models to compute capital requirements under § 23.102 of this chapter, and the issuance of Capital Comparability Determinations under § 23.106 of this chapter.

* * * * *

Issued in Washington, DC, on December 2, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Capital Requirements of Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman's Statement, and Commissioner's Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Timothy G. Massad

I support the proposed rulemaking the Commission unanimously approved today.

Capital requirements for swap dealers are among the most important reforms of the over-the-counter swap market agreed to by the leaders of the G20 nations in 2009. They complement margin requirements for uncleared swaps, which the Commission finalized earlier this year. While margin is the front line defense against a default, adequate capital is critical to the ability of swap dealers to absorb losses.

One of my priorities this year has been to issue a reproposal of our rule setting these capital requirements. Our original proposal was issued at a time when margin requirements for uncleared swaps had not yet been established and bank capital rules were still being finalized. It is important that our rules are harmonized with prudential requirements, which is why it was appropriate to update and repropose our rule.

As with margin, the law provides that swap dealers for which there is a prudential regulator shall comply with the capital rules of the prudential regulators, and the CFTC must adopt capital rules for all others. Because capital requirements are entity-wide, and not specific to transactions, I believe the requirements should take into account the fact that there are different types of firms that act as swap dealers—such as bank affiliates, broker-dealers, futures commission merchants and others primarily engaged in non-financial activities. Requiring all firms to follow one approach could favor one business model over another, and cause even greater concentration in the industry.

The reproposal we have approved today recognizes this diversity. It supports competition as well as safety and soundness, by providing three different approaches. First, for swap dealers that are affiliates of prudentially regulated firms, the proposal permits them to use a method based on that of our banking regulators. Swap dealers that are also broker-dealers can use an approach that is based on the Securities and Exchange Commission's net liquid assets approach. And for those dealers that are engaged primarily in non-financial activities, we have proposed a third approach based on net worth. And we have harmonized these requirements, where appropriate, with the capital rules of our prudential regulators and the Securities and Exchange Commission.

I thank the CFTC's hardworking staff for the significant time and effort they have devoted to this rule. I thank my fellow Commissioners for their support of this measure. And I encourage public comment on this proposal.

Appendix 3—Statement of Commissioner J. Christopher Giancarlo

For some time now, I have been asking whether the amount of capital which regulators have caused financial institutions to take out of trading markets is at all calibrated to the amount of capital which is needed to be kept in global markets to support the health and durability of the global financial system. I have called on the Financial Stability Oversight Council and domestic and foreign financial regulators to conduct a thorough analysis in this regard. Those calls have been largely ignored. So, I hope that commenters to this capital proposal can help provide some insight into my question.

Along those lines, I have included several questions in this proposal that ask for feedback on whether the capital requirements under the different capital approaches are appropriate. I thank staff of the Division of Swap Dealer and Intermediary Oversight for including my questions in the proposal. I am particularly interested in how the proposed capital requirements will affect smaller swap dealers and how much additional capital they may have to raise to comply with the proposal. I have included several questions in the cost-benefit section in this regard. I am also interested in the impact of the proposed rule on any potential new registrants if the swap dealer *de minimis* level falls to $3 billion.

I have also included several questions about the scope of the proposal. For example, the proposed minimum capital requirement is based upon eight percent of the margin required on the swap dealer's cleared and uncleared swaps and security-based swaps and the margin required on the swap dealer's futures and foreign futures. However, Commodity Exchange Act section 4s(e)(3)(A) only cites the risk of uncleared swaps in

setting standards for capital.[1] Additionally, in the Commission's final swap dealer definition rule, it said it will ''in connection with promulgation of final rules relating to capital requirements for swap dealers and major swap participants, consider institution of reduced capital requirements for entities or individuals that fall within the swap dealer definition and that execute swaps only on exchanges, using only proprietary funds.'' [2] Given these pronouncements, I welcome commenters' views on the broad scope of the proposed capital requirements.

Finally, I am concerned about the proposed capital model review and approval process. The proposal states that the Commission expects that a prudential regulator's or foreign regulator's review and approval of capital models that are used in the corporate family of a swap dealer would be a significant factor in the National Futures Association's (NFA) determination of the scope of its review, provided that appropriate information sharing agreements are in place. Given the large number of models that will need to be reviewed, the complexity of those models and the practical resource constraints at the NFA, I am concerned that the proposed process will be unworkable. We have already seen the challenges in the model approval process for initial margin under tight implementation timelines, and in that case there was a standard initial margin model. We should learn from that lesson. So, I am interested to hear commenters' views on alternative model approval processes, such as automatic or temporary approval of capital models that have been previously approved by a prudential or foreign regulator.

I look forward to reviewing thoughtful and well-considered comments.

[FR Doc. 2016–29368 Filed 12–15–16; 8:45 am]

BILLING CODE 6351–01–P

[1] 7 U.S.C. 6s(e)(3)(A).

[2] 77 FR 30596, 30610 fn. 199 (May 23, 2012).

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Part III

Department of Homeland Security

Transportation Security Administration

49 CFR Ch. XII and Parts 1500, 1520, *et al.*
Security Training for Surface Transportation Employees and Surface Transportation Vulnerability Assessments and Security Plans (VASP); Proposed Rules

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Parts 1500, 1520, 1570, 1580, 1582, and 1584

[Docket No. TSA–2015–0001]

RIN 1652–AA55

Security Training for Surface Transportation Employees

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Transportation Security Administration (TSA) is proposing to require security training for employees of higher-risk freight railroad carriers, public transportation agencies (including rail mass transit and bus systems), passenger railroad carriers, and over-the-road bus (OTRB) companies. Owner/operators of these higher-risk railroads, systems, and companies would be required to train employees performing security-sensitive functions, using a curriculum addressing preparedness and how to observe, assess, and respond to terrorist-related threats and/or incidents. As part of this rulemaking, TSA would also expand its current requirements for rail security coordinators and reporting of significant security concerns (currently limited to freight railroads, passenger railroads, and the rail operations of public transportation systems) to include the bus components of higher-risk public transportation systems and higher-risk OTRB companies. TSA also proposes to make the maritime and land transportation provisions of TSA's regulations consistent with other TSA regulations by codifying general responsibility to comply with security requirements; compliance, inspection, and enforcement; and procedures to request alternate measures for compliance. Finally, TSA is adding a definition for Transportation Security-Sensitive Materials (TSSM). Other provisions are being amended or added, as necessary, to implement these additional requirements.

While TSA will review and consider all comments submitted, TSA invites responses to a number of specific questions posed in the preamble of the NPRM. *See* the Comments Invited section under **SUPPLEMENTARY INFORMATION** that follows.

DATES: Submit comments by March 16, 2017.

ADDRESSES: You may submit comments, identified by the TSA docket number to this rulemaking, to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, using any one of the following methods:

Electronically: You may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail, In Person, or Fax: Address, hand-deliver, or fax your written comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Fax 202–493–2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Harry Schultz (TSA Office of Security Policy and Industry Engagement) or Traci Klemm (TSA Office of the Chief Counsel) at telephone (571) 227–5563 or email to *SecurityTrainingPolicy@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this rulemaking action. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. TSA encourages commenters to provide their names and addresses. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you want TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file in the public docket all comments TSA receives, except for comments containing confidential information and Sensitive Security Information (SSI).[1] TSA will consider all comments received on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

NPRM Specific Questions

While TSA will review and consider all comments submitted, TSA invites responses to the following five specific questions:

(1) The preferred avenue to submit security training programs to TSA, such as through email, secure Web site, or mailing address.

(2) TSA is proposing to use accumulated days of employment as one of the factors triggering whether an employee must be trained and requests comment specifically on how to calculate accumulated days and to ensure contractors are not used to avoid the requirements of this proposed rule.

(3) The use of previous training to satisfy requirements in the proposed rule.

(4) Options for harmonizing the proposed training schedule with existing training schedules and for adding efficiencies with other relevant regulatory requirements, including identification of any laws, regulations, or orders not identified by TSA that commenters believe would conflict with the provisions of the proposed rule.

(5) Options for ensuring training is effective in the absence of proficiency standards. For example, the proposed rule does not prescribe conditions for a pass/fail policy that may be associated with post-training testing, nor recommending a specified maximum number of times that an individual may take a test or evaluation to demonstrate knowledge and competency.

Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial

[1] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR parts 15 and 1520.

or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking. Comments containing this type of information must be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

TSA will not place comments containing SSI in the public docket, but will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold documents containing SSI, confidential business information, or trade secrets in a separate file to which the public does not have access, and place a note in the public docket that TSA has received such materials from the commenter. If TSA determines, however, that portions of these comments may be made publicly available, TSA may include a redacted version of the comment in the public docket. If TSA receives a request to examine or copy information that is not in the public docket, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and FOIA regulation of the Department of Homeland Security (DHS) found in 6 CFR part 5.

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Please be aware that anyone is able to search the electronic form of all comments in any of our dockets by the name of the individual who submitted the comment (or signed the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477) and modified on January 17, 2008 (73 FR 3316), or you may visit *http://DocketsInfo.dot.gov.*

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Availability of Rulemaking Document

An electronic copy can be obtained using the Internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) Web page at *http://www.regulations.gov;*

(2) Accessing the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR* to view the daily published **Federal Register** edition; or accessing the ''Search the **Federal Register** by Citation'' in the ''Related Resources'' column on the left, if you need to do a Simple or Advanced search for information, such as a type of document that crosses multiple agencies or dates.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Abbreviations and Terms Used in This Document

AAR—Association of American Railroads
ABA—American Bus Association
Amtrak—National Railroad Passenger Corporation
APTA—American Public Transportation Association
CD—Compact Disc
CCTV—Closed-Circuit Television
CFATS—Chemical Facility Anti-Terrorism Standards
CFATS EAP—Expedited Approval Program for the CFATS program
CFATS RBPS—Risk-Based Performance Standards of the CFATS program
CFATS SSP—Site Specific Plans part of the CFATS program
DHS—Department of Homeland Security
DIF—Difficulty-Importance-Frequency
EOD—Explosives Ordinance Disposal
FMCSA—Federal Motor Carrier Safety Administration
FRA—Federal Railroad Administration
FTA—Federal Transit Administration
GAO—U.S. Government Accountability Office
GCC—Government Coordinating Council
HMR—Hazardous Materials Regulations
HSA—Homeland Security Act of 2002
HTUA—High Threat Urban Area
IED—Improvised Explosive Device
IFR—Interim Final Rule
IRFA—Initial Regulatory Flexibility Analysis
MOU—Memorandum of Understanding
NCTC—National Counterterrorism Center
NSI—Nationwide Suspicious Activity Reporting (SAR) Initiative
OAs—Oversight Agencies
OMB—Office of Management and Budget
OTRB—Over-the-Road Bus
PAG—Transit Policing and Security Peer Advisory Group
PHMSA—Pipeline and Hazardous Materials Safety Administration
PRA—Paperwork Reduction Act of 1995
PTPR—Public Transportation and Passenger Railroads
RFA—Regulatory Flexibility Act of 1980
RIA—Regulatory Impact Analysis
RSC—Rail Security Coordinator
RSSM—Rail Security-Sensitive Material
SBA—Small Business Administration
SCC—Sector Coordinating Council
SMS—Safety Management System
SSI—Sensitive Security Information
TIH—Toxic Inhalation Hazard
TSA—Transportation Security Administration
TSGP—Transit Security Grant Program
TSSM—Transportation Security Sensitive Material
UASI—Urban Area Security Initiative
UMRA—Unfunded Mandates Reform Act of 1995
VBIED—Vehicle-Borne Improvised Explosive Device

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I. Executive Summary

Purpose of the Regulatory Action

The purpose of this proposed rule is to solidify the enhanced baseline of security for higher-risk surface transportation operations by improving and sustaining the capability of employees to observe, assess, and respond to security risks and potential security breaches. These critical capabilities include identifying, reporting, and appropriately reacting to suspicious activity, suspicious items, dangerous substances, and security incidents that may be associated with terrorist reconnaissance, preparation, or action. The proposed requirements specifically apply to training employees performing security-sensitive job functions for higher-risk public transportation systems, railroad carriers (passenger and freight), and OTRB owner/operators. Preparing and training these employees to observe, assess, and respond to anomalies, threats, and incidents within their unique working environment may be the critical point for preventing a terrorist act and mitigating the consequences.

Since its creation following the attacks of September 11, 2001, TSA has had statutory authority to assess a security risk for any mode of transportation, develop security measures for dealing with that risk, and enforce compliance with those measures.[2] This includes broad regulatory authority, which enables TSA to issue, rescind, and revise regulations as necessary to carry out its transportation security functions.[3] As part of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act),[4] Congress mandated that DHS use its authority to issue regulations and included in the statute minimum requirements for employees to be trained, subjects of training, and procedures for the submission and approval of training programs.[5] As part of this mandate, the 9/11 Act also requires higher-risk railroads and OTRBs to appoint security coordinators.[6] This NPRM would propose to implement those provisions.

Summary of the Major Provisions

As discussed in section III.F. of this NPRM, TSA is proposing to apply the requirements to higher-risk operations, based on mode-specific assessments of risk. Based on these assessments, the requirements would apply to:

- Class I freight railroad carriers, railroads transporting Rail Security-Sensitive Materials (RSSMs) through identified High Threat Urban Areas (HTUAs) (applying those terms as defined in current 49 CFR 1580.3), and railroads that host other higher-risk rail operations. This would cover approximately 36 railroads.
- Public transportation and passenger railroads (PTPRs) operating in the eight regions with the highest transit-specific risk. This would cover approximately 46 systems.
- The National Railroad Passenger Corporation (Amtrak), an intercity passenger railroad.
- OTRB owner/operators providing fixed-route service (also referred to as regular route or scheduled service) to/through/from the highest-risk urban areas. This would cover approximately 202 OTRB owner/operators.

This NPRM proposes requiring the entities listed above to:

- Develop security training programs to enhance and sustain the capability of their security-sensitive employees to observe, assess, and respond to security incidents as well as to have the training necessary to implement their specific responsibilities in the event of a security incident.
- Submit the required security training program to TSA for review and approval.
- Implement the security training program and ensure all existing and new security-sensitive employees complete the required security training within the specified timeframes for initial and recurrent training.
- Maintain records demonstrating compliance and make the records available to TSA upon request for inspection and copying.
- Appoint security coordinators and alternates–who will be accessible to TSA 24 hours per day, 7 days per week–and transmit contact information for those individuals to TSA (an extension of current 49 CFR part 1580 requirements).
- Report significant security incidents or concerns to TSA (an extension of current 49 CFR part 1580 requirements).
- Review and update security training programs as necessary to address changing security measures or conditions.

The proposed rule would also amend 49 CFR part 1500 to streamline definitions for TSA's regulation and would add a definition of Transportation Security-Sensitive Materials (TSSMs). Proposed revisions to 49 CFR parts 1503 and 1520 would conform references and provisions related to enforcement and handling of SSI to the expanded scope of security requirements in the proposed rule.

The most significant proposed revisions are found in subchapter D of chapter XII of title 49. This subchapter would be retitled ''Maritime and Surface Transportation Security,'' reorganized, and expanded to include the proposed security program requirements. The general rules for subchapter D would continue to be in part 1570, but reorganized and expanded to address the new requirements proposed in this rule. This NPRM also proposes to add a new section (1570.7) to make it clear that owner/operators, employees, contractors, and other persons can be held liable for violating TSA's regulations. A similar provision is part of TSA's aviation-related regulations and adding it to subchapter D ensures consistency in enforcement across all modes of transportation. This provision is further discussed in section III.D.2 of this NPRM.

Some provisions currently limited to railroads under part 1580 would be

[2] *See* Section 101 of the Aviation and Transportation Security Act (ATSA), Public Law 107–71, 115 Stat. 597 (Nov. 19, 2001), codified at 49 U.S.C. 114 (ATSA created TSA and established the agency's primary federal role to enhance security for all modes of transportation). Section 403(2) of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135 (Nov. 25, 2002), transferred all functions related to transportation security, including those of the Secretary of Transportation and the Under Secretary of Transportation for Security, to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary delegated to the Administrator, subject to the Secretary's guidance and control, the authority vested in the Secretary with respect to TSA, including that in sec. 403(2) of the HSA.

[3] 49 U.S.C. 114(l)(1).

[4] Public Law 110–53, 121 Stat. 266 (Aug. 3, 2007).

[5] *See* secs. 1408, 1517, and 1534 of the 9/11 Act, codified at 6 U.S.C. 1137, 1167, and 1184, respectively. For the remainder of this NPRM, TSA will refer to the codified section numbers.

[6] *See* secs. 1512 and 1181 of the 9/11 Act, codified at 6 U.S.C. 1162 and 1181, respectively. TSA addresses 6 U.S.C 1162(e)(1)(A) and 1181(e)(1)(A) in this rulemaking. TSA intends to address the other regulatory requirements of these provisions in separate rulemakings.

moved and revised to address the additional modes, such as provisions related to ''compliance, inspection, and enforcement.'' This necessitates reorganization and minor revisions to current part 1580. The impact of the proposed rule on the organization and scope of current 49 CFR part 1580 is discussed in section II.C. of this NPRM. The following table (Table 1) provides a summary of the requirements and their applicability (distinguishing between current requirements/applicability and proposed requirements/applicability).

TABLE 1—SUMMARY OF PROPOSED REQUIREMENTS

[Current 49 CFR part 1580 requirements incorporated into this NPRM are indicated with an ''X''; proposed requirements are indicated with a ''P'']

	Inspection authority (§ 1570.9)	Protecting sensitive security information (part 1520)	Security coordinator (§ 1570.201)	Reporting security incidents (§ 1570.203)	Security training [1]
Freight railroad carriers	X	X	X	X	P
Rail hazardous materials shippers	X	X	X	X	.....
Rail hazardous materials receivers in HTUAs	X	X	X	X	.....
Owner/operators of private rail cars	X	X	X	X	.....
Host railroads of freight or PTPR rail operations within scope of rule	X	X	X	X	P
PTPR operating rail transit systems on general railroad system, intercity passenger train service, and commuter train services	X	X	X	X	[2] P
PTPR operating rail transit systems not part of general railroad system	X	X	X	X	[2] P
Tourist, scenic, historic, and excursion rail owner/operators	X	X	X	X	.....
PTPR operating bus transit or commuter bus systems in designated areas	P	P	P	P	P
OTRB owner/operators providing fixed-route service in designated areas	P	P	P	P	P

[1] 49 CFR part 1570, Subpart B (Security Programs); 49 CFR part 1580, Subpart B—Employee Security Training (freight railroads); 49 CFR part 1582, Subpart B—Employee Security Training (PTPR); and 49 CFR part 1584, Subpart B—Employee Security Training (OTRBs).

[2] If Amtrak, or listed in proposed part 1582, Appendix A (a public transportation system, or part of a public transportation system).

Costs and Benefits

TSA estimates the overall cost of this proposed rule is $157.27 million over 10 years discounted at 7 percent. TSA estimates the cost of this proposed rule by the 4 affected parties (all costs are 10 years at 7 percent): For freight railroads the rule would cost a total of $90.74 million, for PTPR the cost is $53.14 million, for OTRB the cost is $12.08 million, and for TSA the cost is $1.31 million.

The proposed rule, if finalized, would enhance surface transportation security by reducing vulnerability to terrorist attacks in four different ways. First, the surface transportation employees in each of the three covered modes would be trained to identify security vulnerabilities. Second, these surface transportation employees would be better trained to recognize potentially threatening behavior and properly report that information. Third, these surface employees would be trained to respond to incidents, thereby mitigating the consequences of an attack. Finally, the covered surface transportation owner/operators would be required to report significant security concerns to TSA so that TSA can analyze potential threats across all modes.

This analysis reflects information obtained through a Notice published in the **Federal Register** in 2013 [7] (2013 Notice). Through that Notice, TSA requested data needed to provide a more accurate understanding of the existing baseline and potential costs associated with the proposed rule. In particular, TSA requested information regarding programs currently implemented—whether as a result of regulatory requirements, grant requirements, in anticipation of a rule, voluntary, or otherwise—and the costs associated with those training programs.

II. Background

A. Context and Purpose

Surface transportation systems—including public transportation systems, intercity and commuter passenger railroads, freight railroads, intercity buses, and related infrastructure—are vital to our economy and essential to national security.[8] The potential for a terrorist attack exists at each stage of moving people, goods, and services throughout the Nation.

Recent attacks indicate the risk of terrorist attack to surface transportation. On August 21, 2015, there was an attempted mass shooting on a packed high-speed train bound for Paris from Amsterdam.[9] Metropolitan Police treated a December 5, 2015, knife attack in a London public transportation station as a terrorist incident.[10] There have been other documented terrorist attacks targeting surface transportation, including the attack in Madrid, Spain, on March 11, 2004, in which terrorists attacked four commuter trains using 10 improvised explosive devices (IED) that exploded near-simultaneously and resulted in the deaths of 191 people and injury to more than 1,800 people.[11] In July 2005, four coordinated suicide bombings occurred, three on separate trains through London Underground stations and the fourth on a double-

[7] 78 FR 35945 (June 14, 2013).

[8] Surface Transportation and Rail Security Act of 2007, report of the Senate Committee on Commerce, Science, and Transportation at 2 (S. Rept. 110–29, Mar. 1, 2007), quoting Executive Order (E.O.) 13416 (Dec. 5, 2006), published at 71 FR 71033 (Dec. 7, 2006).

[9] *See* Michael Birnbaum, ''A change of seats for 3 Americans led to saved lives on Paris-bound train,'' Washington Post (Aug. 24, 2015), available at *https://www.washingtonpost.com/world/as-french-train-suspect-is-interrogated-questions-mount-on-europes-security/2015/08/23/088ff2fe-4923-11e5-9f53-d1e3ddfd0cda_story.html.*

[10] *See* BBC, ''Leytonstone Tube station stabbing a 'terrorist incident' '' (Dec. 6, 2015), available at *http://www.bbc.com/news/uk-35018789.*

[11] Encyclopedia Britannica, ''Madrid train bombings of 2004'' (May 19, 2013), available at *http://www.britannica.com/event/Madrid-train-bombings-of-2004.*

decker bus, killed 52 people.[12] In July 2008, a group linked to Lashkar-e-Tayyiba attacked Mumbai's Western Railway Line with seven IEDs during evening commute hours, killing 183 people.[13] In November 2008, this group committed another coordinated attack that included shooting and bombing operations at several targets—including a train station—and killed a total of 164 people.[14] More recently, U.S. news media reported that the Federal Bureau of Investigation (FBI) uncovered a plot to attack the PATH commuter rail system serving New York and New Jersey in mid-2006.[15] These previous events highlight the magnitude of the deadly consequences that an attack on surface transportation could have.

As part of its ongoing communications with stakeholders, TSA has alerted owner/operators affected by this proposed rule to transportation-related threats and has worked with many of them to review and recognize potential vulnerabilities to their operations. The impact that security training can have on these operations was recognized by Congress when it mandated, and provided detailed requirements for, security training regulations as part of the 9/11 Act.[16]

TSA recognizes that the owner/operators of surface transportations systems, both public and private, are principally responsible for the safety and security of the people using their services. As noted in Presidential Policy Directive/PPD–21, ''Critical Infrastructure Security and Resilience:''

> The Nation's critical infrastructure is diverse and complex. It includes distributed networks, varied organizational structures and operating models (including multinational ownership), interdependent functions and systems in both the physical space and cyberspace, and governance constructs that involve multi-level authorities, responsibilities, and regulations. *Critical infrastructure owners and operators are uniquely positioned to manage risks to their individual operations and assets, and to determine effective strategies to make them more secure and resilient.*[17]

Surface transportation employees—the people who provide and support these services—are a critical resource for protecting passengers and the transportation infrastructure.

As a result of TSA's programmatic efforts, as well as awareness of the requirements of the 9/11 Act, many owner/operators of higher-risk surface transportation operations have voluntarily implemented security training programs that address some of the requirements of this proposed rule. As noted in the economic analysis for this rulemaking, however, the private market may not provide adequate incentives for owner/operators to make a socially optimal investment in the full range of measures that would reduce the probability of a successful terrorist attack based on the economics of externalities. (Externalities are costs or benefits from an economic transaction experienced by parties ''external'' to the transaction.) Specifically, for surface mode owner/operators, the total consequences of an attack or other security incident to society may be greater than what would be suffered by the individual owner/operator of the infrastructure or facility.

Without ignoring the voluntary efforts of owner/operators to increase the baseline of their security, including by providing security training, TSA also recognizes a firm normally would not choose to make an investment in security over its privately optimal amount in a competitive market place, since such an investment would increase the firm's cost of production, placing it at a disadvantage when competing with companies that have not chosen to make a similar investment in security.

Focusing on the higher-risk operations and frontline employees (defined in the rule as those performing security-sensitive functions), this proposed rule would close gaps in the scope or breadth of training provided as part of voluntary efforts. To the extent resource and economic considerations could cause this voluntary commitment to abate in the future, this proposed rule, when finalized, should solidify these efforts and commitment to security training.

Thus, the purpose of this proposed rule is to solidify a baseline of security training for surface transportation by enhancing and sustaining the capability of frontline employees for higher-risk public transportation systems, railroad carriers (passenger and freight), and OTRB owner/operators to observe, assess, and respond to security risks and potential security breaches. These critical capabilities include identifying, reporting, and appropriately reacting to suspicious activity, suspicious items, dangerous substances, and security incidents that may be associated with terrorist reconnaissance, preparation, or action. An employee who is prepared and trained to observe, assess, and respond may be the critical point for preventing a terrorist act.

Security awareness training is an important and effective tool to enhance an employee's ability to detect and deter attacks by terrorists or others—particularly those with malicious intent to target surface transportation or use vehicles as delivery systems for weapons of mass destruction. Well-trained employees can serve as security force-multipliers. Their familiarity with the facilities and operating environments of their specific transportation systems makes them especially effective at recognizing situations and conditions that may pose a threat to the safety and security of passengers, cargo, and transportation infrastructure.

Employees who are prepared to execute their security-related responsibilities and trained to observe, assess, and respond bring an informed vigilance to their daily responsibilities. They are more capable of identifying and making timely reports to support inquiry by law enforcement and security personnel, increasing the potential for detection or disruption of terrorist planning, preparations, and observations. In the event an incident does occur, employees who understand their roles and responsibilities under the owner/operator's security planning and response documents are better prepared to initiate timely responsive actions to mitigate consequences and work with first responders.

This rulemaking is part of TSA's commitment to risk-based security and how it implicates policy decisions, resource commitments, and expectations. Passengers traveling through a higher-risk area or system (whether by bus or train) should be able to expect the same level of security regardless of the carrier. Communities in HTUAs should expect that the freight trains carrying RSSM[18] are operated by employees with a common baseline of security training, regardless of who owns or operates the train. The result is

[12] CNN, ''July 7 2005 London Bombings Fast Facts'' (updated June 29, 2016, 9:44 a.m.), available at *http://www.cnn.com/2013/11/06/world/europe/july-7-2005-london-bombings-fast-facts/.*

[13] Bureau of Diplomatic Security, ''India 2013 Crime and Safety Report: Mumbai'' (March 5, 2013), available at *https://www.osac.gov/pages/ContentReportDetails.aspx?cid=13701.*

[14] CNN, ''Mumbai Terror Attacks Fast Facts'' (updated Nov. 4, 2015, 11:57 a.m.), available at *http://www.cnn.com/2013/09/18/world/asia/mumbai-terror-attacks/.*

[15] Mary Frost, ''NYC subways targeted in ISIS terror plot—NYPD, FBI evaluating threat level,'' Brooklyn Daily Eagle (Sept. 25, 2014), available at *http://www.brooklyneagle.com/articles/2014/9/25/nyc-subways-targeted-isis-terror-plot-nypd-fbi-evaluating-threat-level.*

[16] Public Law 110–53, 121 Stat. 266 (Aug. 3, 2007).

[17] PPD–21 (Feb. 12, 2013) (emphasis added).

[18] As previously noted, TSA is not proposing to modify these terms as defined in current 49 CFR 1580.3.

a proposed rule that bases applicability primarily on the location where the transportation is operated (rather than constructs of ownership) and scope of employees to be trained on the functions they perform (rather than titles in position descriptions).

For these reasons, TSA proposes this regulation requiring owner/operators to implement employee security training programs for employees serving in security-sensitive positions in higher-risk operations. TSA explains aspects of the proposed rule more fully in section III of this NPRM.

B. Statutory Authorities

The security of the Nation's transportation systems is vital to the economic health and security of the United States. Ensuring transportation security while promoting the movement of legitimate travelers and commerce is a critical counter-terrorism mission assigned to TSA.

Since its creation following the attacks of September 11, 2001, TSA has had broad statutory authority to assess a security risk for any mode of transportation, develop security measures for dealing with that risk, and enforce compliance with those measures.[19] This includes broad regulatory authority, which enables TSA to issue, rescind, and revise regulations as necessary to carry out its transportation security functions.[20]

Congress has determined that a regulation is necessary for owner/operators of public transportation systems, passenger railroads, freight railroads, and OTRBs to provide security training to their frontline employees. As part of the 9/11 Act,[21] Congress mandated that DHS use its authority to issue regulations and included in the statute minimum requirements for employees to be trained, subjects of training, and procedures for the submission and approval of training programs.[22] This NPRM proposes to implement these provisions.

The 9/11 Act includes a requirement to include ''[l]ive situational training exercises'' as part of its security training regulations.[23] As part of the Homeland Security Exercise and Evaluation Program (HSEEP), DHS describes the benefit of exercises ''to test and validate plans and capabilities.'' [24] While testing the effectiveness of training is important, the HSEEP focuses on the need to test effectiveness of the overall plan—a process that reveals any weaknesses in training. TSA has determined the intent of requiring exercises would be better met if owner/operators were required to test the effectiveness of their security plans—which would include testing employee understanding and capabilities related to their roles, responsibilities, protocols, and procedures. Therefore, TSA has decided to address this element in a separate rulemaking that will meet related 9/11 Act provisions for security planning.[25]

Finally, the 9/11 Act also requires DHS to define the term ''security-sensitive material'' as it relates to materials transported in commerce that pose ''a significant risk to national security . . . due to the potential use of the material in an act of terrorism.'' [26] The 9/11 Act states that the term must include specific, identified materials.[27] TSA has previously identified ''security-sensitive materials'' transported by freight railroad carriers as ''Rail Security-Sensitive Materials'' (RSSM).[28] As further discussed in section III.A.2 of this NPRM, TSA is proposing materials to be identified as ''Transportation Security-Sensitive Materials (TSSM).''

C. Rule Organization

Implementing requirements in the 9/11 Act for surface transportation regulations necessitates making other changes to TSA's regulations found in title 49 of the CFR. Some of these changes are technical revisions or additions, such as consolidating definitions used in multiple parts of TSA's regulations into part 1500 and adding cross-references to the new regulatory requirements as relevant for investigations (part 1503) and protection of SSI (part 1520).

The most significant changes are to subchapter D, which TSA proposes to rename ''Maritime and Surface Transportation Security.'' Subchapter D currently contains requirements related to security threat assessments (STAs) (parts 1570 and 1572) and rail security (1580). TSA is proposing to significantly reorganize and augment parts 1570 and 1580, and add parts 1582 (PTPR) and 1584 (Highway and Motor Carriers).

Many portions of the proposed rule are common to PTPR, freight, and OTRB operations. These are included in 49 CFR part 1570. Eliminating duplication of these requirements across multiple sections of TSA's regulations reduces unintended inconsistencies, both now and over time to the extent there are any amendments made to these regulations in the future. Because of these modifications, other organizational changes are being made to part 1570—including moving definitions that have applicability across multiple parts of TSA's regulations to part 1500 (discussed more fully in part III.A of this NPRM) and consolidating provisions related to security threat assessments into a new subpart D. The STA provisions are being moved but are otherwise unmodified. As a result, the substance of these provisions is not part of this notice and comment rulemaking.

TSA includes proposed requirements adapted to reflect the unique aspects of each mode in mode-specific parts of 49 CFR Chapter XII, Subchapter D—Maritime and Surface Transportation Security. Part 1580 would be revised to focus on freight railroads. Sections in current part 1580 applicable to PTPR systems would be moved to a new part 1582. TSA also proposes creating a new part 1584, which would include the requirements for OTRB.

With the exception of the following, provisions of current 49 CFR part 1580, Rail Transportation Security, applicable to freight railroads would be reorganized without substantive change. TSA proposes to move some provisions to part 1570—this revision would include the security coordinator and reporting requirements (which are being updated and clarified, and extended to include higher-risk buses).[29] Other provisions, such as ''chain of custody'' provisions for RSSMs, would be reorganized within part 1580 because of this proposed rule. Finally, current Appendix A to part 1580 would be modified to remove outdated references. Table 2 provides a distribution table for changes to current 49 CFR part 1580. To the extent sections are being moved, but not revised, they are not part of this notice and comment rulemaking.

[19] *See supra,* n. 2.

[20] 49 U.S.C. 114(l)(1).

[21] Public Law 110–53, 121 Stat. 266 (Aug. 3, 2007).

[22] *See* 6 U.S.C. 1137, 1167, and 1184.

[23] *See* 6 U.S.C. 1137(c)(7), 1167(c)(8), and 1184(c)(8).

[24] *See* DHS, ''Homeland Security Exercise and Evaluation Program (HSEEP)'' (April 2013), available at *https://www.fema.gov/media-library-data/20130726-1914-25045-8890/hseep_apr13_.pdf.*

[25] *See* requirements in 6 U.S.C. 1134 (public transportation), 1162 (railroads), and 1181 (OTRBs).

[26] 6 U.S.C. 1151(13).

[27] Materials to be included are Class 7 radioactive materials, Division 1.1, 1.2, or 1.3 explosives, materials poisonous or toxic by inhalation, including Division 2.3 gases and Division 6.1 materials, and select agents or toxins regulated by the Centers for Disease Control and Prevention under 42 CFR part 73.

[28] *See* 49 CFR 1580.3 and 1580.100(b).

[29] These modifications are discussed in section III.C. of this NPRM.

TABLE 2—49 CFR PART 1580 DISTRIBUTION TABLE

Former section	New section(s)
1580.1	1570.1, 1580.1, and 1582.1.
1580.3	1570.3, 1580.3, and 1582.3.
1580.5	1570.9.
1580.100	1500.3, 1580.101.
1580.101	1570.201.
1580.103	1580.203.
1580.105	1570.203.
1580.107	1580.205.
1580.109	1580.5 and 1582.5.
1580.111	1580.207.
1580.200	1582.101.
1580.201	1570.201.
1580.203	1570.203.

III. Proposed Rule

A. Amendments to Part 1500

1. General Terms

Consistent with the proposed rule's organization, TSA includes proposed definitions for terms relevant to several subchapters of TSA regulations, beyond the requirements of subchapter D, in part 1500. Terms relevant to several parts of subchapter D would be added to § 1570.3. Terms uniquely relevant to each mode would be included in the relevant parts (part 1580 (freight), part 1582 (PTPR), and part 1584 (OTRB)).

Many of the proposed definitions are identical, or nearly identical, to definitions codified in current 49 CFR part 1580. Some definitions are taken from the 9/11 Act. Other definitions are derived from existing Federal regulatory programs, particularly programs administered by DOT. A few definitions are based on industry sources. TSA's purpose is to use existing definitions that regulated parties are familiar with to the extent that the definitions are consistent with the 9/11 Act and the purposes of this NPRM. Where no existing definition is appropriate, TSA's subject matter experts developed the definition based upon the generally accepted and known use of terms within each of the modes subject to this proposed regulation. Table 3 provides additional information on the terms that would be added to part 1500.

TABLE 3—EXPLANATION OF PROPOSED TERMS AND DEFINITIONS

Summary of change	Explanation
Propose modifying definition of ''Administrator''	This term is used in proposed sections regarding procedures for requesting alternative measures or challenges to required modifications. The definition is being updated to reflect TSA's transition to a DHS component.
Propose adding a definition for ''Authorized representative''	This term is used in the definition of ''Employee.'' It is intended to ensure that any ''authorized representatives'' performing security-sensitive functions for an owner/operator receives the required security training, even if they are not considered a direct employee. More information can be found in the discussion of employees required to be trained in preamble section III.E.
Propose adding a definition for ''Bus''	This term is used in several other terms defined in this proposed rule. TSA's review of DOT regulations identified several definitions for this term. The definition developed by TSA for the purposes of subchapter D is a composite of DOT's definitions adopted for TSA's purposes. While it is a broad definition on its own, the other terms in which it is used limit its application.
Propose adding a definition of ''Bus transit system''	This term is used as part of the scope of what is intended by, and included within, the definition of public transportation. Consistent with the scope of other commuter transit systems, the definition is based upon an explanation of what constitutes ''urban rapid transit service'' in 49 CFR part 209, Appendix A.
Propose adding a definition for ''Commuter bus system''	This term is used as part of the scope of what is intended by, and included within, the definition of public transportation. Consistent with the scope of other commuter transit systems, the definition is based upon the Federal Railroad Administration's (FRA's) explanation of ''commuter service'' for rail in 49 CFR part 209, and the Federal Motor Carrier Safety Administration's (FMCSA's) definition of ''commuter service'' in 49 CFR 374.303(g).
As part of reorganization of current 49 CFR part 1580, propose moving definition of ''Commuter passenger train service'' from 49 CFR 1580.3.	This term is used as part of the scope of what is intended by, and included within, the definition of public transportation.
Propose moving definition of ''DHS'' from 49 CFR 1520.3	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR part 1520.
Propose moving definition of ''DOT'' from 49 CFR 1520.3	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR part 1520.
Proposed adding definition for ''Fixed-route service''	Used within the scope of OTRB owner/operators subject to the proposed regulation (*see* proposed 49 CFR 1570.101 and 1584.1), this term is based on the definition of a fixed-route system found in 49 CFR 37.3.
Propose moving definition of ''General railroad system of transportation'' from 49 CFR 1580.3.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Hazardous Material'' from 49 CFR 1580.3.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Heavy rail transit'' from 49 CFR 1580.3	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose adding a definition of ''Host railroad''	This term, which is consistent with the definition in 49 CFR 236.1003, is used within the scope of this proposed rule relating to operations by railroad carriers. More information can be found in the preamble discussion in section III.F.1.

TABLE 3—EXPLANATION OF PROPOSED TERMS AND DEFINITIONS—Continued

Summary of change	Explanation
Propose moving definition of ''Improvised explosive device (IED)'' from 49 CFR 1580.3.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Intercity passenger train service'' from 49 CFR 1580.3.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Light rail transit'' from 49 CFR 1580.3	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose adding a definition of ''Motor vehicle''	Used throughout this proposed rule, TSA has determined that there is no consistent definition of ''motor vehicle'' within federal regulations. TSA has reviewed various DOT regulations and relies primarily on 49 CFR 390.5 for this definition as most applicable to this proposed regulation, choosing a definition that is inclusive with limitations provided in the relevant applicability sections.
Propose adding a definition for ''Over-the-Road Bus (OTRB)''	This term, the definition of which is consistent with 6 U.S.C. 1151(4), is used within other definitions and the scope of this proposed rule relating to over-the-road bus owners. More information can be found in the preamble discussion in section III.F.3.
Propose moving definition of ''owner/operator'' from 49 CFR 1570.3 and modifying to eliminate cross-reference to title 33 of the CFR.	Used in other definitions and throughout the proposed rule, the definition of this term is a modification of the current definition of ''owner/operator'' that affects 49 CFR, subchapter D. The modifications remove outdated references to make it the term appropriate for the broader scope of transportation regulated by TSA.
Propose moving definition of ''Passenger car'' from 49 CFR 1580.3 and adding ''rail'' to the term to read, ''passenger rail car''.	Part of reorganization of current 49 CFR part 1580. TSA is proposing to insert the word ''rail'' between ''passenger'' and ''car'' to avoid any confusion between rail and motor vehicle conveyances.
Propose adding a definition of ''Passenger railroad carrier''	Used both in the scope of proposed subpart B of 49 CFR part 1570 (Security Coordinator and Reporting Requirements) and the scope of the training rule (proposed 49 CFR part 1582), this term is also used in the context of host railroad operations. More information can be found in the discussion in III.F.2. The definition is based on the definition for this term found in 49 CFR 239.7.
Propose moving definition of ''Passenger train'' from 49 CFR 1580.3	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Private rail car'' from 49 CFR 1580.3	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose adding a definition of ''Public transportation''	Used within other terms, this definition is based primarily on 49 U.S.C. 5302(14). Where the statute uses a definition that is characterized by what is excluded, TSA's definition focuses on what is included.
Propose adding a definition of ''Public transportation agency''	This term is used to define the scope of owner/operators subject to the proposed rule. *See* proposed subpart B to 49 CFR parts 1570 and 1582. *See also* the preamble discussion in section III.F.2 for more information. (The 9/11 Act defines a ''public transportation agency'' as a publicly owned operator of public transportation eligible to receive Federal assistance under Chapter 53 of Title 49, United States Code.''). TSA reviewed the requirements of that statute in developing this definition. As noted above, the definition of ''public transportation'' is based on 49 U.S.C. 5302(14).
Propose moving definition of ''Rail hazardous materials receiver'' from 49 CFR 1580.3.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Rail hazardous materials shipper'' from 49 CFR 1580.3, with a non-significant amendment.	Part of reorganization of current 49 CFR part 1580. As proposed, the definition of ''offers or offeror'' in 49 CFR 1580.3 would be deleted and a reference to the DOT definition for ''person who offers or offeror'' would be incorporated into the definition of ''rail security-sensitive material.''
Propose moving definition of ''Rail secure area'' from 49 CFR 1580.3 ..	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Rail transit facility'' from 49 CFR 1520.3 and 1580.3.	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR part 1520.
Propose moving definition of ''Rail transit system or 'Rail Fixed Guideway System' '' from 49 CFR 1580.3 to proposed 1570.3.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Railroad carrier'' from 49 CFR 1580.3	Part of reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Railroad'' from 49 CFR 1580.3 and modifying it to define ''Railroad transportation''.	Part of reorganization of current 49 CFR part 1580. This proposed rule does not significantly change the definition.
Propose moving definition of ''Record'' from 49 CFR 1520.3	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR part 1520.
Propose adding definition of ''Sensitive Security Information consistent with 49 CFR 1520.3 to 1570.3.	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR parts 1520 and 1570.
Propose moving definition of ''State'' from 49 CFR 1570.3	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR parts 1520 and 1570.

TABLE 3—EXPLANATION OF PROPOSED TERMS AND DEFINITIONS—Continued

Summary of change	Explanation
Propose adding definition of ''Transportation security equipment and systems''.	The term is used in the context of the proposed requirement for security-sensitive employees to be trained on use of security equipment and systems. *See* for example, proposed 49 CFR 1580.155(c)(1). TSA's subject matter experts have developed this definition based on their work with the modes in conducting assessments and developing voluntary security action items.
Propose moving definition of ''Tourist, scenic, historic, or excursion operation'' from 49 CFR 1580.3.	Part of the reorganization of current 49 CFR part 1580. This proposed rule does not change the definition.
Propose moving definition of ''Transit'' from 49 CFR 1580.3 with modifications to reflect broader scope of this proposed rule.	Part of the reorganization of current 49 CFR part 1580. TSA proposes modifying this term to reflect the multimodal scope of the proposed training rule and have the term apply across all the modes.
Propose moving definition of ''Transportation or transport'' from 49 CFR 1580.3 with modifications to reflect broader scope of this proposed rule.	Part of the reorganization of current 49 CFR part 1580. TSA proposes modifying this term to reflect the multimodal scope of the proposed training rule and have the term apply across all the modes.
Propose moving definition of ''Transportation facility'' from 49 CFR 1580.3 with modifications to reflect broader scope of this proposed rule.	Part of the reorganization of current 49 CFR part 1580. TSA proposes modifying this term to reflect the multimodal scope of the proposed training rule and have the term apply across all the modes.
Propose adding definition of ''Transportation Security-Sensitive Materials (TSSM)''.	The definition is included to satisfy 9/11 Act requirements. *See* 6 U.S.C. 1151(13). The term is defined in proposed 49 CFR 1570.3. More information can be found in the preamble discussion of the TSSM list in section III.A.2.
Propose moving definition of ''TSA'' from 49 CFR 1520.3	This term has general applicability to several parts of TSA's regulations beyond the provisions in 49 CFR part 1520.
Propose moving definition of ''vulnerability assessment'' from 49 CFR 1520.3.	This term is being modified to streamline terminology rather than enumerating subcategories within each mode. It is being moved to 49 CFR part 1500 as it has relevance beyond the provisions in part 1520.

2. Transportation Security-Sensitive Materials

The 9/11 Act included a requirement for DHS to define ''security-sensitive material.'' ''Security-sensitive material'' is defined as ''a material, or group or class of material, in a particular amount and form that the Secretary [of Homeland Security], in consultation with the Secretary of Transportation, determines, through rulemaking with opportunity for public comment, poses a significant risk to national security while being transported in commerce due to the potential use of the material in an act of terrorism.'' [30] TSA has met the requirements of the 9/11 Act related to rail through its definition of RSSMs under current 49 CFR part 1580.[31]

In March of 2010, DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a final rule: ''Hazardous Materials: Risk-Based Adjustment of Transportation Security Plan Requirements.'' [32] This PHMSA final rule amended PHMSA's security requirements for hazardous material (hazmat) transportation under 49 CFR part 172 of the Hazardous Material Regulations (HMR),[33] applicable to freight railroad carriers, motor carriers, and shippers and receivers of hazmat. In addition to amendments to security planning requirements, the PHMSA final rule provided a revised list of hazardous materials for which a security plan is required. DOT worked closely with TSA to align the proposed lists of materials subject to their security programs with ongoing efforts by TSA. The materials considered included certain explosives, compressed gases and flammable liquids, poisonous gases and materials, corrosive materials, radioactive materials, and chemicals listed by the Chemical Weapons Convention. There were also requests to PHMSA to harmonize the list of materials for which security plans are required with the list of materials designated as high consequence dangerous goods for which enhanced security measures are recommended in the United Nations Model Regulations on the Transport of Dangerous Goods (UN Recommendations). Discussions regarding the materials identified in the PHMSA regulations can be found in the preambles to their relevant rulemakings.[34]

TSA proposes to adopt the PHMSA list for purposes of defining TSSM. This approach avoids unnecessary duplication and ensures consistent alignment of the materials meeting this standard in Federal regulations. A discussion regarding the materials in the list can be found in the preamble to PHMSA's final rule.[35]

B. Amendments to Part 1503

TSA is proposing minor amendments to part 1503 (Investigative and Enforcement Procedures) as necessary to conform these regulations to changes made by the proposed rule. In § 1503.101(b), the scope of statutory provisions is amended to add authorities in title 6 U.S.C. that are administered by the TSA Administrator—which are relevant to this proposed rule. These are conforming amendments with no cost impact.

C. Amendments to Part 1520

TSA is also proposing to modify part 1520 (Protection of Sensitive Security Information). TSA is required to promulgate regulations governing the protection of information obtained or developed in carrying out security under the authority of ATSA [36] if public disclosure of that information could be detrimental to transportation security. TSA's current SSI regulation, 49 CFR part 1520, establishes certain requirements for the recognition, identification, handling, and dissemination of SSI, including restrictions on disclosure and civil

[30] 6 U.S.C. 1151(13).

[31] *See* 49 CFR 1580.3 and 1580.100(b). *See also* discussion in 73 FR 72130 at 72134 (Nov. 26, 2008).

[32] 75 FR 10974 (Mar. 9, 2010). Additional information is included in the preamble to the related NPRM. *See* 73 FR 52558 (Sept. 9, 2008).

[33] These regulations are also referred to as HM–232.

[34] *See supra,* n. 32.

[35] 75 FR at 10977.

[36] *See* 49 U.S.C. 114(r).

penalties for violations of those restrictions. DOT has nearly identical SSI authority (49 U.S.C. 40119) and a nearly identical SSI regulation (49 CFR part 15).[37]

Because TSA is expanding the scope of its regulatory requirements in order to fulfill the mandates of the 9/11 Act, it is necessary to conform the SSI provisions to include these transportation security-related requirements. The proposed amendments are limited to: (1) Eliminating unnecessary terms from part 1520 that are added to part 1500 and (2) replacing the limiting term ''rail transportation security requirement'' with ''surface transportation security requirement.'' In some places, such as the definition of ''vulnerability assessment'' in § 1520.3, TSA is proposing to streamline a lengthy description of types of transportation to simply state ''aviation, maritime, or surface transportation.''

The impact of these minor revisions should also be minimal. Under § 1520.7(j), any person who has access to SSI is required to protect it according to the requirements of the regulation. While some of the proposed population that would be affected by this rule has not previously been subject to TSA regulations, most of them have previously received SSI information from TSA, as well as training on the proper handling of SSI, and have procedures in place to ensure the requirements of the regulation are met.[38]

TSA's regulations for SSI have a counterpart in DOT regulations under 49 CFR part 15. Any comments received on these proposed amendments will be shared with DOT. As these are parallel rules, assuming there are changes to part 1520 adopted as part of this notice and comment rulemaking, DOT may subsequently make similar changes to part 15. We invite comments on the proposed changes to part 1520, and we will share with DOT any comments received on potential changes to part 15. We also invite comments on this process for making changes to both parts.

D. Amendments to Part 1570

1. Overview of Changes and Structure

TSA is proposing to divide part 1570 into four subparts: (1) Subpart A would cover general requirements applicable to all aspects of subchapter D to chapter XII of title 49; (2) subpart B provides the general framework for security programs; (3) subpart C covers operational requirements; and (4) subpart D would move and consolidate general provisions related to security threat assessments (STAs) which are more specifically addressed in part 1572. As previously discussed, mode—specific requirements are contained in subsequent parts. Because of the significant restructuring of part 1570, the proposed rule text includes the entirety of the revision—not just the parts that would be added because of this rulemaking. This includes terms applicable to the STAs required by part 1572, as well as related STA provisions that TSA proposes moving to new subpart D.

2. Subpart A—General

Terms and Definitions (§ 1570.3)

As previously indicated, TSA is proposing to move several terms from § 1570.3 to § 1500.3 as part of a general effort to streamline TSA's regulations by consolidating terms used in multiple parts. In addition, TSA is proposing to add the terms identified in Table 4 to § 1570.3 as they are used in multiple sections of subchapter D to chapter XII of title 49.

TABLE 4—EXPLANATION OF PROPOSED TERMS AND DEFINITIONS

Summary of change	Explanation
Propose adding definition of ''Contractor''	This term is used in the definition of ''employee'' for purposes of this subchapter and is based on a definition of contractor used in DOT regulations, *see, e.g.,* 49 CFR 655.4.
Propose adding definition for ''Employee''	This term is used in several definitions, most notably, the definition of ''security-sensitive employee,'' which is the term used to define the scope of individuals who must be trained under the proposed rule (*see* discussion in III.E) and the requirements of the training program. *See* proposed definition of ''security-sensitive employee'' in 49 CFR 1580.3, 1582.3, and 1584.3. It is also used in sections regarding responsibility for compliance (proposed 49 CFR 1570.13), and terms used for ''chain of custody'' requirements in proposed 49 CFR 1580.3 (currently 49 CFR 1580.107).
Propose adding definition of ''Immediate supervisor''	This term is used in the definition of ''Employee.'' It is intended to ensure that any ''immediate supervisors'' performing security-sensitive functions for an owner/operator receive the required security training. It is also intended to limit the layers of management that must receive security training to those who have an actual nexus to transportation security. More information can be found in the discussion of employees required to be trained in preamble section III.E.
Propose adding definition of ''Security-sensitive employee''	This term is used in provisions of part 1570 as part of the proposed security training requirements. The definition provides a signal to find the appropriate mode-specific definitions in 49 CFR parts 1580, 1582, and 1584.
Propose adding definition of ''Security-sensitive job function''	This term is used in provisions of part 1570 as part of the proposed security training requirements. The definition provides a signal to find the appropriate mode-specific definitions in 49 CFR parts 1580, 1582 and 1584.

[37] For more information on these regulations, *see* 69 FR 28078 (May 18, 2004).

[38] Publicly available information on proper handling of SSI is available on TSA's Web site at *www.tsa.gov.*

Security Responsibilities for Employees and Other Persons (§ 1570.7)

In proposed § 1570.7, TSA is seeking to make its regulations regarding the responsibility for compliance consistent for all modes. Under 49 U.S.C. 114(f), TSA is required to enforce security related regulations and requirements and oversee the implementation of security measures for all modes of transportation.[39] As with the similar aviation regulation, the obligation for compliance is not limited to owner/operators specifically referenced under applicability provisions. Any person may be held to have violated these proposed rules, including contractors who provide service to owner/operators and the employees of such contractors. For example, a contractor who is authorized by an owner/operator to provide security training to individuals performing security-sensitive functions on the owner/operator's behalf would be expected to fulfill all of the responsibilities under these three parts with respect to such training. Similarly, contractors would also be subject to inspection for compliance with this proposed rule and enforcement actions when appropriate (*see* following discussion on proposed § 1570.9 for more information on TSA's investigatory and enforcement authority).

Compliance, Inspection, and Enforcement (§ 1570.9)

TSA is mandated to: (1) Enforce its regulations and requirements; (2) oversee the implementation and ensure the adequacy of security measures; and (3) inspect, maintain, and test security facilities, equipment, and systems for all modes of transportation.[40] This mandate applies even in the absence of regulations stating the authority, but TSA has chosen to include a restatement of its authority in its regulations. The statute specifically requires TSA to—

- Assess threats to transportation;
- Enforce security-related regulations and requirements;
- Inspect, maintain, and test security of facilities, equipment, and systems;
- Ensure the adequacy of security measures for the transportation of cargo;
- Oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;
- Require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel; and
- Carry out such other duties, and exercise such other powers, relating to transportation security as the Administrator considers appropriate, to the extent authorized by law.

While current part 1570 includes a provision stating TSA's compliance, inspection, and enforcement authority, it is not as detailed as what TSA has promulgated in more recent regulations.[41] Therefore, TSA is proposing to transfer the text of current § 1580.5 to subpart A as proposed § 1570.9, with minor modifications to reflect the addition of certain bus operations that have previously been unregulated by TSA.[42]

3. Subpart B—Security Programs

As previously noted, TSA intends to consolidate and avoid duplication of requirements in its regulations by placing all of the security program requirements that are consistent across all modes in subpart B. These include: (1) Submission, review, and approval of the program; (2) procedures for amending the program; (3) the training schedule (including initial and recurrent training, previous training, relation to other training, and failure to train); and (4) recordkeeping. Proposed requirements for which employees must be trained and content of the program are found in the proposed revisions to part 1580 (freight rail) and new parts 1582 (PTPR) and 1584 (OTRB).

Program Content (§ 1570.103)

Under the statutory requirements, TSA must issue regulations mandating security training for owner/operators of public transportation agencies, railroads, and OTRBs.[43] In proposing these regulations, TSA assumes that Congress intended the requirement to provide for the use of ''existing procedures, protocols, and standards to satisfy the regulatory requirements'' for vulnerability assessments and security plans apply equally to security training.[44] Proposed § 1570.3 implements these requirements by stating that each owner/operator required to have a security program under proposed parts 1580, 1582, and 1584 must address all of the identified requirements. In addition, the proposed section implements the requirement to allow for use of existing programs by allowing the owner/operators to include these existing programs as an appendix. The owner/operators would be required to cross-reference the relevant portions of the appendix or TSA could assume it is all part of the security program and enforce it as such.

To minimize costs of compliance, TSA may identify pre-existing or widely-available training programs that meet some or all of this proposed rule's requirements. If owner/operators decide to use a program already determined by TSA to meet the proposed rules requirements, the owner/operator must notify TSA of the program name, presenter, modifications made to the training material since the program was approved by TSA, and the last date of modification. If TSA has already determined the program meets some or all of the requirements for the proposed rule and is applicable to the owner/operator's operations, it would be unnecessary for the owner/operator to submit a copy of the program to TSA for approval or include it in the appendix.

Responsibility for Determinations (§ 1570.105)

As part of this rulemaking, TSA is proposing to apply the requirements to the highest-risk operations within the three modes identified by the 9/11 Act. As part of the surface security requirements in the 9/11 Act, TSA is required to develop risk tiers.[45] The criteria used for determining the highest-risk tier for each mode is discussed in more detail in section III.F of this NPRM. The text of proposed § 1570.105(a) informs owner/operators that TSA has determined the applicability criteria, but it is the owner/operator's responsibility to determine whether their operations meet the criteria.

The proposed rule would require owner/operators to notify TSA within 30 days of the effective date of the final rule if they meet the criteria for applicability. In addition to publishing the regulatory requirements in the **Federal Register**, TSA will work with

[39] *See* 49 U.S.C. 114(f)(7) and (11). A similar provision applicable to aviation employees and other related persons is in 49 CFR 1540.105(a)(1) and (b).

[40] *See* 49 U.S.C. 114(f).

[41] Compare current § 1570.11 with current § 1580.5. The provision in part 1580 is also consistent with 49 CFR 1542.5, 1544.3. 1546.3, 1548.3, and 1549.3.

[42] A more detailed discussion of current § 1580.5, still relevant to the proposed section, can be found in the preamble for current part 1580. *See* 71 FR 76852 (Dec. 12, 2006) (NPRM) and 73 FR 72130 (Nov. 26, 2008) (Final Rule).

[43] *See* 6 U.S.C. 1137, 1167, and 1184.

[44] *See* 6 U.S.C. 1162(j) and 1181(i) (use of existing procedures, protocols, and standards to satisfy regulatory requirements).

[45] For public transportation, 6 U.S.C. 1137(e) states that any public transportation agency that receives a grant under 6 U.S.C. 1135 shall be required to develop and implement a training program pursuant to this section. The grant program implemented under sec. 1135 relies on high-risk determinations. *See also* 6 U.S.C. 1162(a) and (h) and 1181(a) and (h) (Secretary shall identify risk tiers for freight railroads and OTRB and apply regulatory requirements to those at the highest-risk).

the relevant associations for each of the modes to ensure their memberships are apprised of the requirements. TSA will identify the form and manner of notification in the final rule consistent with cost-effective methodologies at that time. Because the proposed rule would require owner/operators to determine whether the criteria apply, TSA could bring an enforcement action against an owner/operator that meets the criteria, but has failed to comply with the requirements.

The obligation to self-determine applicability also applies to new and existing operations (those commencing after publication of the final rule). They would be required to notify TSA no later than 90 calendar days before commencing operations or implementing modifications that would put them within the applicability of the requirements.

Recognition of Previous Training (§ 1570.107)

As previously noted, TSA is required to allow use of existing programs to satisfy the security program requirements implemented as a result of 9/11 Act's provisions.[46] Under proposed § 1570.107, an owner/operator could rely on previous training that occurred within the identified periods for initial or recurrent training. In order to use previous training, the owner/operator would need to validate the training provided satisfies the requirements of this proposed rule—including records of training, curriculum, and appropriateness for the employee and owner/operator's operations.

Security Training Program Submission, Review, and Approval (§ 1570.109)

The 9/11 Act's requirements include specific deadlines for submission of programs and TSA's review.[47] Proposed § 1570.109 identifies the required deadlines for submitting security training programs and TSA approval.

In general, not later than 90 days from the effective date of the final rule, owner/operators would be required to submit programs to TSA in a form and manner prescribed by TSA. Owner/operators commencing new businesses or operations that would make them subject to this proposed rule would be required to submit their security training programs to TSA no less than 60 days before commencing operations. In the final rule, TSA will provide details for submission (encouraging use of a secure Web site or other electronic submissions). TSA assumes submission would likely be by email or mail service, but requests comments on preferences. Consistent with requirements of the 9/11 Act, TSA would review the programs within 60 days of receipt and either approve them or specify changes that would be needed for approval.[48] If TSA requires changes, the owner/operator would be required to submit a modified training program that meets TSA's specifications within 30 days of notification by TSA of the needed changes. The section includes the availability to request reconsideration of any TSA-required modifications. TSA provides an analysis of burden and estimated costs associated with this information collection in section V.A. of this preamble and the draft OMB 83–I Supporting Statement for its information collection request, which is available in the docket for this rulemaking.

Initial training (§ 1570.111(a))

Consistent with the 9/11 Act's requirements, TSA proposes that existing employees must be trained within one year of TSA's approval of the program.[49] As further required by the 9/11 Act, initial training for new employees or those transitioning to a covered job function (as identified in proposed Appendix B to parts 1580 (freight rail), 1582 (PTPR), and 1584 (OTRB), must occur within the first 60 days of the date an employee begins to perform a security-sensitive function.[50]

During the consultation process at the initial stages of this rulemaking, some stakeholders objected to a one-year deadline for completion of initial training. While the 9/11 Act does not provide for flexibility on the initial training schedule, TSA has attempted to address these concerns through provisions on recurrent and previous training (as discussed in section III.D.3 of this NPRM). In addition, TSA is proposing to include a section allowing regulated parties to request an extension if they cannot meet the required training schedule.[51]

Proposed § 1570.111(a)(3) is included to address the situation of non-permanent employees. TSA recognizes that some individuals may be intermittently employed as contractors or representatives to perform security-sensitive functions; they might not perform these functions for 60 or more consecutive calendar days. For example, an employee may function as a maintenance worker for a 30-day period and then, at a later date, perform that function for another period of 30 days or longer. This may also include individuals who are employed by multiple owner/operators, such as multiple-employer drivers.[52] The proposed rule would require that such individuals receive training within 60 calendar days after employment that meets the definition of a security-sensitive employee.[53]

In general, this means that an employee would need to be trained within 60 days of beginning permanent employment in a position that may perform a security-sensitive function, whether full or part-time. If, however, an individual is employed on an intermittent or non-permanent basis, such as a contractor who is employed in a position that may perform a security-sensitive function for short durations, then the training would need to take place before the individual's total time of employment by the owner/operator equals sixty calendar days within a consecutive twelve-month period. TSA recognizes that some owner/operators may address this requirement by requiring training for all regular contractors or other individuals employed for short, but regular durations. TSA requests comments on other options for determining accumulated days of employment and for ensuring owner/operators do not engage in employment practices or use of contractors to avoid the requirements of this proposed rule.

As previously noted, the proposed rule includes a provision regarding use of previous training (*see* discussion on proposed § 1570.107). TSA is aware of stakeholder concerns regarding the schedule for initial training, but TSA is also aware that many of the affected owner/operators have already implemented initial employee security training—frequently through the use of

[46] *See* 6 U.S.C. 1162(j) and 1181(i) (use of existing procedures, protocols, and standards to satisfy regulatory requirements).

[47] *See* 6 U.S.C. 1137(d)(1) and (2), 1167(d)(1) and (2), and 1184(d)(1) and (2) (must submit program 90 days from effective date, TSA must approve within 60 days of receipt or notify of need for revisions).

[48] *See* 6 U.S.C. 1137(d)(1) and (2), 1167(d)(1) and (2), and 1184(d)(1) and (2) (TSA must approve within 60 days of receipt or notify of need for revisions).

[49] *See* 6 U.S.C. 1137(d)(3), 1167(d)(3), and 1184(d)(3) (no later than 1 year after approval of security training program, owner/operator must have trained all covered employees).

[50] This is a mandatory requirement for railroads and OTRB companies. *See* 6 U.S.C. 1167(d)(3) and 1184(d)(3) (New employees must be trained within first 60 days of employment).

[51] *See* § 1570.115(c) of this proposed rule.

[52] Such as individuals meeting the definition of ''multiple-employer driver'' in the Federal Motor Carrier Safety Administration (FMCSA) regulations at 49 CFR 390.5.

[53] *See* discussion of ''security-sensitive employees'' in section III.E. of this NPRM.

grant funds provided by DHS for that purpose.[54] TSA invites comments on these requirements as they appear in the proposed rule.

In meeting the initial training schedule, TSA expects that many owner/operators will rely on the provisions in proposed § 1570.107, which provides standards for accepting previous training. Under this section of the proposed rule, TSA would allow ''training credit'' to be given for employees who received training that satisfies the requirements of the proposed rule within one year before its effective date.

This may include emergency preparedness plans that railroads connected with the operation of passenger trains must implement to address such subjects as communication, employee training and qualification, joint operations, tunnel safety, liaison with emergency responders, on-board emergency equipment, and passenger safety information, as well as policies that transit agencies implement to ensure safety promotion to support the execution of the Transit Agency Safety Plan by all employees, agents, and contractors for the rail fixed guideway public transportation system.[55] *See* discussion of these training programs in section III.I. of this NPRM. Similarly, public transportation agencies may have been providing training through funds granted under the TSGP.

The recordkeeping provisions of the proposed rule require an owner/operator to provide current and former employees with documentation upon request of any training completed to meet the requirements of this rule.[56] Options for compliance with this requirement could include providing employees with certificates to validate completed training.

This proposed requirement anticipates situations where an employee may have received training from a previous owner/operator, as well as industry practices where employees may work for multiple owner/operators (such as commercial drivers operating OTRBs). If an owner/operator can validate that an employee has received the required training within the specified timeframe, the training would not need to be repeated. Because it would be the obligation of the current owner/operator to ensure that all training requirements are met, that owner/operator would be responsible for ensuring that any previous training courses satisfy the proposed rule's requirements and documenting that the training was received within the required timeframe.

Finally, there may be situations where ''dual-hatted'' or other specific-function employees are required to receive security training from other sources as part of their jobs, such as railroad police officers employed by the owner/operator. As indicated above, it is the obligation of the owner/operator to ensure and document the training, including training received under these circumstances.

Recurrent Training (§ 1570.111(b))

Recurrent training is essential for maintaining a high level of security awareness. The 9/11 Act recognizes this by requiring routine and ongoing training for public transportation employees.[57] Congress has left it to the discretion of TSA to determine the appropriate schedule for recurrent training and to require a similar schedule for railroad and OTRB employees.[58]

TSA believes annual recurrent training is essential for transportation employees to maintain a high level of awareness, competency, and currency with overall changes in security posture within the surface transportation environment. TSA's decision is consistent with several key considerations, including: (1) Other TSA regulations requiring training, as well as similar training required for TSA employees; (2) the difficulty of learning, developing, and demonstrating security awareness in the dynamic aspects of the surface transportation environment, and (3) industry recommended guidelines for security awareness training.

TSA requires annual training for aviation workers. For example, regulations applicable to Ground Security Coordinators used by aircraft operators specifically require annual training.[59] Other aviation workers are required to receive annual recurrent training as part of the approved security program (including aircraft operators, indirect air carriers, air cargo, etc.).[60]

TSA's decision to require annual training is supported by the Difficulty-Importance-Frequency (DIF) model[61] that TSA uses for determining training requirements for its own employees.[62] The DIF model uses three design criteria: Difficulty, importance, and frequency.

TSA's subject matter experts responsible for TSA-related training determined that measuring the proposed security training program against these standards supports annual training as: (1) The difficulty of learning surface transportation security awareness related information is at the medium/moderately difficult range because it requires decision making when applying what one has learned; (2) the importance of conducting this security training is at the high/very important range because the cost of failure is high and would cause damage and losses in the event of an attack; and (3) the frequency of how often the task would be performed is within medium range.

TSA's decision is also supported by the American Public Transportation Association (APTA) and their recommendations for security training: Security Awareness Training for Transit Employees.[63] Developed in collaboration and consultation with TSA and transportation industry stakeholders, the recommended practice provides minimum guidelines for security awareness training for all transit employees to strengthen transit system security. APTA ''recommends that all transit employees be refreshed on transit security awareness objectives annually, in an abbreviated method at least . . . to reflect advancements or modifications to criminal and terrorist activities and reinforce the security awareness training that employees received initially.''

TSA does not find it necessary to include the ''abbreviated method'' option used by APTA as part of the proposed rule for two reasons. First, the

[54] Congressional appropriations to FTA fund course offerings to public transportation agencies that meet some of the requirements in this proposed rule. Similarly, appropriations through DHS fund the provision of courses in prevention and response that are available to PTPR agencies. Further, FTA and FEMA courses that may meet portions of this proposed rule are listed among the approved vendors and programs for use of TSGP awards.

[55] *Id.*

[56] *See* § 1570.121 of the proposed rule.

[57] *See* 6 U.S.C. 1137(f).

[58] *See* 6 U.S.C. 1137(c)(11), 1167(c)(12), and 1184(c)(12).

[59] *See* 49 CFR 1544.233.

[60] The relevant security program requirements are under 49 CFR 1544.233, 1544.235, 1544.407, 1548.5, and 1549.103.

[61] Bill Melton & J. Bahlis, ''ADVISOR Enterprise Difficulty-Importance-Frequency (DIF) Model Fact Sheet'', BNH Expert Software Inc. (February 23, 2011), available at *http://www.bnhexpertsoft.com/english/products/advent/ADVISOR_DIF_Model.pdf.* DIF is a standard instructional design tool used by a variety of users including the Department of Defense (DOD), the Department of Energy (DOE), and private sector education and healthcare providers, to determine training priority and frequency of training.

[62] The proposed schedule is consistent with TSA's security awareness training for its own employees—including annual training on operational security (OPSEC), responding to active shooter incidents, and social engineering that could undermine security of information systems.

[63] APTA Security Risk Management Working Group., ''Security Awareness Training for Transit Employees'' (March 2012), APTA–SS–SRM–RP–005–12.

First Observer™ program, discussed more fully in section III.J. of this NPRM, will meet most of the training requirements in approximately one hour. Having reviewed a wide variety of programs that could be used to meet elements of the 9/11 Act's requirements, TSA is not aware of any other existing material that could meet all of the proposed requirements in such an abbreviated period.[64] To the extent owner/operators intend to continue to use their existing training program to meet the regulatory requirements, they may want to consider using First Observer™ as an abbreviated form of recurrent training.

Second, owner/operators could request to use some other type of abbreviated security training as an alternative measure for compliance. Owner/operators may request to use alternative measures as part of the interactive and iterative process TSA intends to use for approval and review of required security programs, as detailed in proposed 49 CFR 1570.117. Under this proposed section, the owner/operator must establish that the alternative is in the best interest of the public and transportation security. When applied to recurrent training, TSA may require validation that the expected baseline of security awareness is reached and maintained with the abbreviated program. For example, the owner/operator may propose abbreviated training for employees who can pass a pre-test.

TSA is aware that an annual recurrent training requirement could present challenges for owner/operators who must also meet other regulatory training requirements. For example, FRA requires a two-year recurrent training schedule for the emergency preparedness training required under 49 CFR part 239 (emergency response and evacuation for rail passengers). The security training required by PHMSA under 49 CFR part 172 (securing transportation of hazardous materials) is on a three-year recurrent training cycle. As TSA does not control these training schedules, we cannot harmonize all of them through this rulemaking. To the extent, however, that owner/operators must comply with these other training requirements, they may be able to use them as part of their program to meet the meet recurrent training requirements. TSA is interested in comments regarding options for harmonizing training schedules and for adding efficiencies with other relevant regulatory requirements.

While TSA is proposing annual recurrent training, a three-year recurrent cycle is included as a programmatic alternative. The results of the cost analysis for this alternative can be found in chapter III section K of the Regulatory Impact Analysis (RIA) for this rulemaking, which is included in the public docket.

Amendments to the Security Program (§§ 1570.113 and 1570.115)

Allowing owner/operators to revise or amend their programs, as proposed in § 1570.113, is a subset of addressing the 9/11 Act's requirements for implementation and submission or programs.[65] It is also consistent with TSA's statutory authority to allow exemptions from regulatory requirements.[66] Proposed § 1570.113 includes procedures allowing an owner/operator to submit a request to TSA to amend its program and the standard for TSA's approval of that request. The proposed section identifies appropriate reasons for amending programs, such as changes to an operating environment that could include new equipment or changes in station construction. If the operating environment changes, it is reasonable to expect that some aspects of the security training program would also need to be revised. TSA may approve an amendment if it is in the interest of public and transportation security and meets the required security standards. TSA could ask for additional information or time in order to makes its determination.

Similarly, TSA may need to require amendments in the interest of the public and transportation security. The 9/11 Act specifically provides that TSA must update the requirements, as appropriate, ''to reflect new or changing security threats'' and owner/operators shall change their programs and retrain employees as necessary within a reasonable time.[67] As indicated in proposed § 1570.115, TSA could require owner/operators to revise their training based on emerging threats or methods for addressing emerging threats. For example, the curriculum requirements identified in the 9/11 Act do not address training to respond to active shooter incidents. Following several active shooter incidents, including one that resulted in the death of a Transportation Security Officer in Los Angeles, Congress prioritized the need for this type of training.[68] As with other requirements imposed by TSA, the owner/operator could request a petition for reconsideration of TSA-required amendments.

Alternative Measures (§ 1570.117)

The proposed rule includes procedures allowing for an owner/operator to submit a request to use alternative measures to satisfy all of some of the requirements of subchapter D and the standard for TSA to approve such a request. For example, the owner/operator could request to extend the time periods for submitting its training program or for training all of its security-sensitive employees. In reviewing such a request, TSA would expect the owner/operator to demonstrate good cause for the extension. Under this provision, an owner/operator could request a waiver from some or all of the regulatory requirements. TSA could grant such a request under the authority 49 U.S.C. 114(q), which provides the TSA Administrator with authority to consider and grant requests from an owner/operator for a waiver from all or some of the regulatory requirements. For example, a freight railroad may meet the criteria for applicability, but the operations that trigger applicability may be a de minimis part of its overall business operations. In such a situation, the owner/operator might consider requesting either a complete waiver or an alternative that limits the requirements to a more discrete part of its business. Proposed § 1570.117 would include the procedures for requesting such a waiver, procedures for requesting the use of alternative measures, and identification of the types of information TSA would need in order to make a decision to grant such requests. In general, TSA would need to consider factors, such as risk associated with the type of operation, any relevant threat information, and any other factors relevant to potential risk to the public and transportation security.

Petitions for Reconsideration (§ 1570.119)

Proposed § 1570.119 describes the review and petition process for TSA's reconsideration when it denies a request for amendment, waiver, or alternative measures—as well as a TSA requirement to modify or amend a

[64] As part of the 2013 Notice, TSA included a matrix in the docket of training programs that meet elements of the 9/11 Act's requirements. The matrix is available in the docket for the 2013 Notice at: *https://www.regulations.gov/* (search for ''TSA–2013–0005–0084''). Of the 20 programs listed, none of them addressed all of the 9/11 Act requirements.

[65] *See* 6 U.S.C. 1137(d) (public transportation), 1167(d) (railroads), and 1184(d) (OTRB).

[66] *See* 49 U.S.C. 114(q) (Under Secretary may grant exemptions from regulatory requirements).

[67] *See* 6 U.S.C. 1137(d)(4) and 1167(d)(4) and 1184(d)(4).

[68] *See* Gerardo Hernandez Airport Security Act of 2015, Public Law 114–50, 159 Stat. 490 (Sept. 24, 2015).

program. If an owner/operator challenges the decision, the owner/operator would be required to submit a written petition for reconsideration within the time frame identified in the applicable section.[69] The petition would need to include a statement, with supporting documentation, explaining why the owner/operator believes the reason for the denial or for the amendment, as applicable, is incorrect. If the owner/operator requested the amendment, the results of the reconsideration could be confirmation of TSA's previous denial or approval of the proposed amendment. If the issue involves a TSA required amendment, the results of the reconsideration could be withdrawal, affirmation, or modification of the amendment. TSA would consider whether a disposition pursuant to proposed 49 CFR 1570.119 would constitute a final agency action for purposes of review under 49 U.S.C. 46110.

Recordkeeping Requirements (§ 1570.121)

TSA proposes that owner/operators create and maintain lists of their security-sensitive employees and when they received training that meets the requirements of the proposed rule. Specifically, records would need to include each trained employee's name, job title or function, date of hiring, and date and course information on the most recent security training that each employee received. Records for individual employees would need to reflect the training courses completed and date of completion. Training records for each employee of initial and recurrent training would need to be maintained by owner/operators for no less than five years from the date of the training and available at any location(s) specified in the security training program approved by TSA.

The proposed rule provides flexibility to owner/operators to decide whether to maintain the records in electronic format provided that (1) any electronic records system used is designed to prevent tampering, loss of data, or corruption of records, and (2) paper copies of records, and any amendments to those records, would be made available to TSA upon request for inspection or copying. Whether the records are kept in electronic or other form, the employee must be provided with proof of training upon request, at any time during the five-year recordkeeping period without regard to the requestor's current status as an employee of that entity. As discussed above in ''Initial training (§ 1570.111(a)),'' owner/operators may meet this requirement to provide proof of training by providing a certificate or other similar documentation to the employee upon completion of training. In order for TSA to allow any owner/operator to rely upon previous security training to satisfy the requirements of this proposed rule, it is critical that employees be able to validate whether they received previous training.

TSA assumes training records are unlikely to include SSI, but nonetheless provides a reminder in the proposed section that any SSI maintained as a result of these recordkeeping requirements must be maintained consistent with the standards in 49 CFR part 1520. For example, an owner/operator may decide to keep a copy of the content of the training program with the employee files (which is not required by the proposed rule), if the curriculum contains SSI information, any file it is in would need to be stored as required by the SSI regulations. Owner/operators needing additional information about appropriately maintaining SSI may contact TSA for assistance and/or find information on TSA's Web site.[70]

4. Subpart C—Operations

Under current regulations (49 CFR part 1580), TSA requires freight and passenger railroad carriers, rail transit systems, rail hazardous materials shippers, and certain rail hazardous materials receivers to appoint ''rail security coordinators'' [71] (RSCs) and report significant security concerns to TSA.[72] The RSC, serve as the security liaisons to TSA, providing a single point of contact for receiving communications and inquiries from TSA concerning threat information or security procedures, and coordinating responses with appropriate law enforcement and emergency response agencies. The information reported to TSA provides information from the frontline of rail transportation that can be used to identify developing threats based on consolidated reporting and trend analysis. Because of the benefits of this requirement to transportation security, TSA is proposing to extend these requirements to the modes of transportation covered by this proposed rule that are not currently subject to the requirements of 49 CFR part 1580.

Security Coordinator Requirements (§ 1570.201)

As previously noted, TSA currently requires security coordinators for rail operations including freight, passenger, and public transportation. In addition to mandating security coordinators for railroads, the 9/11 Act also requires security coordinators for OTRB companies.[73] Consistent with this mandate, TSA proposes to extend the requirement to appoint a primary and at least one alternate security coordinator for OTRB companies and the bus operations of PTPR owner/operators (with a limited impact as most public transportation bus agencies are part of a larger system that is required to have a security coordinator under current 49 CFR part 1580). This would be accomplished by moving the provision from part 1580 to subpart C of the proposed rule and eliminating rail-specific terms from the text.

Security coordinators are a vital part of transportation security, providing TSA and other government agencies with an identified point of contact with access to company leadership and knowledge of the owner/operators operations, in the event it is necessary to convey extremely time-sensitive information about threats or security procedures to an owner/operator, particularly in situations requiring frequent information updates. The security coordinator and alternate provide TSA with a contact in a position to understand security problems; immediately raise issues with, or transmit information to, corporate or system leadership; and recognize when emergency response action is appropriate. The individuals must be accessible to TSA 24 hours per day, 7 days per week.

The proposed rule does not change the expectation that the security coordinator and alternate be appointed at the headquarters level. This proposed rule does not require the security coordinator or alternate to be a dedicated position staffed by an individual who has no other primary or additional duties. This proposed rule, however, does require that the owner/operator have a designated individual

[69] The proposed rule would require petitions for reconsideration to be submitted no later than 30 days of a TSA requirement to modify under § 1570.109, denial of an owner/operator-requested amendment under § 1570.111, or denial of a request for waiver or alternative measures under § 1570.117; submission would be required within 15 days for a TSA-required amendment under § 1570.113.

[70] *See https://www.tsa.gov/for-industry/sensitive-security-information.*

[71] *See* 49 CFR 1580.101 and 1580.201.

[72] *See* 49 CFR 1580. 105 and 1580.203.

[73] *See* 6 U.S.C. 1162(e)(1)(A) (''Identification of a security coordinator having authority—(i) to implement security actions under the plan; (ii) to coordinate security improvements; (iii) to receive immediate communications from appropriate Federal officials regarding railroad security'').

that TSA may reach at all times. The proposed rule would require the following information for both the security coordinator and alternate: Name, title, telephone number(s), and email address. Any change in this information would have to be provided to TSA within seven days of the change taking effect.

As previously noted, this is not a new requirement for owner/operators of railroads, including the rail transit operations of PTPR owner/operators. If an owner/operator subject to this proposed rule has provided the required information for primary and alternate RSCs to TSA in the past, it would not have to take further action to meet the requirement.[74] This is the case for passenger rail carriers, freight railroad carriers, and rail transit systems operated by public transportation agencies.

Extension and Modification of Requirement To Report Security Concerns (§ 1570.203)

TSA is proposing to make two changes to its existing requirements in part 1580 to report security concerns to TSA.[75] As with the security coordinator requirement, TSA proposes to move and consolidate the requirement into proposed § 1570.203 and extend it to bus operations.[76]

TSA is also proposing to modify the security concerns to be reported to address a need for clarification and align with other relevant standards. Since publication of 49 CFR part 1580, some stakeholders have asked TSA for clarification of the events they are required to report pursuant to 49 CFR 1580.105 and 1580.203. Additionally, in December 2012, the U.S. Government Accountability Office (GAO) published a report on passenger rail security.[77] In the report, GAO stated that TSA has inconsistently overseen and enforced its rail security incident reporting requirement because the agency does not have guidance published, leading to considerable variation in the types and number of incidents reported. The GAO recommended that the agency develop guidance on the types of incidents that should be reported and this guidance should be disseminated to TSA inspectors and regulated entities, including rail and transit agencies. Pending this rulemaking, TSA provided information to the railroads and transit agencies subject to the requirements of part 1580 to provide more examples about the types of incidents that should be reported.

TSA is also modifying the list of reportable significant security concerns to be more consistent with the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI). The NSI is a partnership between Federal, State, local, tribal, and territorial law enforcement that ''establishes a national capacity for gathering, documenting, processing, analyzing and sharing SAR information . . . in a manner that rigorously protects the privacy and civil liberties of Americans.'' [78] The NSI defines ''suspicious activity'' as ''observed behavior reasonably indicative of pre-operational planning associated with terrorism or other criminal activity.'' [79]

The NSI implements a standardized, integrated approach to gathering, documenting, processing, analyzing, and sharing information about suspicious activity that is potentially terrorism-related. In applying this approach, standards have been developed, setting criteria for the types of activities that warrant reporting as suspicious and potentially terrorism-related. These criteria recognize the capability of law enforcement and security professionals to apply their experience and expertise to identify significant security concerns by focusing on the nature of the incidents and the context in which they occur. The standardized approach among law enforcement officers and security officials with surface transportation entities produces more informative reports that can more effectively focus investigative efforts and intelligence analysis for potential trends and indicators of terrorism-related activity.

Thus, TSA intends to ensure clarity by incorporating the examples previously provided to industry and consistency by aligning its regulations with the concepts of the NSI. The proposed list of reportable incidents can be found in proposed Appendix A to part 1570 and includes not only a list of incidents, but descriptions and examples to assist regulated parties in making a determination of whether an incident fits within the reporting requirements.

Finally, TSA is proposing to modify the schedule for reporting incidents. Currently the regulation requires immediate reporting to TSA. If, however, there is an immediate threat, the first priority is to notify and work with first responders. Therefore, TSA is proposing to remove the necessity for immediacy and, instead, require notification within 24 hours of the incident (*see* proposed 49 CFR 1570.203(a)). This will enable TSA to obtain timely information without undermining the ability of the owner/operator to appropriately handle a situation requiring their full attention.

Examples for Reporting Information (§ 1570.203(b))

As previously noted, TSA has almost a decade of experience with incidents reported by railroads under current 49 CFR part 1580. Based on this experience, TSA recognizes that its ability to analyze the data and improve the quality of information disseminated back to its stakeholders is proportional to the quality of information it receives. Proposed § 1570.203(b) is consistent with the previous reporting requirements, which reflected the need for detailed and verified information from individual owner/operators to enhance TSA's ability to provide timely and useful information products to all of the relevant stakeholders. While not included in the rule text, Table 5 is being provided to assist security coordinators and other responsible officials to understand TSA's expectations for the types of information that are needed in order to meet the standards of § 1570.203(b).

[74] The requirement to inform TSA of any changes is not modified by this proposed rulemaking. Therefore, those currently covered by the security coordinator and reporting requirements under current 49 CFR part 1580 must report information regarding changes to the names, titles, telephone numbers, and email addresses of the RSCs and alternate RSCs to TSA within seven calendar days of the change taking effect.

[75] *See* current 49 CFR 1580.105 and 1580.203.

[76] This extension is within TSA's discretion to require other actions or procedures determined to be appropriate to address the security of public transportation and OTRB operations. *See* 6 U.S.C. 1134(c)(2)(I) and 1181(e)(1)(H).

[77] *See* GAO, ''Passenger Rail Security, Consistent Incident Reporting and Analysis Needed to Achieve Program Objectives,'' GAO–13–20 (December 2012).

[78] *See* Nationwide SAR Initiative (NSI), ''About the NSI'' (accessed Nov. 3, 2016), available at *http://nsi.ncirc.gov/about_nsi.aspx.*

[79] *Id.*

TABLE 5—EXAMPLES OF REPORTING INFORMATION REQUIRED BY PROPOSED § 1570.203(C)

Reporting requirements in proposed § 1570.203(c)	Examples
(1) The name of the reporting individual and contact information, including a telephone number or e-mail address.	• Company Representative: Joe BLOGGS. • Company: ABC Rail Road Company. • Address: XXXXX, XX (Street), XXXXX (City), XX (State), XXXXX (ZIP). • Phone: (111) 123–1234. • POC Email: *Reporting.Official@ABCRR.com.*
(2) The affected freight or passenger train, transit vehicle, motor vehicle, station, terminal, rail hazardous materials facility, or other facility or infrastructure, including identifying information and current location.	• Locomotive: ABCRR, Reporting Marks. • Locomotive Number 1234. • Rail Car: ABCRR Railcar Number XXXX 001234. • Train: ABCRR Train Number XXX of XX, etc. • Facility: ABCRR (Rail Yard, Subway Station, Passenger Station, Storage Yard, Repair Facility, etc.) and facility physical address. • Right of Way: Mile Post Marker, Sub-division, and physical address (as much as known).
(3) Scheduled origination and termination locations for the affected freight or passenger train, transit vehicle, or motor vehicle, including departure and designation city and route.	• ABCRR, Northern Corridor Express–Boston to New York, XYZ Line, via X, Y and Z Cities. Train Number XXX of XX is currently located at: MP 123.12, XXX Sub-division, XXXX (City), XX (State). • Transit Vehicle: ABCRR LRV Number XXXXX etc. Route: XXX North Corridor. Is currently located at XXXX Line Section or XXX Station, Street, City, State, ZIP.
(4) Description of the threat, incident, or activity, including who has been notified and what action has been taken.	• At XXXX hours, January 01, 2020. • ABCRR Police Sergeant, Joe BLOGGS, badge number XXXX, ABCRR Police Department (ABCPD) reported the following: At WWWW hours, January 01, 2020, a suspicious person (described as a white male, approximately 6′0″ tall, 190 lbs., blonde hair, approximately 35 to 40 years of age, wearing a long black knee-length coat, blue jeans, red sneakers, and a XXXX ball club baseball hat) was detected adjacent to the ticket vending machine at the street level entrance to the XXst Street and YYYYY Avenue, Station, XXXX (City), XX (State). The person was deemed suspicious because although the temperature at the time was 85 degrees, he was wearing a knee-length heavy black coat. The individual was sweating and exhibited nervousness when security officials were present (the individual looked away every time a security official appeared, so as to not reveal his face). The individual had a black ''Traveler,'' ''Expandable'' suitcase with him (estimated measurements: 36″ W X 24″H X 12″ D) with a red piece of ribbon tied to the handle. At WWW5 hours, the individual rapidly departed the area when a security official began to approach him, leaving the black suitcase behind. A review of the Closed-circuit television (CCTV) surveillance system determined the individual had arrived at the station at VV30 hours in a Red, 4-door, Land Rover, VA License Plate XX123XXXX, which was parked adjacent to the XXXXX. Closed-circuit television revealed the vehicle was being driven by a white female with shoulder length blonde hair, approximately 35 years of age. A check of the VA DOT License registry revealed the vehicle is registered to Joe DOE, DOB: XX/XX/XXXX, POB: XXXXX (City), XX (State) and Jane (NEE: SMITH) DOE, DOB: XX/XX/XXXX, POB: XXXXX (City), XX (State) of 1234 West Disobedience Street, Anytown, VA 202XX, Phone Number: (XXX) XXX–XXXX. A check of the VA driver's license registry revealed similar/matching descriptions of Joe and Jane DOE to those persons identified during the incident. At ZZZZ hours, a XXXX City Police Explosive Ordnance Demolition (EOD) team conducted an examination of the black suitcase with x-ray equipment and determined the suitcase contained an unknown device comprised of wiring and circuitry. Explosive Ordinance Disposal (EOD) disrupted the suitcase, which yielded negative secondary results. EOD's examination of the suitcase's contents revealed limited amounts of women's clothing and what appeared to be the inner workings of a radio. At ZZZ1 hours, the scene was cleared by XXXX City Police EOD Sergeant Jeff BOMBGARTEN, badge number XXXX who secured the suitcase and its contents and transported them away from the facility.
(5) The names and other available biographical data, and/or descriptions (including vehicle or license plate information) of individuals or vehicles known or suspected to be involved in the threat, incident, or activity.	• Witness: Joe SMITH, DOB: XX/XX/XXXX, POB: XXXX City, XX State. Address: XXXXX, XX Street, XXXX City, XX State, Phone Number (XXX) XXX–XXXX, ABCRR, XXXX (Address), (XXX) XXX–XXXX. • Security: Fred ARRESTER, Sergeant, XXXX (City) Police Department, Badge # XXXX, Phone Number: (XXX) XXX–XXXX. • Suspected Associate: Mrs. Jane DOE.

TABLE 5—EXAMPLES OF REPORTING INFORMATION REQUIRED BY PROPOSED § 1570.203(C)—Continued

Reporting requirements in proposed § 1570.203(c)	Examples
(6) The source of any threat information	• DOB: XX/XX/XXXX, POB: XXXX City, XX State. Address: XXXXX, XX (Street), XXXX (City), XX (State), Phone Number (XXX) XXX–XXXX, ABCRR, XXXX (Address), (XXX) XXX–XXXX. • Jane DOE, DOB: XX/XX/XXXX, POB: XXXX (City), XX (State). Address: XXXXX, XX (Street), XXXX (City), XX (State), Phone Number (XXX) XXX–XXXX, ABCRR, XXXX (Address), (XXX) XXX–XXXX.

5. Subpart D—Security Threat Assessments

As previously noted, TSA is including the full text of revised part 1570 as it would look with the proposed changes—including three sections related to STAs generally unaffected by this rulemaking. As part of this rulemaking, TSA would move all sections of current part 1570 limited to STAs to a new subpart D, to consist of §§ 1570.301 (formerly § 1570.7—fraudulent use or manufacture; responsibilities of persons), 1570.303 (formerly § 1570.9—inspection of credential); and 1570.305 (formerly § 1570.13—false statements regarding security background checks by public transportation agency or railroad carrier). Only the last provision (§ 1570.305) has been revised, with revisions limited to removing definitions for terms that have been added elsewhere as part of this rulemaking.

E. Security-Sensitive Employees (§§ 1580.3, 1582.3, and 1584.3)

As part of requiring security training for frontline employees of railroads, PTPR, and OTRB owner/operators–the 9/11 Act provided definitions for ''frontline employee'' within each mode of transportation.[80] For the reasons discussed below, TSA is proposing to use the term ''security-sensitive employees,'' with specific definitions of the term for freight rail, PTPR, and OTRB operations. These proposed definitions, which would appear in §§ 1580.3 (freight rail), 1582.3 (PTPR), and 1584.3 (OTRB), would need to be used by owner/operators to determine which employees must receive security training.

TSA's proposed definition began with an analysis of the employees listed in the 9/11 Act's definitions of ''frontline employees'' and whether there are any other employees who may be in a position to spot suspicious activity because of where they work, their interaction with the public, or their access to information (such as cleaning the restrooms, selling tickets and providing assistance to passengers, maintaining equipment and operations in vulnerable areas, or operating a train or bus). TSA also considered who would need to know how to report or respond to these potential threats. The only gap identified between the employees stipulated in the 9/11 Act and those that would fall under the discretionary category are those who have specific responsibilities under any security plan the organization may have. While most of these individuals are likely identified in other categories, from a security perspective it is essential that there are no gaps, particularly where individuals may have responsibility for responding to a terrorist-related emergency.

As a result of this analysis, TSA proposes that employees who perform functions with a direct nexus to, or impact on, transportation security be designated as ''security-sensitive employees'' based on their job functions. While TSA has proposed a specific list of job functions relevant to the mode, these roughly fall into similar categories. Table 6 aligns these categories with the definitions of frontline employee in the 9/11 Act.

TABLE 6—COMPARISON OF SECURITY TRAINING NPRM PROPOSED CATEGORIES FOR ''SECURITY-SENSITIVE EMPLOYEES'' TO 9/11 ACT DEFINITIONS OF ''FRONTLINE EMPLOYEES'' WHO MUST BE TRAINED

Proposed rule—security-sensitive job functions	9/11 Act—Definitions of frontline employees		
	6 U.S.C. 1151(6) Railroad frontline employees	6 U.S.C. 1131(4) Public transportation frontline employees *	6 U.S.C. 1151(5) OTRB frontline employees
A. Operating a vehicle	Locomotive engineers, conductors, trainmen, and other onboard employees.	Transit vehicle driver or operator.	Drivers.
B. Inspecting and maintaining vehicles	Maintenance and maintenance support personnel, and bridge tenders.	Maintenance and maintenance support employee.	Maintenance and maintenance support personnel.
C. Inspecting or maintaining building or transportation infrastructure.			
D. Controlling dispatch or movement of a vehicle	Dispatchers	Dispatchers	Dispatchers.
E. Providing security of the owner/operator's equipment and property.	Security personnel	Security employee, or transit police.	Security personnel.

[80] *See* 6 U.S.C. 1151(6) (railroads), 6 U.S.C. 1131(4) (public transportation), and 6 U.S.C. 1151(5) (OTRB and railroad frontline employees, respectively).

TABLE 6—COMPARISON OF SECURITY TRAINING NPRM PROPOSED CATEGORIES FOR ''SECURITY-SENSITIVE EMPLOYEES'' TO 9/11 ACT DEFINITIONS OF ''FRONTLINE EMPLOYEES'' WHO MUST BE TRAINED—Continued

Proposed rule—security-sensitive job functions	9/11 Act—Definitions of frontline employees		
	6 U.S.C. 1151(6) Railroad frontline employees	6 U.S.C. 1131(4) Public transportation frontline employees *	6 U.S.C. 1151(5) OTRB frontline employees
F. Loading or unloading cargo or baggage *and/or*	Locomotive engineers, conductors, and other onboard employees.	Station attendant, customer service employee, and any other employee who has direct contact with riders on a regular basis.	Ticket agents [and] other terminal employees.
G. Interacting with travelling public (on board a vehicle or within a transportation facility)			
H. Complying with security programs or measures, including those required by federal law (a catch-all category that would include a small number of employees such as security coordinators and any other individuals who may have responsibility for carrying out aspects of the owner/operator's security program or measures who are not otherwise identified in the previous categories).	Any other employees of railroad carriers that the Secretary determines should receive security training.	Any other employee of a public transportation agency that the Secretary determines should receive security training.	Other employees of an over-the-road bus operator or terminal owner or operator that the Secretary determines should receive security training.

* Definition of 1151(6) applies to passenger rail operations.

In general, TSA proposes to define mode-specific ''security-sensitive employees'' as employees performing one of the security-sensitive job functions identified in a proposed appendix for each part. The definition of ''employee'' in proposed § 1570.3 includes immediate supervisors, contractors, and other authorized representatives. The intent is that anyone who performs a security-sensitive function must have the training, including managers, supervisors, or others who perform the function or who so directly supervise the performance of a function that their nexus to the job function is equivalent to the employee. For example, a yardmaster in freight railroad operations would be considered a security-sensitive employee because he or she directs security-sensitive functions, even if not in the direct management chain of all individuals performing those functions. At the same time, individuals within a corporate structure who neither perform a security-sensitive function nor have direct management responsibilities over individuals who do are unlikely to have a position within the corporation with a significant nexus to transportation. To the extent there are such individuals in the management structure, they would not be considered ''security-sensitive'' employees.

In choosing the term ''security-sensitive employee,'' TSA recognized the relationship of this proposed rule to other regulatory requirements applicable to the population covered by this proposed rule. The Department of Transportation uses the terms ''safety-sensitive function'' and ''safety-sensitive employees'' in its regulations to identify employees whose functions require special measures to *ensure* (emphasis added) safety, such as drug and alcohol testing and rules governing hours of service.[81] TSA proposes using the term ''security-sensitive'' to identify employees whose job functions require special measures to *enhance* (emphasis added) security.

The scope of security-sensitive employees is broader than safety-sensitive employees. In other words, having analyzed the job functions that are regulated as safety-sensitive, TSA has determined that while there are some security-sensitive employees that may not be in safety-sensitive employees, there are no safety-sensitive employees that are not also security-sensitive employees. In the rail context, owner/operators have already identified employees in safety-sensitive positions because they are covered by the Federal hours of service laws[82] during a duty tour. Therefore, TSA proposes to include any rail employee subject to the Federal hours of service laws (49 U.S.C. 211) in the designation of security-sensitive employees to reduce the regulatory impact of identifying these individuals. To further reduce the impact of these proposed training requirements, TSA and DOT anticipate that owner/operators will provide training sessions that meet the requirements of DOT and the proposed requirements of TSA.

TSA also recognizes that each mode covered by the NPRM has unique operating environments and functions. To address unique aspects of each mode, the security-sensitive functions are identified in mode-specific tables within the proposed rule.[83] These tables provide general categories and accompanying modal-specific security-sensitive functions. All employees performing ''security-sensitive functions'' as described in the appendices must be trained. The table in proposed part 1580 Appendix B is unique in that it includes examples of the job titles related to these functions based on historic use of these terms for railroads. The job titles, however, are provided solely as a resource to help understand the functions described; whether an employee must be trained is based upon the function, not the job title.

TSA encourages owner/operators to consider other employees within a corporate structure who may not be performing a security-sensitive function as identified in the proposed rule, but who could provide an additional layer of security if they received security training. Furthermore, if an owner/operator identifies positions or functions not listed by TSA as security-sensitive, but which have the nexus to transportation security that is intended to be covered by the proposed rule, TSA would encourage the owner/operator to identify and include those employees within its security training program.

Finally, TSA is aware that some freight rail employees identified as

[81] *See* 49 CFR 40.1; *see also* 49 U.S.C. 20140, 21101–21108, 49 CFR parts 219 and 228, 49 CFR 382.107 (motor carriers), and 49 CFR 655.4 (public transportation).

[82] 49 U.S.C. 21101 *et seq.* The relevant definitions are included in 49 U.S.C. 21101.

[83] *See* proposed Appendices B to parts 1580 (freight railroad), 1582 (passenger railroad and public transportation), and 1584 (OTRB).

''security-sensitive'' may also be considered ''hazmat employees'' and, therefore, subject to security training under 49 CFR 172.704 (these provisions are part of the hazardous materials regulations promulgated by PHMSA). It is not, however, a one-to-one correlation as determining which employees should be identified as ''security-sensitive'' for purposes of receiving training under this proposed rule is not the same analysis as that conducted for determining if an individual meets the definition of ''hazmat employees'' who must receive training under the PHMSA rule. As a result, there may be some overlap, but the group of individual employees that must be trained under the separate rules is unlikely to be identical. The effect of the overlap on training requirements is further discussed in section III.G of this NPRM.

F. Security Programs—Applicability (§§ 1580.301, 1582.301, and 1584.301)

As previously noted, the 9/11 Act mandates regulations requiring security training for frontline employees of public transportation agencies (6 U.S.C. 1137); railroads (6 U.S.C. 1167); and OTRBs (6 U.S.C. 1184). In implementing these requirements, TSA considered the operations and security risks associated with each mode identified in the 9/11 Act. This analysis determined risk consistent with DHS's official definition of risk as the ''potential for an adverse outcome assessed as a function of threats, vulnerabilities, and consequences associated with an incident, event, or occurrence.'' [84] As TSA focuses on the risk associated with acts of terrorism, this analysis considers threat as informed by intelligence, potential consequences of a terrorist attack, and inherent vulnerabilities in transportation systems and operations.

In general, the security training requirements of this proposed rule would apply to owner/operators [85] with operations that meet the criteria identified in §§ 1580.301, 1582.301, and 1584.301. From a counter-terrorism perspective, TSA has determined that less than 300 out of approximately 10,000 surface transportation operations meet this criteria. Consistent with its commitment to a risk-based approach to transportation security, the proposed rule would only apply to these higher-risk operations. Nonetheless, TSA also encourages lower-risk operations to implement security training programs consistent with the requirements in this proposed rule.

While the proposed criteria assume general similarities for operations within each mode, TSA recognizes that not all owner/operators have similar corporate structures and that there are many considerations affecting organizational decisions. TSA considered an applicability determination that would require a parent corporation to provide security training to its employees if one subsidiary triggered the requirements. But there may be some owner/operators that are subsidiaries of subsidiaries to a parent company that have no other transportation-related assets. Recognizing these variations in corporate structure, TSA is proposing to limit the requirements to the level of the subsidiary whose operations would trigger applicability. During the review and approval process, TSA would work with owner/operators in an effort to address any compliance issues based on corporate structure. For example, owner/operator A may be organized to make each regional area a separate subsidiary. As such, only the subsidiary that meets the applicability requirements would be required to develop a security training program. Owner/operator B may be a single entity for purposes of corporate-legal structure, with branches rather than subsidiaries providing service on specific routes. Under the rule, the entire corporation would be subject to the requirements based on the operations of one route. In this situation, owner/operator A could choose to submit a proposed alternative that would apply the requirements to branches and a handful of headquarters or other regional employees that provide them operational support. The submission requirements and procedures for requesting alternative measures are discussed in section III.D.3 of this NPRM.

The following section describes how TSA considered each of these risk elements in determining applicability for the proposed rule.

1. Freight Railroad

Approximately 574 freight railroads operate on the general railroad system of transportation in the United States.[86] The general railroad system of transportation is a shared rail network in which multiple railroad operators may use the same tracks for multiple purposes. Thus, a very small railroad operator may be using the same tracks as a large operator, and a freight railroad will often operate on the same tracks as a passenger rail operator. The geographic scope of this mode includes railroads operating on nearly 140,000 miles of track throughout North America.[87] The freight rail system transports 40 percent of intercity freight volume and approximately one-third of U.S. exports to ports and other distribution centers.[88] Commodities and products include consumer goods, agriculture and food products, motor vehicles, coal, chemicals, paper and lumber, and other commodities including ores, petroleum, and minerals.[89] In addition, freight rail lines are used for the operation of most of the commuter and intercity passenger railroads outside of the northeast corridor and freight rail personnel are sometimes used, on a contractual basis, to operate passenger trains.

Class I railroads [90] account for 69 percent of U.S. freight rail mileage and 90 percent of the employees. They are the only providers of intercity freight rail transportation, supporting major economic sectors in 44 states. Outside of the Northeast Corridor, Amtrak is dependent on Class I railroads for its operations—over 70 percent of Amtrak's routes operate on track owned by other railroads.[91]

Threat

Intelligence reviews of various attacks worldwide, as well as analysis of seized documents and the interrogation of captured and arrested suspects, reveal historic interest in carrying out attacks on railroad systems. For freight rail, the threat is greatest for shipments of RSSM, such as poison or toxic inhalation hazards (TIH), which could be directly

[84] DHS Risk Lexicon, 2010 Edition, at 27.

[85] *See* proposed definition of ''owner/operator'' in § 1500.3 and discussion of terms in section III.A.1, Table 3, of this NPRM.

[86] Under 49 CFR part 209, Appendix A, the ''general railroad system of transportation'' is defined as ''the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas.''

[87] Association of American Railroads (AAR), ''Railroad Facts, 2014 Edition'' at pgs. 3 and 5 (2014).

[88] *Id.*

[89] *Id.*

[90] TSA is not modifying the definition of ''Class I'' in current 49 CFR part 1580, which incorporates by reference the Surface Transportation Board's classification of railroads based on annual operating revenues. The following are currently designated as Class I railroads: BNSF Railway, CSX Transportation, Grand Trunk Corporation, Kansas City Southern Railway, Norfolk Southern Combined Railroad Subsidiaries, Soo Line Corporation, and Union Pacific Railroad.

[91] *See* DeGood, Kevin, ''Understanding Amtrak and the Importance of Passenger Rail in the United States'' (posted June 4, 2015), available at *https://www.americanprogress.org/issues/economy/report/2015/06/04/114298/understanding-amtrak-and-the-importance-of-passenger-rail-in-the-united-states/*. *See also* Amtrak, ''A Message from Amtrak Regarding On-Time Performance'' (posted Feb. 8, 2015), available at *http://blog.amtrak.com/2015/02/message-amtrak-regarding-time-performance/*.

targeted or used as a weapon of mass effect with devastating physical and psychological consequences. Materials designated as RSSM are a subset of hazardous materials designated by PHMSA under 49 CFR 172.800(b).[92]

Vulnerability

The diversity and expanse of the North American railroad system presents a unique preparedness challenge related to preventing, responding to, and recovering from potentially devastating effects. The rail network is vast and the owner/operators vary in size and communities served. Numerous passenger and commuter rail systems throughout the country operate at least partially over tracks or rights-of-way owned by freight railroads.

Consequences

The interdependency of the railroad infrastructure—bridges, tunnels, dispatch and control centers, tracks, signals, and switches—means that threats and incidents affecting one railroad could impact many others on the general railroad system of transportation. A successful terrorist attack on the U.S. rail system could affect the functioning of private businesses and the government, and cause cascading effects far beyond the targeted physical location. Such an attack could result in significant losses in terms of human casualties, property destruction, and economic effects, as well as damage to public morale and confidence. Disruption or delay of rail service would also have adverse impacts on other sectors. For example, freight railroads have a critical role in the support of the energy sector and are responsible for the transportation of more than 70 percent of all U.S. coal shipments. They are also a critical part of the supply chain for military weapons and supplies. While railroads have been able to quickly respond to delays caused by natural disasters, such as the 2013 flooding in Colorado that washed-out tracks and delayed coal shipments and Amtrak service, this requires rerouting and can cause significant over-crowding and delays on lines used to move passengers and cargo pending restoration of damaged infrastructure.[93] Similarly, the release of TIH or other materials designated as RSSM could be catastrophic if it occurs in a metropolitan area or near critical resources that could be contaminated by the release.

Risk Determination

TSA has determined that the highest-risk freight railroads are those designated as Class I based on their revenue (over $72.9 billion in 2013) and the Nation's dependence on these systems to move both freight in support of critical sectors and passengers. Similarly, there are other shortlines (also known as Class II or Class III railroads) that are also higher-risk because they transport RSSM through HTUAs. Finally, to the extent the preceding does not capture freight railroads hosting higher-risk passenger railroads, the hosting relationship and dual use of infrastructure puts such railroads into the higher-risk category.

Proposed Applicability

Based on this risk determination, TSA is proposing to cover a railroad if it is designated as Class I, transports RSSM in one or more of the areas listed in current Appendix A to 49 CFR part 1580, or hosts a higher-risk rail operation (including freight railroads and the intercity or commuter systems identified in proposed § 1582.101). This would cover approximately 36 freight railroads.

In proposing this applicability, TSA recognizes that joint operations are common within this industry and include agreements such as allowing another railroad carrier to operate over track it does not own.[94] In these situations, the ''host railroad'' that owns the track exercises operational control of the movement of trains of the other railroads (the ''tenant'' railroads) while they are using that track.[95] Under the proposed rule, both the host and tenant railroads would be required to have a training program that appropriately addresses the ramifications of the hosting relationship. For example, the host railroad's training program would need to address the operational considerations of the hosting relationship, such as training dispatchers on their role and responsibilities in halting the tenant railroad's operations over a segment of track that has just been destroyed by an IED. Similarly, a tenant railroad subject to the security training requirements of proposed 49 CFR part 1582 (PTPR), would need to address the operational considerations of the hosting relationship, such as instructing its train and engine employees on the proper communication procedures to follow when informing the host railroad of a suspicious package blocking the track. Under either example, the host and tenant railroad owner/operators would only be responsible for training their own employees.

TSA also understands that some commuter passenger train services are owned by public transportation agencies, but operated by private companies (such as freight railroad carriers). This is not a hosting relationship. In this situation, TSA would consider the freight railroad carrier (the private company) to be a contractor of the PTPR owner/operator (the owner/operator of the passenger train service). TSA would hold the PTPR owner/operator primarily responsible for compliance and for ensuring that all security-sensitive employees receive the required training, whether they are employed directly by the PTPR owner/operator or contractor. In other words, the PTPR owner/operator would have the obligation to train the freight railroad carrier's employees that are performing security-sensitive functions related to the passenger train service. To the extent the contract between the PTPR owner/operator and the freight railroad includes a provision for the freight railroad to train its own employees, such training would need to be documented in the PTPR owner/operator's security training program. TSA would expect the passenger operation to clearly state in its security training program, as part of the submission process under proposed 49 CFR 1570.109, that the freight railroad carrier would conduct the training and provide the required information on that training.

Alternative Considered

TSA considered expanding the applicability of the proposed rule to a broader scope of owner/operators that would be responsible for developing their own security training program. The parameters for this alternative population include all freight railroad owner/operators operating within, or through, any geographic areas

[92] TSA is proposing to adopt the list in 49 CFR 172.800(b) for purposes of meeting the requirement in sec. 1501 of the 9/11 Act to define transportation-related security-sensitive materials. This definition is discussed in section III.A.2 of this NPRM.

[93] *See* ''Colorado floods wash out tracks, delay coal shipments, Amtrak service,'' The Denver Post (Sept. 16, 2013), available at *http://www.denverpost.com/2013/09/16/colorado-floods-wash-out-tracks-delay-coal-shipments-amtrak-service/.*

[94] TSA's use of this term in this proposed rule is consistent with industry's general understanding of its meaning and 49 CFR 239.7, which defines ''joint operations'' as ''rail operations conducted by more than one railroad on the same track, except as necessary for the purpose of interchange, regardless of whether such operations are the result of: (1) Contractual arrangements between the railroads; (2) Order of a government agency or a court of law: or (3) Any other legally binding directive.''

[95] In recognition of these situations, TSA is proposing to add a definition of the term ''host railroad'' to 49 CFR 1500.3. The term ''host railroad'' is defined to mean ''a railroad that has effective control over a segment of track.''

designated for purposes of the FY 2015 Urban Area Security Initiative (UASI) Program regions. TSA estimates that this alternative would cover a total of 69 freight railroads in 26 metropolitan areas. TSA estimates that this alternative would have a cost of approximately $91.99 million for freight railroad owner/operators over a 10-year period (at a 7 percent discount rate). The basis for the estimates of benefits and costs are included in the RIA for this rulemaking, which is included in the public docket.

TSA rejected this alternative because the agency has determined that the proposed applicability aligns with its commitment to risk-based security policy and outcomes-based regulation. TSA has consistently recognized the security risks associated with transport of RSSM through the areas identified in Appendix A to current 49 CFR part 1580. The security basis for identifying these areas has not changed. Furthermore, expanding beyond the proposed applicability was unnecessary to gain the intended security benefits as it would not represent a corresponding expansion of employees trained since 90 percent of railroad employees would receive training as a result of the proposed rule's applicability. Additionally, when compared to the ten-year costs of the proposed applicability rule for freight railroad owner/operators ($90.74 million at 7 percent), this alternative would result in $1.25 million in additional costs.

2. Public Transportation and Passenger Railroads

There are more than 7,000 PTPR systems operating in the United States.[96] As part of an intermodal system of transportation, commuter passenger railroads provide critical regional services, such as between a central city and adjacent suburbs during morning and evening peak periods, as well as connecting to other modes of transportation through multimodal systems and within multimodal infrastructures. Since 1995, public transit ridership is up 39 percent, outpacing population growth, which is up 21 percent, and vehicle miles traveled (VMT), which is up 25 percent.[97] While passenger railroads primarily operate on the same track as freight railroads, they have many similarities to public transportation because of the operational concerns related to transporting people. Amtrak operates the Nation's primary intercity passenger rail service over a 22,000-mile network (primarily over leased, freight railroad tracks), serving more than 500 stations in 46 states and the District of Columbia. Many of these stations are multimodal transportation facilities located in higher-risk areas.

Threat

Based on incidents in other countries, TSA assesses that terrorists view PTPR systems as attractive targets because they carry large numbers of people, are open and easily accessible to the public, are critical to regional transportation systems, and are vital to local economies. Terrorists have targeted rail and bus systems overseas. Notable incidents include the sarin gas attacks on the Tokyo subway system in April 1995; the multiple detonations of IEDs left on commuter trains in Madrid in March 2004; the multiple suicide attacks employing IEDs on the London Underground and a double-decker bus in London in July 2005; the multiple detonations of IEDs on commuter trains in the greater Mumbai area in July 2006; and, the double suicide attacks and two incidents of IED detonations in Dagestan and Moscow, respectively, in March, June, and August 2010.

TSA's Office of Intelligence and Analysis assesses with high confidence that terrorists remain intent on perpetrating attacks against this mode. In the period between January 1 and December 31, 2014, there were 144 reported attacks on mass transit systems overseas. Of these attacks, 76 targeted buses and associated infrastructure and 68 targeted mass transit and passenger rail systems and associated infrastructure.

Vulnerability

Attributes of PTPR systems essential to their efficiency also create potential security vulnerabilities that terrorists seek to exploit. Unlike strict access controls applicable to air transport, the public transportation system's multiple stops and interchanges lead to high passenger turnover, which is difficult to monitor effectively. In addition, the broad geographical coverage of passenger rail networks provides numerous options for access and getaway and affords the ability to use the system itself as the means to reach the location to conduct the attack.

Consequences

A potential terrorist attack on a public transportation center in a major metropolitan area can result in a large number of victims, both killed and wounded, as well as significant infrastructure damage. Rail system bombings in Madrid, London, and Mumbai—all involving use of multiple IEDs—are tragic reminders of this reality. Attacks could be isolated, having minimal effect on the total operating system, or could result in a major impact that has national implications: an attack on an intercity passenger railroad operating on the general system of transportation could potentially shut down railroad operation support for specific sectors. The disruption of any portion of the operation can confuse the public, directly affect businesses, and lead to panic. Attacks on multiple portions of a PTPR system exacerbate these impacts.

Risk Determination

In the context of resource allocations under the Transit Security Grant Program (TSGP), DHS has determined the highest transit-specific risk areas and transit systems using a model approved by the Secretary and vetted by Congress.[98] DHS has consistently considered several factors when determining risk for PTPR, including credible and specific international and domestic terrorist threats based on information provided by the intelligence community, system and infrastructure vulnerabilities, and consequences primarily in terms of the impact on the mission. As the mission of PTPR systems is to transport people, the consequences include the potential for devastating casualties.[99] TSA believes this model is an appropriate method for determining applicability for purposes of this rulemaking.

An analysis of the transit-specific risk scores developed using the DHS method indicates a natural and significant break in the risk curve (delta between risk scores of one urban area to the next) between the top eight regions with the highest transit-specific risk and the others.[100] When combined, these areas represent over 94 percent of the total transit-specific risk to all urban areas across the Nation. Within each of these areas, DHS has identified the systems with the highest-risk based on considerations related to ridership, location of services provided (use of the same stations and stops), and

[96] APTA, ''2014 Public Transportation Fact Book,'' 65th Edition, at 6, (Nov. 2014), available at *http://www.apta.com/resources/statistics/Documents/FactBook/2014-APTA-Fact-Book.pdf.*

[97] *See* ''Quick Facts'' on APTA's Web site as of Jan. 27, 2016, available at *http://www.apta.com/mediacenter/ptbenefits/Pages/default.aspx.*

[98] Federal Emergency Management Agency (FEMA) Grant Programs Directorate, ''Risk Methodology, Fiscal Year 2015 Report to Congress, Calculating Risk for the FY 2015 DHS Preparedness Grant Programs'' (December 21, 2015).

[99] *Id.* at 25–26.

[100] This analysis is based on SSI and/or classified intelligence information. As a result, TSA may not share details of the information or the analysis.

relationship between feeder and primary systems.

Proposed Applicability

Using this criteria, TSA is proposing to apply the requirements of this proposed rule to the systems identified in proposed 49 CFR part 1582, Appendix A. These 47 PTPR systems (46 PTPR plus Amtrak) are the systems with the highest risk operating in the eight regions with the highest transit-specific risk. Applying the rule's requirements to these 47 PTPR systems, corresponds to enhanced security for more than 80 percent of all PTPR passengers.

TSA is also proposing to apply the requirements to any PTPR owner/operator that hosts a high-risk freight railroad as identified in proposed § 1580.101. The reasons previously discussed for the parallel applicability to freight railroads in a hosting relationship with a high-risk passenger railroad apply equally to passenger railroads hosting high-risk freight railroads.

Alternative Considered

TSA considered expanding the applicability of a security training program to a broader scope of owner/operators. The parameters for this alternative population include all PTPR operations within or through a UASI region. TSA estimates that this alternative would cover a total of 253 PTPR owner/operators in 26 metropolitan areas. TSA estimates that this alternative would have a cost of approximately $127.88 million for PTPR owner/operators over a 10-year period (at a 7 percent discount rate). The basis for the estimates of benefits and costs are included in the RIA for this rulemaking, which is included in the public docket.

TSA rejected this alternative because the agency has determined that the proposed applicability aligns with its commitment to risk-based security policy and outcomes-based regulation. The risk analysis used for developing the TSGP funding allocations begins with identification of the UASI regions and then takes into consideration unique aspects of PTPR operations within that UASI in light of known risks. To adopt the UASI designations for applicability would ignore the second, critical step of the analysis used for TSGP allocations. By linking applicability to those agencies that have historically and consistently been designated as highest-risk for purposes of TSGP funding allocation, the proposed applicability links the greatest regulatory burden to those systems that the Federal government has determined merit the greatest funding allocations to address security. The majority of the funding under the TSGP goes to the highest-risk regions to ensure the greater risk is being addressed (94 percent in FY 15 and 95 percent in FY 14).

Based on these considerations, the negative impact of a broader regulatory requirement would not have a corresponding benefit to security—especially recognizing that the systems covered under the proposed applicability transport 80 percent of the PTPR ridership. Additionally, when compared to the ten-year costs of the proposed applicability rule for PTPR owner/operators ($53.14 million at 7%), this alternative would result in $74.74 million in additional costs.

3. Over-the-Road Buses

Highways are the largest and most prevalent component of the Nation's transportation network. Virtually every location within the continental United States is accessible by highway. The system today encompasses more than four million miles of roadway on which more than 600,000 bridges and 650 tunnels offer possible chokepoints. Within that system, commercial buses offer the most cost-effective intercity transportation to thousands of communities. For many people, fixed-route, intercity bus service is the only alternative to private vehicles.

It is estimated that there are over 3,300 private OTRB owner/operators operating approximately 29,000 buses and employing over 118,000 people in full and part-time jobs within the United States.[101] These owner/operators primarily conduct interstate operations that include wholly-owned bus terminals, shared terminals with other transportation modes (such as passenger rail), or pre-determined pick-up and drop-off locations (which may not be on the owner/operator's property).

In general, OTRBs have an average capacity of 55–60 passengers per bus and carry approximately 751 million passengers annually to thousands of destinations within the United States and to/from Canada and Mexico. Destinations include urban areas and passenger transfer points with close proximity to many of the most iconic and valuable sites in the Nation.

Threat

According to TSA's intelligence analysts and subject matter experts, buses represent attractive targets for terrorists, especially as it relates to hijacking, because they can be used as a vehicle-borne improvised explosive device (VBIED), provide the potential for large numbers of casualties, or could serve as a source for hostages. While there has not been a terrorist attack against a bus in the United States, threats and terrorist actions against motor coaches have occurred in other nations, including Israel, Spain, and the United Kingdom. As the Volpe National Transportation Systems Center noted, the industry provides terrorists with a ''physically dispersed, easily accessed, high volume, target rich environment with potential for mass casualties.'' [102] Over-the-Road Buses ''serve all large metropolitan areas and travel in close proximity to some of the nation's most visible and populated sites, such as sporting events, major tourist attractions, and national landmarks.'' [103]

TSA identifies that the most likely threat would be represented by an IED brought aboard by a passenger or delivered by another vehicle in close proximity to the OTRB. There is also the potential threat of an attacker intent on capturing control of the bus and using it as a delivery system for a weapon of mass destruction against a high-value destination. Terrorists with access to this type of vehicle could use its capacity to transport as much as 12 tons of explosives. Coupled with the use of such vehicles in urban centers and in daily proximity to high-value buildings or venues, an OTRB could serve as a VBIED.

Vulnerability

Over-the-Road Buses travel on open roads, often on scheduled and predictable routes, with only a driver and passengers. While OTRBs are used to transport large volumes of passengers and baggage (either in the under-floor storage area or accessible to the

[101] For purposes of this discussion, an OTRB is considered the same as a motorcoach, which is consistent with the industry's interchangeable use of this term. For example, the Motorcoach Census 2015, commissioned by the American Bus Association (ABA), states: ''a motorcoach, or over-the-road bus (OTRB), is defined as a vehicle designed for long-distance transportation of passengers, characterized by integral construction with an elevated passenger deck located over a baggage compartment. It is at least 35 feet in length with a capacity of more than 30 passengers . . . . This definition of a motorcoach excludes the typical city transit bus city sightseeing buses, such as double-decker buses and trolleys.'' *See* ABA, ''Motorcoach Census 2015,'' at 7 (Feb. 11, 2016), available at *http://www.buses.org/assets/images/uploads/general/Motorcoach%20Census%202015.pdf.*

[102] Volpe National Transportation Systems Center, ''Security Enhancement Study for the U.S. Motorcoach Industry,'' at vii (May 2003), available at *http://ntl.bts.gov/lib/55000/55200/55204/Security_enhancement_motorcoach_industry_exec_summ.pdf.*

[103] *Id.*

passenger), most owner/operators do not screen passengers and baggage for threats. Furthermore, OTRBs generally have large cargo compartments that can be reached without boarding the bus. As previously noted, a high number of OTRBs operate in urban settings and have the ability to gain close proximity to high-profile targets and highly-populated areas. These operations are vulnerable to a potential terrorist—providing frequent and predictable access to a vehicle that could either be targeted or exploited by an individual with malicious intent: It is relatively easy to perform reconnaissance, purchase a ticket, and travel anonymously with baggage that does not undergo screening.

Consequences

The consequence of a successful attack on an individual OTRB in a remote location is assumed to be the loss of the vehicle and many of its passengers. The same vehicle as a VBIED aimed at a high-value target is much greater. The National Counterterrorism Center (NCTC) states that one VBIED containing 4,000 kg of homemade explosives is equivalent to 200 pipe bombs or 20 suicide vests.[104]

Risk Determination

While it is possible an OTRB could be the target of a terrorist attack, it is more likely that an OTRB would be used to deliver an IED, making the bus a VBIED that could be used to target an urban area. This risk determination reflects that a terrorist could obtain access to a large vehicle by simply purchasing a ticket for a fixed-route OTRB travelling to the target region (with specific knowledge of where the bus would transfer passengers and any close proximity that could provide to other targets).

Because the risk involving an OTRB as a VBIED is primarily to the targeted urban area, TSA relied on a risk model developed by DHS to determine highest-risk urban areas for the UASI grant program.[105] This model has been approved by the Secretary of Homeland Security and vetted by Congress as an appropriate method to determine risk to an individual city or urban area. As with PTPR, there is a natural and significant break in the risk curve (delta of risk scores or one urban area to the next).

Proposed Applicability

TSA proposes to apply the requirements of this rule to owner/operators providing fixed-route service in the 10 areas identified in proposed 49 CFR part 1584, Appendix A.[106] These 10 areas are those that receive the highest funding allocation under the FY 2015 UASI grant program. UASI funds are allocated based on a risk methodology employed by DHS and Federal Emergency Management Agency (FEMA). Together, these 10 urban areas were allocated 88 percent of total UASI funds based on risk to these 10 regions.[107]

The determining factor for whether a fixed-route OTRB owner/operator is within the scope of the proposed rule is not where they are headquartered, but where they provide service. In proposing this applicability, TSA considered factors that could make an OTRB a potential target for a terrorist attack, including its visibility (the size of its operations), the extent to which its schedule is publicly available, whether or not it is relatively easy for unknown individuals to board the bus, and whether the bus would have ease of access to high-consequence locations.

TSA is aware that some private companies provide commuter services that may trigger applicability of the proposed rule. Diagram A provides a flowchart to assist with determining if the proposed rule would apply.

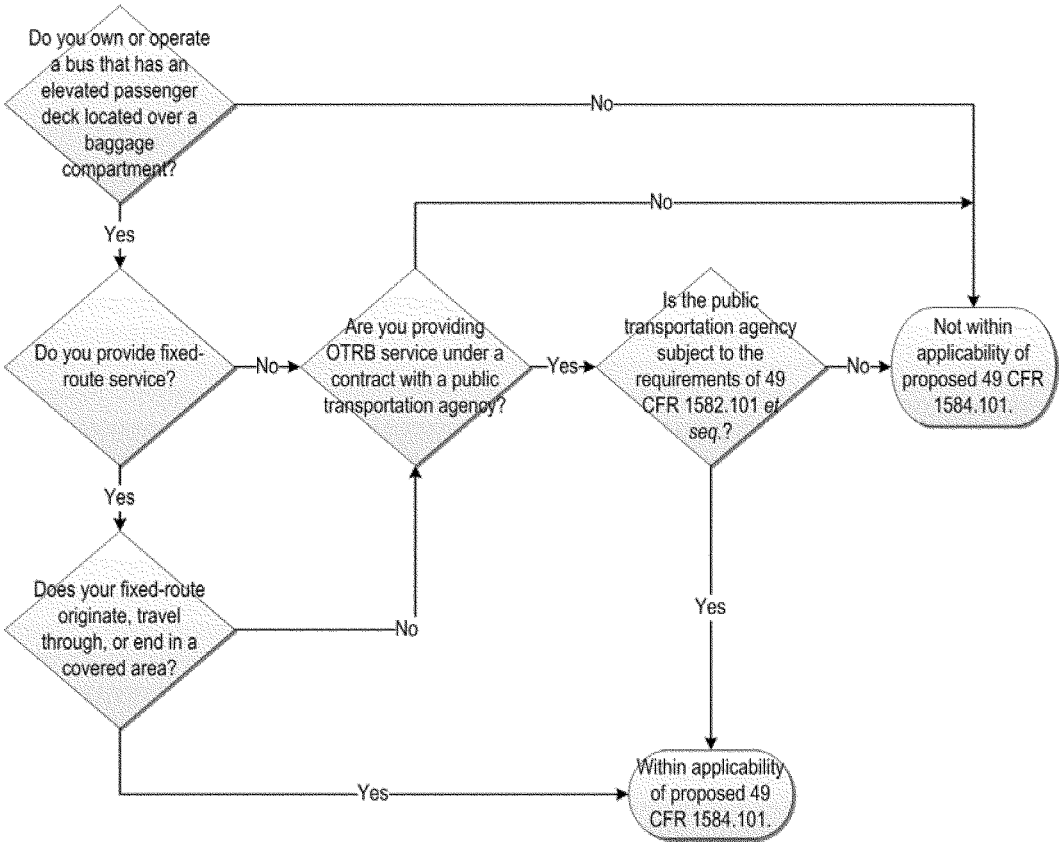
[104] *See* ''TNT EQUIVALENTS'' at *https://www.nctc.gov/site/methods.html#sarin.*

[105] The UASI program is intended to assist ''high-threat, high-density Urban Areas in efforts to build and sustain the capabilities necessary to prevent, protect against, mitigate, respond to, and recover from acts of terrorism.'' *See* DHS, ''Notice of Funding Opportunity: Fiscal Year 2015 Homeland Security Grant Program,'' at 2 (FY 15 UASI Allocations), available at *http://www.fema.gov/media-library-data/1429291822887-7f203c9296fde6160b727475532c7796/FY2015HSGP_NOFO_v3.pdf. See also supra,* at n. 98.

[106] ''Fixed-route service'' is defined in proposed § 1500.3 to mean, ''the provision of transportation service by private entities operated a long a prescribed route according to a fixed schedule.''

[107] *See* FY 2015 UASI Allocations, *supra* n.105.

Diagram A. Commuter Service Applicability Flowchart



TSA estimates that the applicability of the proposed rule would apply to approximately 202 OTRB owner/operators.

Alternative Considered

TSA considered expanding the applicability of a security training program to OTRB owner/operators operating within or through one or more of the UASI regions. TSA estimates that this alternative would cover a total of 403 owner/operators in 26 metropolitan areas in year one of the regulation. TSA estimates that this alternative would have a cost of approximately $22.09 million for OTRB owner/operators over a 10-year period (at a 7 percent discount rate). The basis for the estimates of benefits and costs are included in the RIA for this rulemaking, which is included in the public docket.

TSA rejected this alternative because the agency has determined that the proposed rule better aligns with its commitment to risk-based security policy and outcomes-based regulation. As previously noted, while it is possible an OTRB could be the target of a terrorist attack, it is more likely that an OTRB would be used to deliver an IED–making the bus a VBIED that could be used to target an urban area. While there are more UASI regions than those covered by the proposed rule, the areas identified in proposed Appendix A to part 1584 represent those with the highest-risk. Additionally, when compared to the ten-year costs of the proposed applicability rule for OTRB owner/operators ($12.08 million at 7 percent), this alternative would result in $10.01 million in additional costs.

4. Foreign Owner/Operators

While the proposed applicability provisions for security training do not specifically reference foreign owner/operators,[108] the employees who must be trained include any employee performing a security-sensitive function ''in the United States or in direct support of the common carriage of persons or property between a place in the United States and any place outside the United States.'' [109] Therefore, the training requirements of this proposed rule would apply equally to domestic owner/operators and foreign owner/operators with employees performing covered functions within the United States or in support of operations within the United States. For example, if a Canadian OTRB owner/operator has fixed-route service that begins at a point in Canada and transits through an area identified in proposed part 1584, Appendix A before concluding at a point in Mexico, any employees operating that bus providing maintenance or inspection services, providing dispatch information, or performing any other security-sensitive function for that bus affecting its operations within the United States would need to be trained and the owner/operator would need to submit a training plan to TSA for approval. Where the function is being performed, in essence whether the employee is performing the security-sensitive function at a location in Canada or along the route in the United States, is irrelevant.

In addition, while foreign owner/operators providing service in the United States would be required to have a security coordinator and alternate, foreign owner/operators would only be required to report potential threats and significant security concerns for operations in the United States or transportation to, from, or within the

[108] *See* proposed §§ 1580.101 (freight railroads), 1582.101 (PTPR), and 1584.101 (OTRBs).

[109] *See* proposed §§ 1580.3 (freight railroads), 1582.3 (PTPR), and 1584.3 (OTRBs).

United States. Foreign freight railroad owner/operators currently meet this requirement under the requirements of current 49 CFR part 1580. This approach is also consistent with that taken by the FRA.

5. Preemption

While current 49 CFR part 1580 includes a preemption provision, which will be carried over to the proposed revisions of part 1580 and addition of part 1582, that provision is based upon the specific statutory preemption in 49 U.S.C. 20106. There is no similar statutory provision for the other modes of transportation covered by this proposed rule. Therefore, TSA has not included preemption provisions for the other modes. Furthermore, based on TSA's experience with the implementation of 49 CFR part 1580 since it was finalized in 2008, it has not become aware of any State, local, or tribal laws, regulations, or orders that would be inconsistent with the provisions of this NPRM nor were any concerns raised during the consultations discussed in section IV of this NPRM. TSA invites comments about specific laws, regulations, or orders that commenters believe would conflict with the provisions of the proposed rule.

G. Security Program General Requirements (§§ 1580.113, 1582.113, and 1584.113)

Under proposed §§ 1580.113, 1582.113, and 1584.113 owner/operators identified in §§ 1580.101, 1582.101, and 1584.101 would be required to adopt and implement a security training program that meets the requirements of the relevant subparts. TSA is deliberately proposing that owner/operators be required to ''adopt and implement'' rather than ''develop and implement'' training programs because TSA is aware that relevant training curriculum may already exist that aligns with most, if not all, of the curriculum requirements—including resources developed by TSA (which will be further discussed in section III.I and J. of this NPRM).

1. Information About the Owner/Operator

This section includes proposed requirements for the content of the program to be submitted to TSA, including information regarding the owner/operator (paragraphs (b)(1) and (2)), scope of training (for example, number of employees to be trained by job function) (paragraph (b)(3)), implementation schedule for the training program (paragraph (b)(4)) consistent with the requirements of proposed § 1570.111, and location of training records (paragraph (b)(5)) consistent with the requirements in proposed § 1570.121.

2. Information on How Training Will Be Provided

Proposed paragraphs (b)(6) through (9) require general information on the curriculum to be used to meet the training requirements, such as lesson plans, objectives, and modes of delivery. As previously noted, TSA is aware that some owner/operators would seek approval to use existing training programs, implemented to comply with other Federal requirements or other standards, to satisfy some or all of the requirements of this NPRM. Under proposed paragraph (b)(6), the curriculum or lesson plan for that program would need to be included in the training program submitted for TSA approval.

For example, an owner/operator may have provided training on topics similar to those in the proposed rule to meet programs implemented to fulfill the HMR, such as those in 49 CFR part 172, or FRA safety/evacuation training.[110] In the training program submitted to TSA for approval, owner/operators using any of these training programs to meet the requirements of the proposed rule would also need to explain how the training programs selected meet TSA's requirements and are appropriate for the particular owner/operator. During review, TSA may need to request additional information from the owner/operator in order to determine if the courses selected meet this rule's requirements.

3. Ensuring Supervision of Untrained Employees and Providing Notice of Changes Affecting Training

Proposed paragraphs (b)(7) and (8) would require owner/operators to provide information on their plans for addressing specific requirements in §§ 1580.115, 1582.115, and 1584.115. These include plans for ensuring untrained employees are properly supervised (as required by proposed §§ 1580.115(a), 1582.115(a), and 1584.115(a)) and notifying employees of any changes that affect their training. For example, under proposed § 1580.115(c) (similar provisions exist in §§ 1582.115(c) and 1584.115(c)), employees must be trained on their responsibilities under the owner/operator's security plans and/or programs. If the security plans and/or programs change, the employee must be notified of how that change would affect the information they were provided during previously provided training. This would not affect the timing of recurrent training unless affected employees are required to participate in training courses as part of updates to the security program.

4. Methods for Determining Effectiveness of Training

Proposed paragraph (b)(9) would require owner/operators to include in their training program a method for measuring the effectiveness of their training program. TSA would afford flexibility to each individual owner/operator to measure effectiveness of their security training program using methods and criteria appropriate for their operations. TSA does not prescribe the method in the proposed rule, but does propose that every training program specify the manner and method by which the effectiveness of the training program would be evaluated by the owner/operator. For example, TSA expects that some owner/operators would choose to administer a form of written test or evaluation to gauge their employees' level of knowledge, while others may rely upon operational tests conducted by supervisors to determine employees are being trained effectively.

Similarly, TSA is not proposing to prescribe conditions for a pass/fail policy that may be associated with post-training testing. While individual companies may elect to enforce pass/fail criteria with associated personnel actions, TSA is neither requiring this nor recommending a specified maximum number of times that an individual may take a test or evaluation to demonstrate knowledge and competency. As previously noted, the standards proposed by an owner/operator for determining training efficacy may affect TSA's approval of any alternative measures for compliance. TSA requests comments on this issue to further inform a final rule.

5. Relation to Other Training

TSA is proposing paragraph (c) in recognition that many owner/operators covered by this proposed rule are subject to training requirements under regulations of DOT that overlap with the training content identified in the 9/11 Act's requirements. For example, an owner/operator may have provided training on topics similar to those in the proposed rule to meet programs implemented under DOT hazardous material regulations,[111] FRA safety/

[110] *See* 49 CFR part 239.

[111] *See, e.g.,* 49 CFR part 172.

evacuation training,[112] or Federal Transit Administration (FTA) Safety Management System training provided under a rail fixed guideway public transportation system's Transit Agency Safety Plan.[113] Other training programs are addressed in section III.I of this NPRM.

TSA does not expect owner/operators to duplicate training. If they are already subject to requirements to provide similar training, they can use that training to satisfy TSA's requirements. To the extent that an owner/operator intends to use existing training programs implemented to comply with other Federal requirements or other standards in order to satisfy some or all of the requirements of this NPRM, the program submitted to TSA for approval would need to identify how the other training would be used to satisfy TSA's requirements, such as the curriculum or lesson plan for that program.

Proposed paragraph (c)(2) requires an index to be provided if the owner/operator chooses to submit all or part of an existing security training program to TSA for approval. The index would need to be organized in the same sequence as the content requirements in §§ 1580.115, 1582.115, and 1584.115. Indexing is a necessary requirement if TSA is to provide flexibility for owner/operators to use existing training programs to satisfy this proposed rule. TSA may request additional information on the program through the review and approval process.

H. Security Training and Knowledge for Security-Sensitive Employees (§§ 1580.115, 1582.115, and 1584.115)

1. Training Required for Security-Sensitive Employees

Any owner/operator required to have a security training program under §§ 1580.101, 1582.101, or 1584.101, must provide security training to its security-sensitive employees. Consistent with the definition of employee in § 1570.3, this requirement applies to any direct employee, contractor, employee of a contractor, or other authorized person who is compensated for performing a security-sensitive function on behalf of or for the benefit of the owner/operator. For example, if an OTRB owner/operator does not employ any drivers directly, but uses drivers under contract, those drivers would need to be trained. Similarly, if an owner/operator has chosen to combine dispatch services with two affiliates of its parent corporation, the owner/operator required to provide security training to its direct employees would also be required to provide security training to any dispatchers providing services for its fleet.

In some circumstances, security-sensitive functions may be performed by individuals not within the definition of ''employee'' for purposes of this NPRM. For example, police officers employed by a local law enforcement agency may be routinely patrolling the owner/operator's premises and/or operations. They would not be subject to the proposed rule unless there is a contractual relationship for the law enforcement agency to provide that service and the law enforcement officer is assigned to that location. In situations where the owner/operator has a dedicated police or security force, the members of that force assigned to work at the facility would need to have security training consistent with that required for other employees. For those situations where those personnel are not required to be trained, TSA would encourage law enforcement personnel regularly assigned to patrols at that location to receive the same training as the employees to enhance communication and cooperation in response to potential threats.

2. Limits on Use of Untrained Employees

If a security-sensitive employee does not receive the required security training, under the proposed rule, that employee would be prohibited from performing a security-sensitive function unless he or she is under the direct supervision of a security-sensitive employee who has met the training requirements. While TSA is not defining the word ''direct,'' TSA would expect the supervisor to be located in reasonable proximity to the employee to supervise actions and provide the necessary level of security awareness and response capabilities. Further, even if an employee is directly supervised, TSA proposes to impose a 60-day limit for the amount of time that an employee may perform a security-sensitive function without receiving training. After 60 days, the proposed rule would require the owner/operator to remove the employee from a security-sensitive function; the owner/operator would, of course, retain the discretion to reassign the individual to other non-security-sensitive job functions.

3. Knowledge Required

Consistent with other TSA regulations,[114] TSA is proposing to require a training program that focuses on the specific knowledge provided to security-sensitive employees. The proposed rule affords flexibility for owner/operators to develop and implement a program that addresses the required components of the security training program in the context of their operational environments.

In developing the requirements, TSA considered the specifically enumerated subjects in the 9/11 Act, other Federal regulatory requirements, and curriculum elements already being provided by owner/operators (based on information obtained as part of TSA's ongoing interaction with its stakeholders). TSA has organized these requirements into four broad categories: prepare, observe, assess, and respond. As noted in Diagram B below, all statutorily required program elements are included within these broad categories. For purposes of this discussion and Diagram B, the statutory requirements will be referenced as PT # (''PT'' aligns to 6 U.S.C. 1137 and the # with the relevant section in 1137(c)—for example, PT # 1 corresponds to 6 U.S.C. 1137(c)(1)); RR # (''RR'' aligns with requirements in 6 U.S.C. 1167 and the # with the relevant sections of 1167(c)); and OTRB # (''OTRB'' aligns with requirements in 6 U.S.C. 1184 and the # with the relevant section in 1184(c)). Other existing training that could be relevant to each of the categories is also identified in Diagram B as it could be useful to owner/operators in identifying existing training that could be used to satisfy the proposed regulatory requirements.

The ''prepare'' category is intended to address training that may be specifically relevant to a particular job function. For example, an appropriate method for self-defense (as required by PT 3, RR 3, and OTRB 3) could vary based upon an employee's job and extent to which he or she interacts with the public. Similarly, an employee's role in operating and maintaining security equipment (as required by PT 10, RR 11, and OTRB 11) varies based upon the responsibilities of the employee.

The ''prepare'' category would also address training on discharging any security responsibilities that security-sensitive employees may have under a security plan or measure. This proposed rule does not require any owner/operator to adopt or implement a

[112] *See* 49 CFR part 239.

[113] *See* 49 CFR 674.29 and Appendix A to part 674.

[114] *See, e.g.,* 49 CFR 1548.11 (Training and knowledge for individuals with security-related duties) applicable to indirect air carriers).

security plan or measures. TSA is aware, however, that many owner/operators have security plans or measures that they developed voluntarily, to comply with federal requirements, or to qualify for Federal grants. To the extent these plans or procedures exist, employees must be trained in order to ensure these plans or measures are effective. Similar to the threat and incident prevention and response training, this portion of the training program would need to be tailored to the specific operation. TSA intends for training provided under this category to satisfy requirements for in-depth security training for ''hazmat employees'' as required by 49 CFR 172.704(a)(5). For freight railroads, the requirements in proposed § 1580.115(c) include providing training on chain of custody and control requirements, as appropriate. This additional training is relevant to ensuring appropriate procedures are followed to comply with the security requirements in proposed subpart C to part 1580 (which contains the requirements in current §§ 1580.103 and 1580.107).

The ''observe'' category is intended to provide knowledge to increase a security-sensitive employee's observational skills. This category would address behavior recognition requirements of the 9/11 Act (PT 6, RR 6 and OTRB 6)—encompassing an understanding of unusual or abnormal behavior that should trigger a response by employees because of the potential that the behavior may indicate a threat to transportation security. It also addresses a requirement to be able to recognize dangerous or suspicious items, behavior, or situations (required by PT 8, RR 9, and OTRB 9). In general, this training focuses on recognizing the difference between what is normal for the operational environment and abnormalities that could indicate terrorist planning or imminent attack. Training delivered should teach the employees that suspicious activity is a combination of actions and individual behaviors that appear strange, inconsistent, or out of the ordinary for the employee's work environment. In most instances, it will not be a single factor, but a combination of factors taking place at a particular time and place, that will accurately identify a suspicious individual or act.

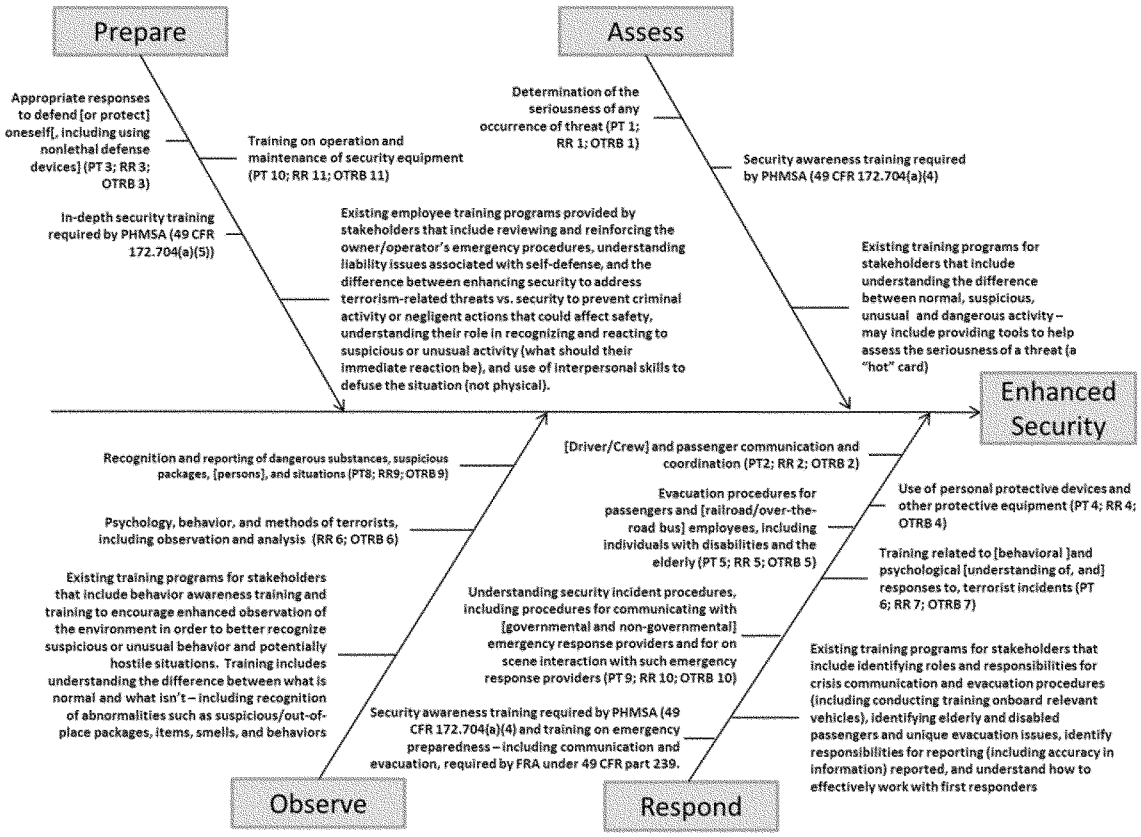
The ''assess'' category requires providing knowledge of how to determine if what is observed requires a response and what those appropriate responses may be. TSA is aware that some stakeholders provide training that includes tools to help employees assess the seriousness of a threat. This category addresses requirements in the 9/11 Act (PT 1, RR1, and OTRB 1) as well as the security awareness training required for ''hazmat employees'' under 49 CFR 172.704(e)(4).

The ''respond'' category includes training on security incident responses—including how to appropriately report a security threat, interact with the public and first responders at the scene of threat or incident, applicable uses of self-defense devices or protective equipment, and communication with passengers. This category addresses several elements of the 9/11 Act relating to communication and coordination (PT 2, RR 2, and OTRB 2), use of personal protective devices or equipment (PT 4, RR 4, and OTRB 4), evacuation procedures (PT 5, RR 5, and OTRB 5), responses to terrorist threats or incidents (PT 6, RR 7, and OTRB 7), and understanding procedures for interacting with responders (PT 9, RR 10, and OTRB 10). This category also addresses elements of security awareness training required by 49 CFR 172.704(a)(4). To the extent owner/operators need to provide training on specific self-defense devices or protective equipment, TSA has not calculated these costs as it assumes this is a standard part of any operation before providing such devices or equipment to individuals and would not be a cost of this rule. Based on feedback received in consultation with stakeholders, TSA considered whether to tailor particular training requirements to specific job functions. It may be argued, for example, that training elements relevant to employees who encounter the public are not necessary for mechanics or other employees performing non-public functions. TSA believes, however, that there should be a common level of proficiency among security-sensitive employees of the covered entities; training in security awareness and behavior recognition is appropriate for all employees.

At the same time, security-sensitive employees must be aware of their particular responsibility in preventing or responding to a threat or incident prevention and response and adequately trained to fulfill their roles. TSA recognizes that owner/operators may integrate into their required security training programs varying levels of training for particular categories of employees or job functions to meet the objectives of their overall security strategy or plan. TSA encourages continuation of these practices as long as the security training program meets the core requirements proposed in this rulemaking.

Diagram B identifies the type of training covered within each of these categories by reference to the considerations that led to their development.

Diagram B. Development Considerations for Requirements in §§ 1580.113, 1582.113, and 1584.113



I. Other Security Training Programs

The 9/11 Act includes requirements for TSA to consider ''any current security training requirements or best practices'' before issuing security training regulations.[115] As discussed above and indicated in Diagram B, TSA has taken current Federal regulations, guidance, and other practices affecting transportation security into consideration and has crafted this proposed rule to be consistent with those regulations and practices where they meet the requirements of the 9/11 Act and the objectives of this rulemaking. In addition, TSA has been consulting with DOT to avoid potential inconsistencies and unnecessary duplication as a result of this proposed rule.

Many of the owner/operators required to provide security training under this regulation have been providing security training either under the requirements of training programs discussed in this section or using materials developed and/or approved by TSA for other purposes. A range of courses including those sponsored by TSA and other Federal agencies, such as FTA, Federal Emergency Management Agency (FEMA), and PHMSA, provide a means for covered entities to coordinate training for their employees in many of the elements stipulated in the proposed rule. For example, the training program this proposed rule would require is consistent with, and builds upon, security training programs that PTPR owner/operators have implemented through courses sponsored by FTA, TSA, and FEMA, including guidance provided to PTPR owner/operators to fast track grant applications for security training funding. In many cases, agencies have secured third-party training through funds awarded on projects approved under the TSGP administered by DHS. These government-sponsored and third-party courses would remain as approved options to the extent they adequately address the elements required in the final rule. As in the past, TSA would provide lists of approved courses to PTPR owner/operators subject to the regulatory requirements.

As discussed in section III.D.3 (recognition of previous training) of this NPRM, an owner/operator may rely on this training to satisfy the training requirements of the proposed rule to the extent the training program they submit includes the curriculum and an explanation of how the previous training meets TSA's requirements and is appropriate for the particular owner/operator. TSA anticipates that for many owner/operators, the training discussed above would meet most of the requirements. It is likely, however, that additional training would be needed for some of the knowledge required by the ''prepare'' category of training in proposed §§ 1580.115(c), 1582.115(c), and 1584.115(c). The following section discusses some of the programs and requirements that are relevant to these considerations.

1. Federal Railroad Administration Safety Training Requirements

Passenger railroad employee training programs already comply with FRA safety standards requiring the preparation, adoption, and implementation of emergency preparedness plans by railroads connected with the operation of passenger trains (including freight carriers hosting passenger rail

[115] *See* 6 U.S.C. 1167(a) and 1184(a).

operations).[116] The FRA defines an ''emergency'' as an unexpected event related to the operation of passenger train service involving a significant threat to the safety or health of one or more persons requiring immediate action, and includes a security situation.[117] Under the regulations in 49 CFR part 239, each affected railroad is required to instruct its employees on the provisions of its plan. Emergency preparedness plans must address such subjects as communication (including on-board crewmember notification of the control center and passengers about the nature of the emergency and control center personnel notification of outside emergency responders and adjacent rail modes of transportation), passenger evacuation in emergency situations, employee training and qualification, joint operations, tunnel safety, liaison with emergency responders, on-board emergency equipment, and passenger safety information. FRA also requires full-scale emergency simulations for passenger trains. In general, the FRA has found few failures to provide the required training. In FY 2014, there was a single recommended violation for failure to meet the requirements of 49 CFR 239.7.[118]

As stated in §§ 1580.113(c) and 1582.113(c) of the proposed rule, TSA recognizes that the training required by 49 CFR 239.7 may be combined with other training to partially or fully meet or exceed requirements under proposed §§ 1580.115(f) or 1582.115(f) and would not expect owner/operators to duplicate this training. TSA would work in cooperation with the FRA to validate that the owner/operators have provided the training as represented in any programs submitted to TSA for approval. As previously noted, the training program required under this proposed rule would need to clearly describe and identify the training and how it is being used to satisfy the requirements of the TSA regulation.

2. Federal Transit Administration Safety Requirements

Under 49 CFR part 659, the FTA manages State Safety Oversight for Rail Fixed Guideway Systems.[119] Currently, part 659 requires States to oversee the safety and security of rail fixed guideway systems operating in their jurisdictions through designated Oversight Agencies (OAs). The OAs must require the operator of the rail fixed guideway system to develop and implement a written system safety program plan and a written system security plan as separate products. Each covered system must base its Transit Agency Safety Plan on an adequate Safety Management System (SMS), and include an adequate means of safety promotion to support the execution of the plan by all employees, agents, and contractors.[120]

The Safety Promotion component of the SMS includes safety communication, which requires a combination of training and communication of safety information to employees to heighten the efficiency and effectiveness of the transit agency's SMS, and typically includes training on the mechanism for employees to report safety concerns.[121] Safety communication is intended to ensure that personnel are aware of the SMS and their role within it, and receive safety-critical information in an effective and timely manner.[122]

Additionally, the OAs must require covered transit agencies to conduct annual reviews of both their system safety program plans and system security plans. Further, the OAs must require covered agencies to develop and document a process for the performance of on-going internal safety and security reviews in their system safety program plans. Finally, the OAs themselves must conduct on-site reviews of system safety program plan and system security plan implementation.

3. OTRB Safety Requirements

The FMCSA has not issued regulations regarding OTRB owner/operators to provide training to their employees on evacuation procedures. In its 2012 update to the ''Motorcoach Safety Action Plan,'' FMCSA noted its commitment to examining ''ways to convey safety information to passengers and improve evacuation for a diverse population.'' It is important to recognize that in the OTRB environment, the only employee of the owner/operator on the bus may be the driver. Focusing on what the driver can do, FMCSA published guidance in 2007 to the industry recommending providing pre-trip safety information to passengers. FMCSA also distributed safety brochures, posters, and an audio compact disc (CD) based on the guidance that contains safety announcements regarding emergency egress that can be broadcast. The original CD was in English and FMCSA subsequently translated it in six other languages.[123] To the extent an owner/operator has provided training related to this issue pursuant to FMCSA recommendations, they could provide information on this training and their use of it to TSA as part its security training program submission.

4. Hazardous Materials Regulations

a. Overlap With DOT Regulations Regarding Transportation of Hazardous Materials

Both DOT and DHS have responsibility regarding the transportation of hazardous materials. TSA is the lead Federal entity for transportation security, including hazardous materials and pipeline security, while PHMSA has responsibility for promulgating and enforcing regulations and administering a national program of safety, including security, in multimodal hazmat transportation.[124] As part of a Memorandum of Understanding (MOU) between these agencies to coordinate on activities related to their respective missions, TSA and PHMSA agreed to coordinate in the development of standards, regulations, guidelines, or directives and to build on existing standards when it is determined that the adequacy of existing standards needs to be addressed.[125] Consistent with that agreement, TSA and PHMSA have coordinated regarding PHMSA's security regulations and on this NPRM.

[116] *See* 49 CFR part 239.

[117] *See* 49 CFR 239.7.

[118] *See* FRA, ''Fiscal Year 2014 Enforcement Report,'' at 3. This is an annual report published by FRA summarizing settled claims for civil penalty violations of Federal railroad safety and hazardous materials statues, regulations and orders during Federal Fiscal Year 2014 and is available is available under Enforcement & Litigation on FRA's Web site at *https://www.fra.dot.gov/eLib.*

[119] On March 16, 2016, the FTA published a final rule for State safety oversight of rail fixed guideway public transportation systems not regulated by the FRA that replaces the current State Safety Oversight (SSO) rule in 49 CFR part 659. *See* State Safety Oversight; Final Rule, 81 FR 14229 (Mar. 16, 2016) (adding part 674 to title 49 of the CFR). The FTA will rescind the current SSO rule no later than April 15, 2019. SSO Agencies and rail transit agencies (RTAs) will continue to comply with the current SSO rule until they come into compliance with the new regulations. The FTA omitted System Security Plans from its final rule, noting, ''TSA . . . has the prerogative and responsibility for all rulemakings on security in public transportation.'' *Id.* at 14233.

[120] *See* 49 CFR 674.29 and Appendix A to part 674.

[121] *Id.*

[122] *Id.*

[123] U.S. Department of Transportation, ''Motorcoach Safety Action Plan:2012 Update,'' at 29 (Dec. 2012), FMCSA–ADO–13–001. *See id.* at 42–43 for additional information on ongoing initiatives of FMCSA on this issue.

[124] *See* ''Annex to the Memorandum of Understanding Between the Department of Homeland Security and the Department of Transportation Concerning Transportation Security Administration and Pipeline and Hazardous Materials Safety Administration Cooperation on Pipeline and Hazardous Materials Transportation Security,'' at secs. III.b. and III.c. (August 2006).

[125] *Id.* at sec. II.

A copy of the MOU is available in the docket for this rulemaking.

For the purposes of this rulemaking, it is important to recognize that PHMSA's security requirements for hazmat transportation apply to freight railroad carriers, motor carriers, and shippers and receivers of hazmat. Within these populations, PHMSA regulations require all individuals within the definition of ''hazmat employee'' to receive training in security awareness.[126] The HMR also requires hazmat employers who offer for transportation or who transport a subset of hazardous materials in specific quantities to develop security plans.[127] In addition, any hazmat employer required to have a security plan must provide in-depth security training to its employees.[128]

Specifically, the HMR require training of hazmat employees in: (1) Familiarity with the general provisions of the HMR and recognizing and identifying hazardous materials; (2) knowledge of specific HMR requirements applicable to functions performed; and (3) knowledge of emergency response information, self-protection measures, and accident prevention methods. The in-depth security training requirements include training on: (1) Awareness of the security issues associated with hazardous materials transportation and possible methods to enhance transportation security; and (2) the owner/operator's security objectives, specific security procedures, employee responsibilities, actions to be taken in the event of a security breach, and the organizational security structure.[129]

TSA's proposed rule would apply to a subset of those entities required to have security training programs under the HMR. Within the population subject to both the HMR and TSA's proposed rule, employees to be trained also differs. PHMSA applies the definition of ''hazmat employee'' used for their safety regulations,[130] while TSA's proposed rule applies to employees whose functions are determined by TSA to be ''security-sensitive.'' Data is not available to precisely determine the extent of overlap. For the subset of the HMR population also within the scope of TSA's proposed rule, TSA's proposed training requirements go beyond the baseline required by PHMSA. Diagram B includes references to the HMR requirements.

PHMSA has reviewed TSA's proposed requirements and agrees that owner/operators subject to its rule who meet TSA's proposed requirements would also satisfy the corresponding provisions in PHMSA's security training requirements. PHMSA's regulations state that training conducted by owner/operators to comply with security training programs required by other Federal agencies may be used to satisfy their hazmat employee training to the extent that such training addresses the training components specified for hazmat employee training.[131]

b. Inspections and Enforcement

TSA recognizes that stakeholders may be concerned about the potential overlap between PHMSA's regulations and TSA's proposed regulations. For example, under its Secure Contact Review program, the FRA audits railroads and evaluates their compliance with security plans and security training as mandated by the PHMSA regulations. Federal Railroad Administration inspectors are given authority to write citations for an owner/operator's failure to properly comply with the requirements. PHMSA also conducts periodic compliance investigations and its inspectors are given authority to write citations for failure to properly comply with the requirements.[132]

PHMSA recognizes TSA's lead role and regulatory responsibilities in the secure transport of hazmat. After summarizing TSA's authorities in its preamble to the final rule amending the HMR, PHMSA stated:

adopted its security regulations, it was stated that these regulations were 'the first step in what may be a series of rulemakings to address the security of hazardous materials shipments.' 68 FR 14511. PHMSA noted in the NPRM that TSA 'is developing regulations that are likely to impose additional requirements beyond those established in this final rule' and stated that it would 'consult and coordinate with TSA concerning security-related hazardous materials transportation regulations . . . .

TSA intends to promulgate additional regulations for railroad carriers and other modes of surface transportation that will require them to submit vulnerability assessments and security plans to DHS for review and approval, as well as to develop and implement security training programs for employees performing security-sensitive functions to prepare for potential security threats and conditions. The security plan requirements established by the HMR are to be used as a baseline for security planning. When TSA regulations are issued, the PHMSA security plan and security training requirements for regulated parties that will be subject to the TSA regulations will be reevaluated and revised as appropriate.[133]

DHS and DOT are committed to coordinating on the oversight of security-related training for carriers of RSSM. Consistent with the MOU previously discussed, PHMSA's Final Rule revising the HMR acknowledged the agreement between the agencies:

If, in the course of an inspection of a railroad or motor carrier or a rail or highway hazardous material shipper or receiver, TSA identifies evidence of non-compliance with a DOT safety or security regulation, TSA will provide the information to FRA (for rail) or FMCSA (for motor carriers) and PHMSA for appropriate action. Similarly, since DOT does not have the authority to enforce TSA security requirements, if a DOT inspector identifies evidence of non-compliance with a TSA security regulation or identifies other security deficiencies, DOT will provide the information to TSA for appropriate action.[134]

TSA has committed to DOT to do the same.

c. Overlap With Other DHS Regulations

Parts of TSA's current regulations for rail security include requirements applicable to certain shippers and receivers of hazardous materials.[135] While TSA is not modifying its existing requirements for shippers and receivers as part of this proposed rule, it is also not proposing to apply the security training requirements to shippers and receivers.

This is consistent with TSA's intent to avoid any overlap with regulations promulgated by the National Protection and Programs Directorate (NPPD) of DHS for the security of certain high-risk chemical facilities in the United States.[136] NPPD has previously recognized that certain aspects of its authorities [137] are concurrent and overlapping with TSA due to the transportation of these chemicals by rail, but stated that it does not presently plan to screen railroad facilities for inclusion in the CFATS program (although the Department reserved the right to reevaluate possible scope at a

[126] 49 CFR 172.704(a)(4). *See* 49 CFR 171.8 for definition of ''hazmat employee.''

[127] 49 CFR 172.800 and 172.802.

[128] Whether a hazmat employer is required to have a security plan, and therefore provide in-depth security training, is determined by whether they transport any of the materials identified in 49 CFR 172.800.

[129] *Id.*

[130] 49 CFR 171.8.

[131] 49 CFR 172.704(b).

[132] *See* 75 FR 10974 (Mar. 9, 2010). *See also* 49 CFR 107.301 *et seq.*

[133] 75 FR at 10976.

[134] *Id.* at 10977.

[135] *See* scope identified in current § 1580.1.

[136] Promulgated under the authority of sec. 550 of the Department of Homeland Security Appropriations Act, 2007 (2007 DHS Appropriations Act), Public Law 109–295, 120 Stat. 1355 (Oct. 4, 2006).

[137] *See id.*

future date).[138] TSA and NPPD, continue to work closely together to ensure that the efforts directed at these facilities are coordinated and consistent.

While facility security training and transportation security training have unique differences and shall be considered as separate issues, TSA's subject matter experts have reviewed the training requirements of CFATS RBPS 11 and determined that they meet or exceed the requirements considered necessary by TSA for secure transportation of the identified chemicals. There would be no additional security benefit from extending the training requirements of this proposed rule to entities subject to CFATS. This determination was considered as part of TSA's decision not to include shippers and receivers of hazardous materials within the scope of this proposed rule.

J. Training Resources

As previously discussed, TSA is aware that many owner/operators that would be subject to this proposed rule already provide security training to their employees that may meet the proposed requirements. To further reduce the burden to owner/operators who do not have an existing training program or whose program does not include all of the required content, TSA is expanding existing resources that will be made available to owner/operators at no cost. Owner/operators would be able to use these expanded resources, described below, to meet the content requirements of §§ 1580.115, 1582.115, and 1584.115 of the proposed rule.

First Observer™

First Observer™ is a national training program initially created through a grant from DHS to raise security awareness for highway modes.[139] It was designed to provide transportation professionals with information that will enable them to observe effectively, assess and report suspicious individuals, vehicles, packages, and/or objects. The program has been used to teach thousands of highway transportation professionals to actively participate in recognizing suspicious activities and reporting them through appropriate mechanisms.

TSA is expanding the program to be relevant to other modes of surface transportation, including freight railroads, passenger railroads, and public transportation systems. The First Observer™ Program is undergoing extensive revision and TSA is ensuring the content of all revised First Observer™ products will ultimately meet the security training requirements set forth in a final rule. At this time, TSA does not anticipate that First Observer™ will satisfy the requirement to provide employer specific training to security-sensitive employees with responsibility under their employer's specific security programs or measures—addressed under the ''Prepare'' component of training—as this is company-specific training. TSA does, however, anticipate that the SMARToolbox, discussed below, may provide resources needed to reduce costs for this aspect of the proposed training.

To ensure the expanded program is relevant to all of the modes of transportation covered by this proposed rule, TSA sought to obtain input from its stakeholders and will continue with this effort. For example, while this rulemaking was under development, a meeting of the joint industry-government panel operating as the Transit Policing and Security Peer Advisory Group (PAG)[140] looked at available training programs in light of what the 9/11 Act specified as required training for public transportation.[141] For purposes of the discussion on the 9/11 Act's requirements, the FTA's representatives included a course curriculum developer. The group produced a comprehensive matrix that included standards and criteria needed to meet the training elements required by the 9/11 Act as well as suggested learning objectives to assist in the creation of lesson plans. The intent was to provide a resource that could be used by transit agencies to: (1) Review their existing training programs and close any gaps; (2) develop new programs; or (3) evaluate commercial courses. The panel also pre-screened a selection of available courses that could be used for training that met all of the elements identified in the 9/11 Act. The standards and criteria developed by this group feeds into the considerations identified in Diagram B. This exercise also supports TSA's assumption that most of the owner/operators that would be affected by this proposed rule already have training programs in place that would substantially comply with the proposed rule's requirements.

SMARToolbox

As with the general security training content, TSA is aware that many owner/operators already provide training to prepare security-sensitive employees for their specific responsibilities under their company's security plan as required by proposed §§ 1580.115(c), 1582.115(c), and 1584.115(c). For example, any owner/operator subject to the security training requirements of 49 CFR part 172 is required to provide in-depth training on company-specific measures under 49 CFR 172.704(a)(5). This population overlaps with most of the freight railroad population that would be subject to this proposed rule.

For those that do not currently provide this type of training, TSA has resources available to reduce the burden. In particular, TSA encourages owner/operators to use the SMARToolbox—an industry-led initiative supported by TSA—as a resource presenting a broad range of security measures that peer agencies have identified as valuable to their organization. A searchable, modifiable database allows for various specified searches—making it easy for the users to find information relevant to their specific needs. SMARToolbox includes measures gathered from publically available sources as well as from discussions amongst industry representatives at a variety of stakeholder events. As part of this rulemaking effort, TSA has ensured the SMARToolbox includes information relevant to this training requirement.

K. Programmatic Alternatives

In addition to the applicability alternatives discussed in section III.F. of this NPRM, TSA has also considered other programmatic alternatives. In general, these alternatives eliminated aspects of the proposed rule that are within TSA's discretion, or even necessary parts of implementing the statutory requirements, but not directly mandated by the 9/11 Act.

Table 7 identifies these provisions relevant to each mode.

[138] *See* 72 FR 17729, 17698–17699 (Apr. 9, 2007) (IFR for CFATS).

[139] ''First Observer™'' refers to the current program and any future expansion or changes to the program.

[140] The PAG shares expertise and guidance among TSA, transit police chiefs, and security directors. The group meets by teleconference with TSA at least once a month to discuss relevant issues involving transit security and anti-terrorism approaches.

[141] *See* 6 U.S.C. 1137(c).

TABLE 7—IDENTIFICATION OF PROGRAMMATIC REQUIREMENTS ELIMINATED OR MODIFIED IN ALTERNATIVE ANALYSIS

	Freight rail	PTPR (Rail)	PTPR (Bus)	OTRB)
Recordkeeping	X	X	X	X
Training on chain of custody requirements	X			
Security coordinators and alternates			X	
Reporting security incidents			X	X
Annual recurrent training (replaced with 3 year cycle)	X	X	X	X

In determining the implications of these alternatives, TSA continues to assume that owner/operators would use First Observer™ to meet the requirements—or to fill any gaps in their current training programs. In most cases, the programmatic alternatives assume elimination of the requirement. For recurrent training, the alternative assumes recurrent training would occur every three years rather than annually (since there is not a statutory requirement for how often covered security sensitive employees must be trained, TSA sets the minimum interval of recurrent training to once every three years as opposed to the annual training TSA is requiring in the proposed rule). Based on these assumptions, these alternatives would have an estimated cost of approximately—

- $25.27 million for freight railroad owner/operators over a 10-year period (at a 7 percent discount rate).
- $18.50 million for PTPR owner/operators over a 10-year period (at a 7 percent discount rate).
- $5.85 million for OTRB owner/operators over a 10-year period (at a 7 percent discount rate).

The basis for the estimates of benefits and costs is set forth in the RIA for this rulemaking, which is included in the public docket.

TSA rejected these alternatives because the agency has determined that the proposed rule better aligns with its commitment to risk-based security policy and outcomes-based regulation. While recordkeeping is not specifically stated as a requirement in the 9/11 Act, it is a necessary part of enforcing any regulatory requirement. TSA also believes requiring owner/operators to maintain records of training and provide proof of training to current and former employees upon request can reduce costs of training based upon the recognition given to prior training. Chain of custody is a critical requirement for freight railroads to ensure security during the transportation of RSSM. TSA believes it is essential for employees with responsibility to perform requirements identified in part 1580 related to chain of custody be trained on how to perform those requirements as part of their security training curriculum. To inconsistently apply the requirement for security coordinators and reporting of security incidents for high-risk entities could create significant gaps in the information obtained and shared—creating unnecessary security vulnerabilities. TSA discusses its basis for requiring annual training in section III.D.3 of this NPRM.

IV. Stakeholder Consultations

The 9/11 Act directed TSA to consult with major stakeholders during the development of this NPRM.[142] The categories of stakeholders to be included in these consultations consist of industry representatives, first responders, terrorism experts, and, nonprofit employee labor organizations. As discussed below, TSA has complied with these requirements through meetings with stakeholders before drafting of this proposed rule began, requests for comments submitted through associations, as well as a targeted request for additional input through a Notice published in the **Federal Register**.

As noted, TSA published a notice in the **Federal Register** requesting the public to provide comments and data on employee security training programs and planned security training exercises currently provided by owner/operators of freight railroads, passenger railroads, public transportation systems (excluding ferries), and OTRBs.[143] TSA received a few responsive comments from trade associations, public agencies, and private companies that helped TSA to understand the current ''baseline'' training environment for freight rail, PTPR, and OTRB employees. As the limited information received provided data relevant to the economic impact of this proposed rule, it is discussed more fully in the RIA for this rulemaking, which can be found in the docket.

TSA has taken stakeholder comments into consideration in developing the NPRM. The text below describes stakeholder outreach TSA has conducted.

A. Multi-Modal Outreach

In September and October of 2009, TSA reached out to representatives of the constituencies mandated by 6 U.S.C. 1137, 1167, and 1184. These stakeholders included representatives of State, local, and tribal governmental authorities; first responders; security and terrorism experts; appropriate labor organizations; and organizations representing the elderly and disabled.

On September 14, 2009, TSA reached out to representatives of the following stakeholder groups by transmitting a letter and summary document outlining the key statutory requirements of the NPRM and requesting their comments: TSA/Office of Civil Rights and Liberties; Homeland Security Institute; Mineta Transportation Institute; FEMA/United States Fire Administration/National Fire Programs; International Association of Chiefs of Police; National Sheriffs Association; National Emergency Medical Services Association; Commercial Vehicle Safety Alliance; State, Local, Tribal, and Territorial Government Coordinating Council (GCC); and DHS/National Protection and Programs Directorate/Intergovernmental Programs.

B. Freight Rail

TSA conducted meetings and conference calls with representatives of the freight railroad industry, including trade associations representing railroad carriers and shippers of hazardous materials. Class I carriers as well as short line and regional railroads participated in these consultations. TSA also met with representatives from two rail labor organizations. In addition, TSA met with members of the AAR in November 2009 to discuss the proposed security training.

The AAR has stated that ''TSA regulation of security training for railroad employees is unnecessary'' [144]

[142] *See* 6 U.S.C. 1137(b), 1167(b), and 1184(b).

[143] *See* 78 FR 35945 (June 14, 2013).

[144] ''Comments of the Association of American Railroads'' (Docket ID: TSA–2013–0005–0116), available at *https://www.regulations.gov/*. Input the Docket ID ''TSA–2013–0005–0116'' into the blue ''Search'' field.

because most freight rail hazmat employees already receive training in compliance with the PHMSA, which requires freight rail employees who perform HAZMAT functions to ''receive training that provides an awareness of security risks associated with hazardous materials transportation . . . this training must also include a component covering how to recognize and respond to possible security threats.'' [145] The AAR affirms this and explicitly states in its comments that ''railroads provide security awareness training to their front line employees and have done so for many years'' and employees have to take recurrent training every three years, at minimum.[146] The American Short Line and Regional Railroad Association also submitted comments and stated that, with regards to its members, the current level of ''[t]raining involves looking for suspicious persons, items[, w]hat IEDs may look like[, and h]ow to handle different situations . . . .'' [147]

TSA's freight rail subject matter experts confirmed that higher-risk freight railroad owner/operators currently provide training to their security-sensitive employees on the procedures on chain of custody control requirements–based on the compliance rates for current 49 CFR 1580.107. This information leads TSA to conclude that all freight rail owner/operators affected by the proposed rule that transport RSSM provide training to their employees on, at minimum, security awareness; employee- and company-specific security program and measures; and chain of custody and control requirements.

C. Public Transportation and Passenger Rail

TSA consulted with industry representatives, governmental authorities, security experts, first responders, and employee representatives through the Transit, Commuter and Long Distance Rail GCC,[148] the Mass Transit Sector Coordinating Council (SCC),[149] and PAG.[150]

TSA initiated consultations in October 2007 by explaining the planned approach in a joint meeting with the SCC and via a teleconference with the PAG. Participants at both forums were advised that a summary of the developing concepts and considerations for the security training program rulemaking would be prepared and provided to them for review and feedback. In preparing the summary, TSA coordinated with the membership of the GCC. The summary was completed in November 2007. Dissemination to the SCC and PAG for review and comment occurred in December 2007 and January 2008. TSA received feedback in February and March 2008.

A second round of consultations with the SCC and PAG occurred during October and November 2009. At that time, the consultations expanded to include additional law enforcement chiefs and security directors, specifically those not previously consulted to participate in the semi-annual Transit Safety and Security Roundtables.[151]

In its general comments in response to the 2013 Notice, APTA asserted that ''the elements of the 9/11 Act are already addressed within the scope of security training programs throughout the public transportation industry.'' [152] The American Public Transportation Association cited training required by 49 CFR 239.101 as evidence that they meet certain portions of the 9/11 Act. As noted in section III.G.1 of this NPRM, 49 CFR part 239 (also known as the ''Passenger Train Emergency Preparedness Rule'') has a training requirement for rail equipment familiarization, situational awareness, coordination of functions, and 'hands-on' instruction concerning the location, function, and operation of on-board emergency equipment.[153] These requirements, which align with some of those in TSA's proposed rule, apply to many of the public transportation modes affected by the proposed rule (intercity passenger rail and commuter rail). Individual public transportation agencies—including a few that would be affected by the proposed rule–also provided comments on the type of training they currently implement for frontline employees. This training includes programs on security awareness and employee- and company-specific training on their own security programs and measures (which employees have to take every two years). All of this information has led TSA to conclude that some PTPR owner/operators, either in compliance with other security rules or because the owner/operator makes security a priority, invest in security training for their frontline employees and, at minimum, cover the topics of security awareness, and employee- and company-specific security program and measures.

D. Over-the-Road Buses

TSA conducted a meeting with industry stakeholders in November 2007. In July 2009, TSA met again with industry representatives. During the 2007 consultations, industry stakeholders included large motorcoach

[145] 49 CFR 172.704(a)(4).

[146] *Id.* (citing 49 CFR 172.704(a)(4)).

[147] ''Comments of the American Short Line and Regional Railroad Association'' (Docket ID: TSA–2013–0005–0124), available at *https://www.regulations.gov/*. Input the Docket ID ''TSA–2013–0005–0124'' into the blue ''Search'' field.

[148] The Commuter and Long Distance Rail GCC includes representatives from TSA, other DHS components, the FTA, and the FBI.

[149] The Mass Transit SCC is a representative group for the mass transit and passenger rail community formed in accordance with the National Infrastructure Protection Plan to advance the public-private partnership for mass transit and passenger rail security. Its membership includes senior executives, law enforcement chiefs, and security directors for mass transit and passenger rail agencies of varying sizes, locations, and system types as well as representatives of APTA, the Community Transportation Association of America, and the Amalgamated Transit Union.

[150] As previously noted, *see supra,* n. 140, the PAG brings together the expertise of some 15 law enforcement chiefs and security directors from mass transit and passenger rail systems across the Nation of varying location, size, and system type as a consultative forum with extensive experience to facilitate development and implementation of effective security programs. To advance these purposes, the Group, which formed in November 2006, convenes with TSA officials in monthly teleconferences. Membership in the PAG consists of the law enforcement chiefs or security directors of public transportation agencies in large metropolitan areas, as well as Amtrak. In addition to Amtrak, the following agencies are members of the PAG: Metro Transit of Harris County, Texas (Houston Area), Massachusetts Bay Transportation Authority; New York Metropolitan Transportation Authority; New York Police Department—Transit Bureau; New Jersey Transit; Southeast Pennsylvania Transportation Authority; Washington Metropolitan Area Transit Authority; Metropolitan Atlanta Rapid Transit Authority; Chicago Transit Authority; Dallas Area Rapid Transit; Denver Regional Transportation District; King County Metro Transit (Seattle Area); Bay Area Rapid Transit; and Los Angeles County Sheriff's Department.

[151] TSA, FTA, and FEMA host semi-annual Transit Safety and Security Roundtables with the law enforcement chiefs and security directors of the largest 50 mass transit and passenger rail systems (by passenger volume) and Amtrak. These agencies account for more than 80 percent of all users of public transportation services nationally. The three-day sessions employ a workshop format to address specific issues pertaining to terrorism prevention and response. The collective expertise fosters the development of collaborative security solutions, informs setting of priorities for security programs, and advances the strategic priority of elevating the baseline level of security throughout the mass transit and passenger rail mode.

[152] APTA, ''RE: Docket No. TSA–2013–0005'' (Docket ID: TSA–2013–0005–0114), available at *https://www.regulations.gov/*. Input the Docket ID ''TSA–2013–0005–0114'' into the blue ''Search'' field.

[153] *Id.*

operators and trade associations representing both large and small operators. In July 2009, TSA again met with representatives of the OTRB community and presented a series of issues on which TSA sought their individual opinions.

In its response to the 2013 Notice, the American Bus Association (ABA) [154] described the importance of the OTRB Security Grant Program in providing financial assistance to the industry for implementing security measures, such as equipment and training.[155] According to the ABA, nearly 10 percent of the funding from the OTRB Security Grant Program went to security training. The OTRB Security Grant Program has since been discontinued and the ABA states that some security upgrades were not enacted because:

> [T]he private bus industry was largely unable to pay for such upgrades. The inability to pay is a function of the small business nature of the industry, the huge number of bus operators with few resources and the inability of bus passengers to absorb any fare increases that could be used to pay for security upgrades.[156]

The ABA states that despite this loss in funding, two of the major private OTRB companies currently use ''Operation Secure Transport''—an OTRB-specific version of First Observer™—to train their ''front line'' employees. This is validated by the comments provided by the private companies themselves. Additionally, according to comments from the OTRB Working Group of the Highway Motor Carrier SCC, ''all [of its] PAG members have supplied training to front line employees using Highway Watch, First Observer™, or Cat Eyes training.'' [157] This group includes a third, major OTRB company. All of this information has led TSA to conclude that, at minimum, three of the larger OTRB companies currently use First Observer™ to train their ''front line'' employees.

E. Labor Unions

In addition to inviting participation of labor union representatives in many of the mode-specific meetings, TSA also met specifically with labor unions as part of its stakeholder consultation process. In December 2007, TSA met with representatives of several labor unions. On November 3, 2009, TSA met with representatives from the Transportation Trades Department of the American Federation of Labor and Congress of Industrial Organizations, the International Brotherhood of Teamsters, the Brotherhood of Locomotive Engineers and the Amalgamated Transit Union to discuss the surface training issues.

V. Rulemaking Analyses and Notices

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) [158] requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA sec. 3507(d), obtain approval from the OMB for each collection of information it conducts, sponsors, or requires through regulations.

Under OMB Control No. 1652–0051, OMB has approved a related information collection request for contact information for RSCs and alternate RSCs, as well as the reporting of significant security concerns by freight railroad carriers, passenger rail road carriers, and rail transit systems.

This proposed rule contains new information collection activities subject to the PRA. Accordingly, TSA has submitted the following information requirements to OMB for its review. The OMB 83–I Supporting Statement for this information collection request is available in the docket for this rulemaking.

Title: Security Training Programs for Surface Mode Employees.

Summary: This proposed rule would require the following information collections:

First, owner/operators identified in 49 CFR 1580.101, 1582.101, and 1584.101 would be required to submit to TSA for approval a security training program for security-sensitive employees that meets the requirements of subpart B of 49 CFR part 1580, subpart B of 49 CFR part 1582, and subpart B of 49 CFR part 1584.

Second, respondents would be required to retain individual training records on security-sensitive employees at the location(s) specified in each respondent's respective security training program, and make such records available to TSA upon request.

Third, the public transportation bus systems and OTRB owner/operators to whom the proposed rule applies would be required to report significant security concerns, which includes incidents, suspicious activities, and/or threat information.

Finally, the owner/operators to whom the proposed rule applies would be required to make their operations and records available for announced or unannounced inspections that would assess compliance with the NPRM.

Use of: This proposal would support the information needs to evaluate security training programs against requirements set forth in the NPRM. Recordkeeping requirements would be used to verify employee training is in compliance with the proposed rule. Security coordinator information would support respondent communications with TSA concerning intelligence information, security related activities, and incident or threat response with appropriate law enforcement and emergency response agencies. The reporting of significant security concerns would support the analysis of trends and indicators of developing threats and potential terrorist activity. Finally, information collected through inspections would be used to enforce compliance with the proposed requirements.

Respondents (including number of): The likely respondents to this information collection are the owners and/or operators of covered surface modes, which are estimated to incur approximately 1,374,501 responses over the next 3 years (including 449,067 freight railroad responses; 673,033 PTPR responses; and 252,401 OTRB company responses), which amounts to an average annual cost of $657,370.

Frequency: TSA estimates that following initial submission, security training programs would need to be periodically updated as appropriate. Security training records would need to be updated after each training occurrence. Security coordinator information would need to be updated as appropriate. Significant security concerns would be reported as they occur. TSA estimates inspections for compliance would occur at a rate of one inspection per year per owner/operator.

Annual Burden Estimate: The average yearly burden for security training program development and submission, security coordinator submission, employee training documentation recordkeeping, and incident reporting is estimated to be 1,518 hours for freight railroads; 2,147 hours for PTPRs; and 4,247 hours for OTRB companies. The total average annual time burden estimate is approximately 7,912 hours. Table 8 shows the information collections and corresponding hour

[154] The ABA describes itself as a trade association that is ''home to some 850 bus operating companies and over 3,000 other companies, organizations and partnerships involved in providing transportation, tour and travel services to the traveling public.'' *See* ''Comments of the American Bus Association'' (Docket ID: TSA–2013–0005–0119), available at *https://www.regulations.gov/*. Input the Docket ID ''TSA–2013–0005–0119'' into the blue ''Search'' field.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] 44 U.S.C. 3501 *et seq.*

burdens for entities falling under the requirements of the proposed rule.

TABLE 8—PRA HOURS OF BURDEN

Collection	Time per response (hours)	Number of responses			3-Year time burden	Average annual time burden
		Year 1	Year 2	Year 3		
Initial Security Training Program Development and Submission						
Freight Rail	52	36	0	0	1,872	624
PTPR	52	47	0	0	2,444	815
OTRB (Large to Medium)	32	28	0	1	928	309
OTRB (Small)	16	174	3	3	2,883	961
Modified Security Training Program Development and Submission						
Freight Rail	25	32	0	0	810	270
PTPR	25	21	0	0	518	173
OTRB (Large to Medium)	16	25	0	0	418	139
OTRB (Small)	8	157	3	3	1,297	432
Security Coordinator Information Submission						
PTPR	0.5	52	8	8	35	12
OTRB	0.5	459	178	181	409	136
Employee Training Documentation Recordkeeping						
Freight Rail	0.004	148,992	149,665	150,341	1,871	624
PTPR	0.004	219,437	219,646	219,856	2,746	915
OTRB	0.004	41,300	41,824	42,355	523	174
Incident Reporting						
PTPR	0.05	4,652	4,652	4,652	698	233
OTRB	0.05	41,173	41,898	42,635	6,285	2,095
Total Burden (responses)					1,374,501	
Total Burden (hours)					23,735	7,912

TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirements by February 14, 2017. Direct the comments to the address listed in the **ADDRESSES** section of this document, and email your comments to OMB using the following address: *OIRA_submission@omb.eop.gov.* A comment to OMB is most effective if OMB receives it within 30 days of publication. TSA will publish the OMB control number for this information collection in the **Federal Register** after OMB approves it.

As provided by the PRA, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Economic Impact Analyses

1. Regulatory Impact Analysis Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order (E.O.) 12866, Regulatory Planning and Review,[159] as supplemented by E.O. 13563, Improving Regulation and Regulatory Review,[160] directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (RFA)[161] requires agencies to consider the economic impact of regulatory changes on small entities. Third, the Trade Agreement Act of 1979[162] prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995[163] (UMRA) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

[159] 58 FR 51735 (Oct. 4, 1993).

[160] 76 FR 3821 (Jan. 21, 2011).

[161] Public Law 96–354, 94 Stat. 1164 (Sept. 19, 1980) (codified at 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)).

[162] Public Law 96–39, 93 Stat. 144 (July 26, 1979) (codified at 19 U.S.C. 2531–2533).

[163] Public Law 104–4, 109 Stat. 66 (Mar. 22, 1995) (codified at 2 U.S.C. 1181–1538).

2. Executive Orders 12866 and 13563 Assessments

Executive Orders 12866 and 13563 direct agencies to assess the 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.

In conducting these analyses, TSA has determined:

1. This rulemaking is a ''significant regulatory action,'' although not an economically significant regulatory action, under sec. 3(f) of E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this NPRM.

2. TSA has prepared an Initial Regulatory Flexibility Analysis (IRFA), which suggests this rulemaking would have a significant impact on a substantial number of small entities.

3. This rulemaking would not constitute a barrier to international trade.

4. This rulemaking does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector under UMRA.

TSA has prepared an analysis of its estimated costs and benefits, summarized in the following paragraphs. The OMB Circular A–4 Accounting Statement for this proposed rule is in section V.C. When estimating the cost of a rulemaking, agencies typically estimate future expected costs imposed by a regulation over a period of analysis. For this rule's period of analysis, TSA uses a 10-year period of analysis to estimate the initial and recurring costs of the regulated surface mode owner/operators and new owner/operators that are expected due to industry growth.

TSA concluded the following about the current, or baseline, training environment for freight rail, public transportation and passenger railroad (PTPR), and OTRB employees (see section 1.9 of the RIA placed in the docket for further detailed information on the current baseline):

There are 574 U.S. freight rail owners/operators and are composed of 7 Class I, 21 Class II, and 546 Class III railroads.[164] A total of 36 (7 Class I, 8 Class II, and 21 Class III) out of the 574 U.S. freight rail owner/operators carry RSSM through an HTUA and would be affected by the proposed rule.[165] These 36 freight rail owner/operators provide security awareness [166] and chain of custody and control [167] trainings to their employees. These trainings address two of the required elements of security training required by the proposed rule in § 1580.115 (Security training and knowledge for security-sensitive employees: Prepare and Assess). Additionally, freight rail owner/operators are already required to comply with the requirements to assign security coordinators and report significant security concerns to TSA under current 49 CFR 1580. Table 9 below displays the requirements of the proposed rule for freight rail. The check marked items in the table represent existing requirements under PHMSA 49 CFR 172.704 and 1580.107, therefore do not represent additional burden to the freight rail owners/operators.

Table 9. Freight Rail Owner/Operator Baseline Assessment

Proposed Population	Training Components					Security Coordinators	Report Significant Security Concerns
	Prepare	Chain of Custody	Observe	Assess	Respond		
Freight rail		✓		✓		✓	✓

Note: Check marked items represents existing requirements. The "prepare" element of the training curriculum under proposed part 1580 includes training on the chain of custody requirements that are in current part 1580. For purposes of this table, "Prepare" refers to everything but "chain of custody," and "Chain of custody" only refers to that topic.

There are more than 7,100 public transportation organizations.[168] Of these, 47 PTPR owner/operators [169] fall within the applicability of the proposed rule. Twenty-four of these 47 PTPR owner/operators effectively provide training to their employees on security awareness and employee- and company-specific security programs and measures.[170] These trainings address two of the required elements of security training required by the proposed rule in § 1582.115 (Security training and knowledge for security-sensitive employees: Prepare and Assess). Additionally, 23 PTPR owner/operators are already required to comply with the requirements to assign security coordinators and report significant security concerns to TSA under current 49 CFR 1580. Table 10 below displays the requirements of the proposed rule for PTPRs. The check marked items in the table represent existing requirements under 49 CFR 1580 and, therefore do not represent additional burden to the freight rail owners/operators.

[164] AAR, ''Railroad Facts, 2015 Edition,'' at 3 (2015).

[165] TSA used its railcar tracking system that monitors toxic inhalant hazard cars, the Toxic Inhalation Hazard Risk Reduction Verification System, (TIHRRVS) to identify freight rail owner/operators.

[166] As required by PHMSA 49 CFR 172.704.

[167] In place because of the chain of custody requirement in 49 CFR 1580.107.

[168] APTA, ''2014 Public Transportation Fact Book'' (Nov. 2014), available at *http://www.apta.com/resources/statistics/Documents/FactBook/2014-APTA-Fact-Book.pdf.*

[169] TSA elicited and used input from SMEs in its Surface Division, combined with data from the Federal Transit Administration's (FTA) National Transit Database (NTD) to identify the 47 PTPR owner/operators.

[170] Agencies identified using latest evaluation from TSA's BASE assessment. Information on BASE assessment can be found here: *https://www.tsa.gov/news/top-stories/2015/09/21/transit-agencies-earn-high-ratings-through-base-program.*

Table 10. PTPR Owner/Operators Baseline Assessment

Proposed Population	Training Components				Security Coordinators	Report Significant Security Concerns
	Prepare	Observe	Assess	Respond		
PTPR owners/operators with rail service and a robust training program ….	✓		✓		✓	✓
PTPR owners/operators with rail service and no robust training program ….					✓	✓
Bus-only PTPR owners/operators with a robust training program ….	✓		✓			
Bus-only PTPR owners/operators with no robust training program ….						

Note: Check marked items represents existing requirements.

There are 3,741 U.S. companies in the motorcoach industry.[171] Of these, 202 of them [172] fall within the applicability of the proposed rule. Three of the 202 are large OTRB companies that currently use the TSA-supplied First Observer™ program, which covers a majority of the 9/11 Act security training requirements, to train their employees. This training addresses three of the security training elements of this proposed rule § 1584.115 (Security training and knowledge for security-sensitive employees: Observe, Assess, and Respond). Table 11 displays the requirements of this proposed rule for OTRB owner/operators. The check marked items in the table represent the training components already covered by the First Observer™ program and, therefore do not represent additional burden to the ORTB owners/operators currently using this program compared to the ''no-action'' baseline.[173] In Appendix A of the RIA, however, TSA has also monetized the cost of their current participation in First Observer™. TSA estimated this cost at $0.36 million to these owner/operators over 10 years (discounted at 7 percent).[174]

Table 11. OTRB Owner/Operators Baseline Assessment

Proposed Population	Training Components				Security Coordinators	Report Significant Security Concerns
	Prepare	Observe	Assess	Respond		
Three "large" OTRB owners/operators ……		✓	✓	✓		
Remaining OTRB owner/operators ……..						

Note: Check marked items represents voluntary participation in First Observer™.

TSA summarizes the costs of the proposed rule to be borne by four affected parties: Freight railroad owner/operators, PTPR owner/operators, OTRB owner/operators, and TSA. As displayed in Table 12, TSA estimates

[171] American Bus Association Foundation, ''Motorcoach Census 2014'' (Mar. 12, 2015), available at *http://www.buses.org/assets/images/uploads/general/Report%20-%20Census2013data.pdf.*

[172] TSA relied on a variety of sources to identify the 202 owner/operators: TSA Intercity Bus Security Grant Program (IBSGP) applications, the American Intercity Bus Riders Association (AIBRA) intercity bus service operator list, consultations with ABA, and Internet research of Web sites like *GotoBus.com* and other publicly available sources of information.

[173] OMB, ''Circular A–4,'' at 2 (Sept. 17, 2003), available at *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf* (''Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a 'no action' baseline: What the world will be like if the proposed rule is not adopted.'').

[174] OMB also requires TSA to consider a ''pre-statute'' baseline. *Id.* at 16. Costs of First Observer™ have accrued since passage of the 9/11 Act and are part of this ''pre-statute'' baseline.

the 10-year total cost of this proposed rule to be $222.80 million undiscounted, $190.45 million discounted at 3 percent, and $157.27 million discounted at 7 percent. The costs to industry (all three surface modes) comprise approximately 99 percent of the total costs of the rule; and the remaining costs are incurred by TSA.

TABLE 12—TOTAL COST OF THE PROPOSED RULE BY ENTITY

[$ millions]

Year	Freight rail	PTPR	OTRB	TSA	Total proposed rule cost		
					Undiscounted	Discounted at 3%	Discounted at 7%
1	$14.51	$9.29	$2.04	$0.52	$26.35	$25.59	$24.63
2	14.37	5.84	1.62	0.12	21.95	20.69	19.17
3	8.68	9.06	1.47	0.13	19.33	17.69	15.78
4	14.50	5.85	1.66	0.13	22.13	19.67	16.89
5	14.56	9.08	1.68	0.13	25.45	21.95	18.15
6	8.93	6.00	1.82	0.18	16.93	14.18	11.28
7	14.69	9.10	1.73	0.13	25.65	20.86	15.98
8	14.76	5.87	1.76	0.14	22.66	17.78	13.11
9	8.92	9.11	1.60	0.14	19.76	15.15	10.75
10	14.89	5.88	1.80	0.14	22.71	16.91	11.55
Total	128.80	75.08	17.17	1.75	222.80	190.45	157.27
Annualized						22.33	22.39

Note: Totals may not add due to rounding.

TSA estimates the 10-year costs to the freight railroad industry to be $128.80 million undiscounted, $110.00 million discounted at 3 percent, and $90.74 million discounted at 7 percent, as displayed by cost categories in Table 13.

Table 13. Total Cost to the Freight Rail Industry from the Proposed Rule ($ millions)

Year	Training Costs	Training Plan Costs	Recordkeeping Costs	Inspection Costs	Total Freight Rail Cost		
					Undiscounted	Discounted at 3%	Discounted at 7%
1	$14.25	$0.22	$0.04	$0.00	$14.51	$14.09	$13.56
2	14.32	0.00	0.04	0.01	14.37	13.54	12.55
3	8.63	0.00	0.04	0.01	8.68	7.94	7.08
4	14.45	0.00	0.04	0.01	14.50	12.88	11.06
5	14.51	0.00	0.04	0.01	14.56	12.56	10.38
6	8.75	0.13	0.04	0.01	8.93	7.48	5.95
7	14.64	0.00	0.04	0.01	14.69	11.95	9.15
8	14.71	0.00	0.04	0.01	14.76	11.65	8.59
9	8.87	0.00	0.04	0.01	8.92	6.83	4.85
10	14.84	0.00	0.04	0.01	14.89	11.08	7.57
Total					$128.80	$110.00	$90.74
Annualized						$12.90	$12.92

Note: Totals may not add due to rounding.

TSA estimates the 10-year costs to the PTPR industry to be $75.08 million undiscounted, $64.26 million discounted at 3 percent, and $53.14 million discounted at 7 percent, as displayed by cost categories in Table 14.

Table 14. Total Cost to the PTPR Industry from the Proposed Rule ($ millions)

Year	Training Costs	Training Plan Costs	Security Coordinator Costs	Incident Reporting Costs	Recordkeeping Costs	Inspection Costs	Total PTPR Cost		
							Undiscounted	Discounted at 3%	Discounted at 7%
1…..	$8.98	$0.25	$0.00	$0.02	$0.04	$0.00	$9.29	$9.02	$8.68
2…..	5.78	0.00	0.00	0.02	0.04	0.01	5.84	5.50	5.10
3…..	9.00	0.00	0.00	0.02	0.04	0.01	9.06	8.29	7.40
4…..	5.79	0.00	0.00	0.02	0.04	0.01	5.85	5.20	4.46
5…..	9.01	0.00	0.00	0.02	0.04	0.01	9.08	7.83	6.47
6…..	5.80	0.14	0.00	0.02	0.04	0.01	6.00	5.03	4.00
7…..	9.03	0.00	0.00	0.02	0.04	0.01	9.10	7.40	5.66
8…..	5.81	0.00	0.00	0.02	0.04	0.01	5.87	4.64	3.42
9…..	9.05	0.00	0.00	0.02	0.04	0.01	9.11	6.99	4.96
10…	5.82	0.00	0.00	0.02	0.04	0.01	5.88	4.38	2.99
Total							$75.08	$64.26	$53.14
Annualized								$7.53	$7.57

Note: Totals may not add due to rounding.

TSA estimates the 10-year costs to the OTRB industry to be $17.17 million undiscounted, $14.65 million discounted at 3 percent, and $12.08 million discounted at 7 percent, as displayed by cost categories in Table 15.

Table 15. Total Cost to the OTRB Industry from the Proposed Rule ($ millions)

Year	Training Costs	Training Plan Costs	Security Coordinator Costs	Incident Reporting Costs	Recordkeeping Costs	Inspection Costs	Total OTRB Cost		
							Undiscounted	Discounted at 3%	Discounted at 7%
1…..	$1.37	$0.47	$0.02	$0.16	$0.01	$0.00	$2.04	$1.98	$1.90
2…..	1.39	0.01	0.01	0.17	0.01	0.04	1.62	1.52	1.41
3…..	1.24	0.01	0.01	0.17	0.01	0.04	1.47	1.34	1.20
4…..	1.43	0.01	0.01	0.17	0.01	0.04	1.66	1.47	1.27
5…..	1.45	0.01	0.01	0.18	0.01	0.04	1.68	1.45	1.20
6…..	1.29	0.30	0.01	0.18	0.01	0.04	1.82	1.52	1.21
7…..	1.48	0.01	0.01	0.18	0.01	0.04	1.73	1.41	1.08
8…..	1.50	0.01	0.01	0.19	0.01	0.04	1.76	1.39	1.02
9…..	1.34	0.01	0.01	0.19	0.01	0.04	1.60	1.22	0.87
10…	1.54	0.01	0.01	0.19	0.01	0.04	1.80	1.34	0.92
Total							$17.17	$14.65	$12.08
Annualized								$1.72	$1.72

Note: Totals may not add due to rounding.

TSA estimates the 10-year costs to TSA to be $1.75 million undiscounted, $1.54 million discounted at 3 percent, and $1.31 million discounted at 7 percent, as displayed by cost categories in Table 16.

Table 16. Total Cost to TSA from the Proposed Rule ($ millions)

Year	Training Plans	Security Coordinators	Incident Reporting	Inspection	Total TSA Costs		
					Undiscounted	Discounted at 3%	Discounted at 7%
1…….	$0.31	$0.00	$0.09	$0.12	$0.52	$0.51	$0.49
2…….	0.00	0.00	0.09	0.03	0.12	0.12	0.11
3…….	0.00	0.00	0.09	0.03	0.13	0.11	0.10
4…….	0.00	0.00	0.10	0.03	0.13	0.11	0.10
5…….	0.00	0.00	0.10	0.03	0.13	0.11	0.09
6…….	0.05	0.00	0.10	0.03	0.18	0.15	0.12
7…….	0.00	0.00	0.10	0.03	0.13	0.11	0.08
8…….	0.00	0.00	0.10	0.03	0.14	0.11	0.08
9…….	0.00	0.00	0.10	0.03	0.14	0.11	0.07
10…...	0.00	0.00	0.11	0.03	0.14	0.10	0.07
Total					$1.75	$1.54	$1.31
Annualized						$0.18	$0.19

Note: Totals may not add due to rounding.

The proposed rule would enhance surface transportation security by reducing vulnerability to terrorist attacks in four different ways. First, the surface transportation employees in each of the three covered modes would be trained to identify security vulnerabilities. Second, these surface transportation employees would be better trained to recognize potentially threatening behavior and properly report that information. Third, these surface employees would be trained to respond to incidents, thereby mitigating the consequences of an attack. Finally, the covered surface transportation owner/operators would be required to report significant security concerns to TSA so that TSA can analyze potential threats across all modes.

While training is not an absolute deterrent for terrorists intent on carrying out attacks on surface modes of transportation, TSA expects the probability of success for such attacks to decrease if security-sensitive employees within these transportation modes are trained in the elements required under the proposed rule.

TSA uses a break-even analysis to frame the relationship between the potential benefits of the proposed rule and the costs of implementing the rule. When it is not possible to quantify or monetize a majority of the incremental benefits of a regulation, OMB recommends conducting a threshold, or ''break-even'' analysis. According to OMB Circular No. A–4, ''Regulatory Analysis,'' such an analysis answers the question ''How small could the value of the non-qualified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?'' [175]

To conduct the break-even analysis, TSA evaluates three composite scenarios for each the three modes covered by the proposed rule. For each scenario, TSA calculates a total monetary consequence from an estimated statistical value of the human casualties and capital replacement resulting from the attack (see Section 4.3 of the Surface Training Program for Surface Mode Employees Regulatory Impact Analysis for a more detailed description of these calculations however many assumptions regarding specific terrorist attacks scenarios are SSI and cannot be publically released).

Table 17 presents the composite or weighted average of direct consequences from a successful attack on each mode.

[175] *See id.*

Table 17. Composite Monetized Consequences from a Successful Attack[176]

Variables		Transportation Mode		
		Freight	PTPR	OTRBs
Weighted Average Values	Number of Deaths	98.15	48.83	61.94
	Number of Severe Injuries (non-chemical)	110.89	57.29	46.63
	Number of Moderate Injuries (non-chemical)	105.73	55.73	2.63
	Number of Chemical Severe Injuries	0.24	—	—
	Number of Chemical Moderate Injuries	0.46	0.11	—
	Monetized Public Infrastructure Loss ($ millions)	$10.52	$5.16	$0
	Monetized Private Property Loss ($ millions)	$1.14	$0.41	$1.32
	Monetized Rescue and Cleanup ($ millions)	$0.42	$0.77	$0
Total Monetized Direct Consequences[177] ($ millions)		**$1,218.92**	**$613.19**	**$679.02**

Note: Totals may not add due to rounding.

TSA compared the estimated direct monetary costs of an attack to the annualized cost (discounted at 7 percent) to industry and TSA from the proposed rule for each mode to estimate how often an attack of that nature would need to be averted for the expected benefits to equal estimated costs. Table 18 presents the results of the break-even analysis for each mode. For example, Table 18 shows that if the freight rail training requirements in this rule prevents one freight rail terrorist attack every 96 years, this rule ''breaks-even'' (the benefits equal the costs).

The break-even analysis does not include the difficult to quantify indirect costs of an attack or the macroeconomic impacts that could occur due to a major attack. In addition to the direct impacts of a terrorist attack in terms of lost life and property, there are other more indirect impacts that are difficult to measure. As noted by Cass Sunstein in the Laws of Fear, ''. . . fear is a real social cost, and it is likely to lead to other social costs.'' [178] In addition, Ackerman and Heinzerling state ''. . . terrorism 'works' through the fear and demoralization caused by uncontrollable uncertainty.'' [179] As devastating as the direct impacts of a successful terrorist attack can be in terms of the immediate loss of life and property, avoiding the impacts of the more difficult to measure indirect effects are also substantial benefits of preventing a terrorist attack.

TABLE 18—BREAK-EVEN ANALYSIS RESULTS

[$ millions]

Modes	Weighted average direct costs of a successful attack a	Annualized cost of the proposed rule at 7% b	Breakeven averted attack frequency c = a ÷ b
Freight Rail	$1,218.92	$12.94	One attack every 94 years.
PTPR	613.19	7.60	One attack every 81 years.
OTRB	679.02	1.86	One attack every 365 years.

Note: Totals may not add due to rounding.

3. OMB A–4 Statement

The OMB A–4 Accounting Statement (in Table 19) presents annualized costs and qualitative benefits of the proposed rule.

[176] As explained in the RIA in the docket, to monetize injuries, TSA used two approaches (depending on whether the injury was due to exposure to hazardous chemicals). To monetize ''non-chemical'' injuries, TSA uses guidance from the Department of Transportation for valuing injuries based on the Abbreviated Injury Scale. To monetize chemical-related injuries, TSA obtained information on the cost of medical treatment for poisoning injuries.

[177] Total Direct Consequences = (Deaths × $9.1 million VSL) + (Severe injuries × $2.42 million) + (Moderate injuries × $0.43 million) + (Severe chemical injuries × $42,462) + (Moderate chemical injuries × $1,563) + Public property loss + Private property loss + Rescue and clean-up cost.

[178] Cass R. Sunstein, ''Laws of Fear,'' at 127 (2005).

[179] Frank Ackerman and Lisa Heinzerling, ''Priceless On Knowing the Price of Everything and the Value of Nothing,'' at 136 (2004).

TABLE 19—OMB A–4 $ ACCOUNTING STATEMENT

[in $ millions, 2015 dollars]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (final RIA, preamble, etc.)
Benefits ($ millions)				
Annualized monetized benefits (discount rate in parentheses)				NPRM RIA.
Unquantified benefits	The requirements proposed in this rule, if finalized, produce benefits by reducing security risks through training security-sensitive surface mode employees to identify and/or mitigate an attempted terrorist attack.			NPRM RIA.
Costs ($ millions)				
Annualized monetized costs (discount rate in parentheses)	(7%) $22.39 (3%) $22.33			NPRM RIA.
Annualized quantified, but unmonetized, costs	0	0	0	NPRM RIA.
Qualitative costs (unquantified)	N/A			NPRM RIA.
Transfers				
Annualized monetized transfers: "on budget"	0	0	0	NPRM RIA.
From whom to whom?	N/A	N/A	N/A	None.
Annualized monetized transfers: "off-budget"	0	0	0	NPRM RIA.
From whom to whom?	N/A	N/A	N/A	None.
Miscellaneous Analyses/Category	**Effects**			**Source Citation (NPRM RIA, preamble, etc.).**
Effects on State, local, and/or tribal governments	None			NPRM RIA.
Effects on small businesses	Prepared IRFA			IRFA.
Effects on wages	None			None.
Effects on growth	None			None.

4. Alternatives Considered

In addition to the proposed rule, TSA also considered two alternative policies. As discussed in section III.K of this NPRM, the first alternative (Alternative 1) only includes requirements that are statutory according to the 9/11 Act.[180] The second alternative (Alternative 2) expands the population of owners/operators to all who operate within the UASI—which includes the entire metropolitan statistical area—and requires them to develop their own training program. This would be the case if First Observer Plus™ were not made available to owner/operators or if the owners/operators would not adopt First Observer Plus™. This alternative was considered in the early stages of this proposed rule when the First Observer™ program was still in development. Notionally, an owner/operator-developed training program would provide a marginal increase in effectiveness over a ''one size fits all'' training program because it would be customized to the individual owner/operator and take into account the unique security and structural characteristics inherent in a large and complicated system like a transportation network.

Though not the least costly option, TSA selects the proposed rule as its preferred alternative because TSA recommends that all surface mode employees be refreshed on their security training objectives annually, in an abbreviated method at the very least. TSA recognizes recurrent training as essential to maintaining a high level of security awareness. The 9/11 Act recognizes this as well by requiring routine and ongoing training for public transportation employees. Congress has left it to the discretion of TSA to determine the appropriate schedule for recurrent training. TSA believes that annual training is essential for maintaining a high level of security awareness among surface transportation employees. TSA's goal is to ensure the expected baseline of security awareness is reached and maintained across the higher-risk systems and will work with the owner/operators as necessary to ensure that goal is accomplished.

Additionally, the affected population for the proposed rule (and Alternative 1) is based on a risk assessment on these modes of transportation (for more detail see preamble section III.B.). TSA reviewed the scope of the relevant industries and the security risks associated with each. This assessment considers not only threat (as informed by intelligence), but also the potential consequences of a terrorist attack on a system or vehicle(s) and the vulnerabilities inherent in the design and/or operation of these systems and vehicles. Both the proposed rule and Alternative 1 target higher-risk areas or transportation systems as opposed to Alternative 2, which covers a broader population and sets its parameters by other industry characteristics. The reasons for rejecting Alternative 2 are discussed in section III.D. of this NPRM. For these reasons, TSA has chosen the proposed rule as its preferred alternative. Table 20 presents a

[180] Table 59 in the RIA found in the docket provides a section-by section analysis of which regulatory provisions are statutorily required and which provisions are discretionary.

comparison of the costs by cost component for industry and TSA for the proposed rule and both alternatives.

Table 20. Comparison of Costs Between Alternatives (in millions)

Alternative	Initial Affected Population (Number of Owner/Operators)	Requirements	10-Year Costs (in $ millions) at a 7% discount rate		
			Industry	TSA	Total
Proposed Rule	36 Freight Rails 47 PTPRs 202 OTRBs	(1) Train security-sensitive employees on security using First Observer Plus™ or custom training plan, (2) designate a security coordinator, (3) report significant security incidents to TSA, (4) maintain employee training records, and (5) allow TSA to perform onsite inspections.	$155.96	$1.31	$157.27
Alternative 1		(1) Train security-sensitive employees once every three years on security using First Observer Plus™ or custom training plan (except for Chain of custody and control); (2) OTRB designates a security coordinator, and (3) allow TSA to perform onsite inspections.	$49.61	$0.63	$50.24

Table 20. Comparison of Costs Between Alternatives (in millions)

Alternative	Initial Affected Population (Number of Owner/Operators)	Requirements	10-Year Costs (in $ millions) at a 7% discount rate		
			Industry	TSA	Total
Alternative 2	69 Freight Rails 253 PTPRs 403 OTRBs	(1) Train security-sensitive employees on security using a custom training plan, (2) designate a security coordinator, (3) report significant security incidents to TSA, (4) maintain employee training records, and (5) allow TSA to perform onsite inspections.	$241.96	$4.02	$245.98

Note: Totals may not add due to rounding.

5. Regulatory Flexibility Assessment

The Regulatory Flexibility Act (RFA) of 1980 requires agencies to consider the impacts of their rules on small entities. TSA performed an Initial Regulatory Flexibility Analysis (IRFA) to analyze the impact to small entities affected by the proposed rule. See the RIA in the docket for the full IRFA. A summary of the RFA is below.

Under the RFA, the term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and small governmental jurisdictions with populations of less than 50,000. Individuals and States are not considered ''small entities'' based on the definitions in the RFA (5 U.S.C. 601).

The PTPR owner/operators affected by this proposed rule are not considered small because they are either owned/operated by governmental jurisdictions that exceed the RFA population threshold of 50,000 or a business that exceeds the SBA size threshold. Only freight rail and OTRB owner/operators have small entities that may be affected by the proposed rule. TSA uses the Small Business Administration's (SBA) size standards to identify that 13 freight rail owner/operators affected by the proposed rule are considered a small business. TSA calculates that proposed rule's requirements are estimated to cost $68.78 per employee and $6,068.49 per entity to these freight rail owner/operators. Of these 13 small freight rail owner/operators, TSA estimates that only one of them would have an impact to revenue greater that 1 percent. For OTRBs, TSA uses SBA's threshold to estimate that 174 OTRB owner/operators affected by the proposed rule are considered a small business. TSA calculates that the proposed rule's requirements are estimated to cost $33.41 per employee and $3,347.67 per entity to these OTRB owner/operators. Of these 174 small OTRB owner/operators, TSA estimates that 20 of them would have an impact to revenue greater than 1 percent.

TSA considered two alternative policies in addition to the proposed rule. As discussed in section III.K of this NPRM and section 5.1 of the RIA, the first alternative (Alternative 1) only includes requirements that are statutory according to the 9/11 Act. This alternative would remain applicable to the same population of the proposed rule, but would only require owner/operators to train security-sensitive employees according to statutory guidelines set in the 9/11 Act. In Alternative 1, recurrent training is required only once every three years—similar to other training requirements of transportation modes—because the 9/11 Act does not require annual recurrent training as TSA does in the proposed rule.

As discussed in section III.F(1)(2)(3) of this NPRM (Alternatives Considered) and section 5.2 of the RIA, the second alternative (Alternative 2) expands the population of owners/operators to all who operate within the UASI—which includes the entire metropolitan statistical area–and requires them to develop their own training program. TSA considered Alternative 2 while the First Observer™ program was still in development.

TSA chose the proposed rule as its preferred alternative, thus rejecting Alternative 1, because TSA recommends that all surface mode employees be refreshed on their security training objectives annually. TSA recognizes recurrent training as essential to maintaining a high level of security awareness. TSA's objective is to ensure the expected baseline of security

awareness is reached and maintained across the higher-risk systems and will work with the owner/operators as necessary to ensure that goal is accomplished. TSA has met this objective by developing First Observer Plus™. TSA intends for the training content in First Observer Plus™ to align with most of the regulatory requirements in a final rule. This resource will be provided free to owner/operators so that they may comply with the proposed rule at minimized costs.

Additionally, the affected population for the proposed rule (and Alternative 1) is based on a risk assessment on these modes of transportation (for more detail see section III.B of this NPRM). TSA reviewed the scope of the relevant industries and the security risks associated with each. This assessment considers not only threat (as informed by intelligence), but also the potential consequences of a terrorist attack on a system or vehicle(s) and the vulnerabilities inherent in the design and/or operation of these systems and vehicles. Both the proposed rule and Alternative 1 target higher-risk areas or transportation systems as opposed to Alternative 2, which covers a broader population and sets its parameters by other industry characteristics. Alternative 2 leads to higher costs to small entities not necessarily considered higher-risk. TSA rejected Alternative 2 because the agency has determined that the proposed rule better aligns with its commitment to risk-based security policy and outcomes-based regulation and because it would impose a higher cost to small entities outside the higher-risk profile.

TSA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposed requirements in the proposed rule.

6. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this proposed rule and has determined that it would have only a domestic impact and therefore no effect on any trade-sensitive activity.

7. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.''

This proposed rule does not contain such a mandate. The requirements of Title II of the UMRA, therefore, do not apply and TSA has not prepared a statement.

C. Executive Order 13132, Federalism

TSA has analyzed this rulemaking under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore would not have federalism implications.

D. Environmental Analysis

TSA has reviewed this rulemaking for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment. This action is covered by categorical exclusion (CATEX) number A3(b) in DHS Management Directive 023–01 (formerly Management Directive 5100.1), Environmental Planning Program, which guides TSA compliance with NEPA.

E. Energy Impact Analysis

The energy impact of this rulemaking has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94–163, as amended (42 U.S.C. 6362). TSA has determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects

49 CFR Part 1500

Air carriers, Air transportation, Aircraft, Airports, Bus transit systems, Commuter bus systems, Law enforcement officer, Maritime carriers, Over-the-Road buses, Public transportation, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures, Transportation facility, Vessels.

49 CFR Part 1520

Air carriers, Air transportation, Aircraft, Airports, Bus transit systems, Commuter bus systems, Law enforcement officer, Maritime carriers, Over-the-Road buses, Public transportation, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures, Transportation facility, Vessels.

49 CFR Part 1570

Commuter bus systems, Crime, Fraud, Hazardous materials transportation, Motor carriers, Over-the-Road bus safety, Over-the-Road buses, Public transportation, Public transportation safety, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures, Transportation facility, Transportation Security-Sensitive Materials.

49 CFR Part 1580

Hazardous materials transportation, Rail hazardous materials receivers, Rail hazardous materials shippers, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1582

Public transportation, Public transportation safety, Railroad carriers, Railroad safety, Railroads, Rail transit systems, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1584

Over-the-Road bus safety, Over-the-Road buses, Reporting and recordkeeping requirements, Security measures.

The Proposed Amendments

For the reasons set forth in the preamble, the Transportation Security Administration proposes to amend Chapter XII, of Title 49, Code of Federal Regulations to read as follows:

SUBCHAPTER A—ADMINISTRATIVE AND PROCEDURAL RULES

PART 1500—APPLICABILITY, TERMS, AND ABBREVIATIONS

■ 1. The authority citation for part 1500 is revised to read as follows:

Authority: 6 U.S.C. 1137, 1151, 1167, and 1184; 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

■ 2. Revise § 1500.3 to read as follows:

§ 1500.3 Terms and abbreviations used in this chapter.

As used in this chapter:

Administrator means the Assistant Secretary for Homeland Security, Transportation Security Administration (Assistant Secretary), who is the highest-ranking TSA official, or his or her designee. Administrator also means the Under Secretary of Transportation for Security identified in 49 U.S.C. 114(b).

Authorized representative means any individual who is not a direct employee of a person regulated under this title, but is authorized to act on that person's behalf to perform measures required under the Transportation Security Regulations, or a TSA security program. For purposes of this subchapter, the term ''authorized representative'' includes agents, contractors, and subcontractors, and employees of the same.

Bus means any of several types of motor vehicles used by public or private entities to provide transportation service for passengers.

Bus transit system means a public transportation system providing frequent transportation service (not limited to morning and evening peak travel times) for the primary purpose of moving passengers between bus stops, often through multiple connections (a bus transit system does not become a commuter bus system even if its primary purpose is the transportation of commuters). This term does not include tourist, scenic, historic, or excursion operations.

Commuter bus system means a system providing passenger service primarily during morning and evening peak periods, between an urban area and more distant outlying communities in a greater metropolitan area. This term does not include tourist, scenic, historic, or excursion operations.

Commuter passenger train service means ''train, commuter'' as defined in 49 CFR 238.5, and includes service provided by diesel or electric powered locomotives and railroad passenger cars to serve an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area. A commuter passenger train service is part of the general railroad system of transportation regardless of whether it is physically connected to other railroads.

DHS means the Department of Homeland Security and any directorate, bureau, or other component within the Department of Homeland Security, including the United States Coast Guard.

DOT means the Department of Transportation and any operating administration, entity, or office within the Department of Transportation.

Fixed-route service means the provision of transportation service by private entities operated along a prescribed route according to a fixed schedule.

General railroad system of transportation means ''the network of standard gauge track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas'' as defined in Appendix A to 49 CFR part 209.

Hazardous material means ''hazardous material'' as defined in 49 CFR 171.8.

Heavy rail transit means service provided by self-propelled electric railcars, typically drawing power from a third rail, operating in separate rights-of-way in multiple cars; also referred to as subways, metros or regional rail.

Host railroad means a railroad that has effective control over a segment of track.

Improvised explosive device (IED) means a device fabricated in an improvised manner that incorporates explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals in its design, and generally includes a power supply, a switch or timer, and a detonator or initiator.

Intercity passenger train service means both ''train, long-distance intercity passenger'' and ''train, short-distance intercity passenger'' as defined in 49 CFR 238.5.

Light rail transit means service provided by self-propelled electric railcars, typically drawing power from an overhead wire, operating in either exclusive or non-exclusive rights-of-way in single or multiple cars, with shorter distance trips, and frequent stops; also referred to as streetcars, trolleys, and trams.

Motor vehicle means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

Over-the-Road Bus (OTRB) means a bus characterized by an elevated passenger deck located over a baggage compartment.

Owner/operator means any person that owns, or maintains operational control over, any transportation infrastructure asset, facility, or system regulated under this title, including airport operator, aircraft operator, foreign air carrier, indirect air carrier, certified cargo screening facility, flight school within the meaning of 49 CFR 1552.1(b), motor vehicle, public transportation agency, or railroad carrier. For purposes of a maritime facility or a vessel, owner/operator has the same meaning as defined in 33 CFR 101.105.

Passenger rail car means rail rolling equipment intended to provide transportation for members of the general public and includes a self-propelled rail car designed to carry passengers, baggage, mail, or express. This term includes a rail passenger coach, cab car, and a Multiple Unit (MU) locomotive. In the context of articulated equipment, ''passenger rail car'' means that segment of the rail rolling equipment located between two trucks. This term does not include a private rail car.

Passenger railroad carrier means a railroad carrier that provides transportation to persons (other than employees, contractors, or persons riding equipment to observe or monitor railroad operations) by railroad in intercity passenger service or commuter or other short-haul passenger service in a metropolitan or suburban area.

Passenger train means a train that transports or is available to transport members of the general public.

Person means an individual, corporation, company, association, firm, partnership, society, joint-stock company, or governmental authority. It includes a trustee, receiver, assignee, successor, or similar representative of any of them.

Private rail car means rail rolling equipment that is used only for excursion, recreational, or private transportation purposes. A private rail car is not a passenger rail car.

Public transportation means transportation provided to the general public by a regular and continuing general or specific transportation vehicle that is owned or operated by a

public transportation agency, including providing one or more of the following types of passenger transportation:

(1) Intercity or commuter passenger train service or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(1)).

(2) Heavy or light rail transit service, whether on or off the general railroad system of transportation.

(3) An automated guideway, cable car, inclined plane, funicular, or monorail system.

(4) Bus transit or commuter bus service.

Public transportation agency means any publicly-owned or operated provider of regular and continuing public transportation.

Rail hazardous materials receiver means any owner/operator of a fixed-site facility that has a physical connection to the general railroad system of transportation and receives or unloads from transportation in commerce by rail one or more of the categories and quantities of rail security-sensitive materials identified in 49 CFR 1580.3, but does not include the owner/operator of a facility owned or operated by a department, agency or instrumentality of the Federal government.

Rail hazardous materials shipper means the owner/operator of any fixed-site facility that has a physical connection to the general railroad system of transportation and offers (as defined in the definition of ''person who offers or offeror'' in 49 CFR 171.8), prepares or loads for transportation by rail one or more of the categories and quantities of rail security-sensitive materials as identified in 49 CFR 1580.3, but does not include the owner/operator of a facility owned or operated by a department, agency or instrumentality of the Federal government.

Rail secure area means a secure location(s) identified by a rail hazardous materials shipper or rail hazardous materials receiver where security-related pre-transportation or transportation functions are performed or rail cars containing the categories and quantities of rail security-sensitive materials are prepared, loaded, stored, and/or unloaded.

Rail transit facility means rail transit stations, terminals, and locations at which rail transit infrastructure assets are stored, command and control operations are performed, or maintenance is performed. The term also includes rail yards, crew management centers, dispatching centers, transportation terminals and stations, fueling centers, and telecommunication centers.

Rail transit system or ''*Rail Fixed Guideway System*'' means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, cable car, trolley, or automated guideway that traditionally does not operate on track that is part of the general railroad system of transportation.

Railroad carrier means an owner/operator providing railroad transportation.

Railroad transportation means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads. Such term includes rail transit service operating on track that is part of the general railroad system of transportation but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Record includes any means by which information is preserved, irrespective of format, including a book, paper, drawing, map, recording, tape, film, photograph, machine-readable material, and any information stored in an electronic format. The term record also includes any draft, proposed, or recommended change to any record.

Sensitive security information (SSI) means information that is described in and must be managed in accordance with 49 CFR part 1520.

State means a State of the United States and the District of Columbia.

Tourist, scenic, historic, or excursion operation means a railroad or bus operation that carries passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train or bus movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations.

Transit means mass transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation. Rail transit may occur on or off the general railroad system of transportation.

Transportation or transport means the movement of property including loading, unloading, and storage. Transportation or transport also includes the movement of people, boarding, and disembarking incident to that movement.

Transportation facility means a location at which transportation cargo, equipment or infrastructure assets are stored, equipment is transferred between conveyances and/or modes of transportation, transportation command and control operations are performed, or maintenance operations are performed. The term also includes, but is not limited to, passenger stations and terminals (including any fixed facility at which passengers are picked-up or discharged), vehicle storage buildings or yards, crew management centers, dispatching centers, fueling centers, and telecommunication centers.

Transportation security equipment and systems means items, both integrated into a system and stand-alone, used by owner/operators to enhance capabilities to detect, deter, prevent, or respond to a threat or incident, including, but not limited to, video surveillance, explosives detection, radiological detection, intrusion detection, motion detection, and security screening.

Transportation Security Regulations (TSR) means the regulations issued by the Transportation Security Administration, in title 49 of the Code of Federal Regulations, chapter XII, which includes parts 1500 through 1699.

Transportation Security-Sensitive Material (TSSM) means hazardous materials identified in 49 CFR 172.800(b).

TSA means the Transportation Security Administration.

United States, in a geographical sense, means the States of the United States, the District of Columbia, and territories and possessions of the United States, including the territorial sea and the overlying airspace.

Vulnerability assessment includes any review, audit, or other examination of the security of a transportation system, infrastructure asset, or a transportation-related automated system or network to determine its vulnerability to unlawful interference, whether during the conception, planning, design, construction, operation, or decommissioning phase. A vulnerability assessment includes the methodology for the assessment, the results of the assessment, and any proposed, recommended, or directed actions or countermeasures to address security concerns.

PART 1503—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 3. The authority citation for part 1503 continues to read as follows:

Authority: 6 U.S.C. 1142; 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 114, 20109, 31105, 40113–40114, 40119, 44901–44907, 46101–46107, 46109–46110, 46301, 46305, 46311, 46313–46314.

Subpart B—Scope of Investigative and Enforcement Procedures

■ 4. In § 1503.101 revise paragraphs (b)(1) and (b)(2), and add paragraph (b)(3) to read as follows:

§ 1503.101 TSA requirements.

* * * * *

(b) * * *

(1) Those provisions of title 49 U.S.C. administered by the Administrator;

(2) 46 U.S.C. chapter 701; and

(3) Those provisions of title 6 U.S.C. administered by the Administrator.

SUBCHAPTER B—SECURITY RULES FOR ALL MODES OF TRANSPORTATION

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

■ 5. The authority citation for part 1520 continues to read as follows:

Authority: 46 U.S.C. 70102–70106, 70117; 49 U.S.C. 114, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

§ 1520.3 [Amended]

■ 6. In § 1520.3 remove the definitions for ''DHS, ''DOT'', ''Rail facility'', ''Rail hazardous materials receiver'', ''Rail hazardous materials shipper, ''Rail transit facility'', ''Rail transit system or Rail Fixed Guideway System'', ''Railroad'', ''Record'', and ''Vulnerability assessment''.

■ 7. In § 1520.5 revise paragraphs (b)(1), (b)(6)(i), (b)(8) introductory text, (b)(10), (b)(12) introductory text, and (b)(15) to read as follows:

§ 1520.5 Sensitive security information.

* * * * *

(b) * * *

(1) *Security programs, security plans, and contingency plans.* Any security program, security plan, or security contingency plan issued, established, required, received, or approved by DHS or DOT, including any comments, instructions, or implementing guidance, including—

(i) Any aircraft operator, airport operator, fixed base operator, or air cargo security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103;

(iv) Any security incident response plan established under 46 U.S.C. 70104, and

(v) Any security program or plan required under subchapter D of this title.

* * * * *

(6) * * *

(i) Details of any aviation, maritime, or surface transportation inspection, or any investigation or an alleged violation of aviation, maritime, or surface transportation security requirements of Federal law, that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or investigation, and including any recommendations concerning the inspection or investigation.

* * * * *

(8) *Security measures.* Specific details of aviation, maritime, or surface transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including the following:

* * * * *

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out aviation, maritime, or surface transportation security measures required or recommended by DHS or DOT.

* * * * *

(12) *Critical transportation infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation, maritime, or surface transportation that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is—

* * * * *

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation, maritime, or surface transportation, where such research is approved, accepted, funded, recommended, or directed by DHS or DOT, including research results.

* * * * *

■ 8. In § 1520.7 revise paragraph (n) to read as follows:

§ 1520.7 Covered persons.

* * * * *

(n) Each owner/operator of maritime or surface transportation subject to the requirements of subchapter D of this chapter.

■ 9. Revise the heading for subchapter D to read as follows:

SUBCHAPTER D—MARITIME AND SURFACE TRANSPORTATION SECURITY

■ 10. Revise part 1570 to read as follows:

PART 1570—GENERAL RULES

Subpart A—General

Sec.
1570.1 Scope.
1570.3 Terms used in this subchapter.
1570.5 Fraud and intentional falsification of records.
1570.7 Security responsibilities of employees and other persons.
1570.9 Compliance, inspection, and enforcement.

Subpart B—Security Programs

Sec.
1570.101 Scope.
1570.103 Content.
1570.105 Responsibility for Determinations.
1570.107 Recognition of prior or established security measures or programs.
1570.109 Submission and approval.
1570.111 Implementation schedules.
1570.113 Amendments requested by owner/operator.
1570.115 Amendments required by TSA.
1570.117 Alternative measures.
1572.119 Petitions for reconsideration.
1570.121 Recordkeeping and availability.

Subpart C—Operations

Sec.
1570.201 Security Coordinator.
1570.203 Reporting significant security concerns.

Subpart D—Security Threat Assessments

Sec.
1570.301 Fraudulent use or manufacture; responsibilities of persons.
1570.303 Inspection of credential.
1570.305 False statements regarding security background checks by public transportation agency or railroad carrier.

Appendix A to Part 1570—Reporting Of Significant Security Concerns

Authority: 6 U.S.C. 469, 1134, 1137, 1143, 1151, 1162, 1167, 1170, 1181 and 1184; 18 U.S.C. 842, 845; 46 U.S.C. 70105; 49 U.S.C. 114, 5103a, 40113, and 46105.

Subpart A—General

§ 1570.1 Scope.

This part applies to any person involved in maritime or surface transportation as specified in this subchapter.

§ 1570.3 Terms used in this subchapter.

In addition to the definitions in §§ 1500.3, 1500.5, and 1503.202 of subchapter A, the following terms are used in this subchapter:

Adjudicate means to make an administrative determination of whether an applicant meets the standards in this subchapter, based on the merits of the issues raised.

Alien means any person not a citizen or national of the United States.

Alien registration number means the number issued by the U.S. Department of Homeland Security (DHS) to an individual when he or she becomes a lawful permanent resident of the United States or attains other lawful, non-citizen status.

Applicant means a person who has applied for one of the security threat assessments identified in this subchapter.

Commercial driver's license (CDL) is used as defined in 49 CFR 383.5.

Contractor means a person or organization that provides a service for an owner/operator regulated under this subchapter consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Convicted means any plea of guilty or nolo contendere, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned, or expunged. For purposes of this subchapter, a conviction is expunged when the conviction is removed from the individual's criminal history record and there are no legal disabilities or restrictions associated with the expunged conviction, other than the fact that the conviction may be used for sentencing purposes for subsequent convictions. In addition, where an individual is allowed to withdraw an original plea of guilty or nolo contendere and enter a plea of not guilty and the case is subsequently dismissed, the individual is no longer considered to have a conviction for purposes of this subchapter.

Determination of No Security Threat means an administrative determination by TSA that an individual does not pose a security threat warranting denial of an HME or a TWIC.

Employee means an individual who is engaged or compensated by an owner/operator regulated under this subchapter, or by a contractor to an owner/operator regulated under this subchapter. The term includes direct employees, contractor employees, authorized representatives, immediate supervisors, and individuals who are self-employed.

Federal Maritime Security Coordinator (FMSC) has the same meaning as defined in 46 U.S.C. 70103(a)(2)(G); is the Captain of the Port (COTP) exercising authority for the COTP zones described in 33 CFR part 3, and is the Port Facility Security Officer as described in the International Ship and Port Facility Security (ISPS) Code, part A.

Final Determination of Threat Assessment means a final administrative determination by TSA, including the resolution of related appeals, that an individual poses a security threat warranting denial of an HME or a TWIC.

Hazardous materials endorsement (HME) means the authorization for an individual to transport hazardous materials in commerce, an indication of which must be on the individual's commercial driver's license, as provided in the Federal Motor Carrier Safety Administration (FMCSA) regulations in 49 CFR part 383.

Immediate supervisor means a manager, supervisor, or agent of the owner/operator to the extent the individual (a) performs the work of a security-sensitive employee or (b) supervises and otherwise directs the performance of a security-sensitive employee.

Imprisoned or *imprisonment* means confined to a prison, jail, or institution for the criminally insane, on a full-time basis, pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity. Time spent confined or restricted to a half-way house, treatment facility, or similar institution, pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity, does not constitute imprisonment for purposes of this rule.

Incarceration means confined or otherwise restricted to a jail-type institution, half-way house, treatment facility, or another institution on a full or part-time basis, pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity.

Initial Determination of Threat Assessment means an initial administrative determination by TSA that an applicant poses a security threat warranting denial of an HME or a TWIC.

Initial Determination of Threat Assessment and Immediate Revocation means an initial administrative determination that an individual poses a security threat that warrants immediate revocation of an HME or invalidation of a TWIC. In the case of an HME, the State must immediately revoke the HME if TSA issues an Initial Determination of Threat Assessment and Immediate Revocation. In the case of a TWIC, TSA invalidates the TWIC when TSA issues an Initial Determination of Threat Assessment and Immediate Revocation.

Invalidate means the action TSA takes to make a credential inoperative when it is reported as lost, stolen, damaged, no longer needed, or when TSA determines an applicant does not meet the security threat assessment standards of 49 CFR part 1572.

Lawful permanent resident means an alien lawfully admitted for permanent residence, as defined in 8 U.S.C. 1101(a)(20).

Maritime facility has the same meaning as ''facility'' together with ''OCS facility'' (Outer Continental Shelf facility), as defined in 33 CFR 101.105.

Mental health facility means a mental institution, mental hospital, sanitarium, psychiatric facility, and any other facility that provides diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

National of the United States means a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States, as defined in 8 U.S.C. 1101(a)(22), and includes American Samoa and Swains Island.

Revocation means the termination, deactivation, rescission, invalidation, cancellation, or withdrawal of the privileges and duties conferred by an HME or TWIC, when TSA determines an applicant does not meet the security threat assessment standards of 49 CFR part 1572.

Secure area means the area on board a vessel or at a facility or outer continental shelf facility, over which the owner/operator has implemented security measures for access control, as defined by a Coast Guard approved security plan. It does not include passenger access areas or public access areas, as those terms are defined in 33 CFR 104.106 and 105.106 respectively. Vessels operating under the waivers provided for at 46 U.S.C. 8103(b)(3)(A) or (B) have no secure areas. Facilities subject to 33 CFR chapter I, subchapter H, part 105 may, with approval of the Coast Guard, designate only those portions of their facility that are directly connected to maritime transportation or are at risk of being involved in a transportation security incident as their secure areas.

Security threat means an individual whom TSA determines or suspects of posing a threat to national security; to transportation security; or of terrorism.

Security-sensitive employee, for purposes of this part, means ''security sensitive employee'' as defined in §§ 1580.3, 1582.3, or 1584.3 of this title.

Security-sensitive job function, for purposes of this part, means a job function identified in Appendix B to part 1580, Appendix B to part 1582, and Appendix B to part 1584 of this title.

Transportation Worker Identification Credential (TWIC) means a Federal biometric credential, issued to an individual, when TSA determines that the individual does not pose a security threat.

Withdrawal of Initial Determination of Threat Assessment is the document that TSA issues after issuing an Initial Determination of Security Threat, when TSA determines that an individual does not pose a security threat that warrants denial of an HME or TWIC.

§ 1570.5 Fraud and intentional falsification of records.

No person may make, cause to be made, attempt, or cause to attempt any of the following:

(a) Any fraudulent or intentionally false statement in any record or report that is kept, made, or used to show compliance with the subchapter, or exercise any privileges under this subchapter.

(b) Any reproduction or alteration, for fraudulent purpose, of any record, report, security program, access medium, or identification medium issued under this subchapter or pursuant to standards in this subchapter.

§ 1570.7 Security responsibilities of employees and other persons.

(a) No person may—

(1) Tamper or interfere with, compromise, modify, attempt to circumvent, or cause another person to tamper or interfere with, compromise, modify, or attempt to circumvent any security measure implemented under this subchapter.

(2) Enter, or be present within, a secured or restricted area without complying with the security measures applied as required under this subchapter to control access to, or presence or movement in, such areas.

(3) Use, allow to be used, or cause to be used, any approved access medium or identification medium that authorizes the access, presence, or movement of persons or vehicles in secured or restricted areas in any other manner than that for which it was issued by the appropriate authority to meet the requirements of this subchapter.

(b) The provisions of paragraph (a) of this section do not apply to conducting inspections or tests to determine compliance with this subchapter authorized by—

(1) TSA and DHS officials working with TSA; or

(2) The owner/operator when acting in accordance with the procedures described in a security plan and/or program approved by TSA.

§ 1570.9 Compliance, inspection, and enforcement.

(a) Each person subject to any of the requirements of this subchapter, must allow TSA and other authorized DHS officials, at any time and in a reasonable manner, without advance notice, to enter, assess, inspect, and test property, facilities, equipment, and operations; and to view, inspect, and copy records, as necessary to carry out TSA's security-related statutory or regulatory authorities, including its authority to—

(1) Assess threats to transportation.

(2) Enforce security-related laws, regulations, directives, and requirements.

(3) Inspect, maintain, and test the security of facilities, equipment, and systems.

(4) Ensure the adequacy of security measures for the transportation of passengers and cargo.

(5) Oversee the implementation, and ensure the adequacy, of security measures for the owner/operator's conveyances and vehicles, at transportation facilities and infrastructure and other assets related to transportation.

(6) Review security plans and/or programs.

(7) Determine compliance with any requirements in this chapter.

(8) Carry out such other duties, and exercise such other powers, relating to transportation security, as the Administrator for TSA considers appropriate, to the extent authorized by law.

(b) At the request of TSA, each owner/operator subject to the requirements of this subchapter must provide evidence of compliance with this chapter, including copies of records.

(c) TSA and other authorized DHS officials, may enter, without advance notice, and be present within any area or within any vehicle or conveyance, terminal, or other facility covered by this chapter without access media or identification media issued or approved by an owner/operator covered by this chapter in order to inspect or test compliance, or perform other such duties as TSA may direct.

(d) TSA inspectors and other authorized DHS officials working with TSA will, on request, present their credentials for examination, but the credentials may not be photocopied or otherwise reproduced.

Subpart B—Security Programs

§ 1570.101 Scope.

The requirements of this subpart address general security program requirements applicable to each owner/operator required to have a security program under subpart B to 49 CFR parts 1580, 1582, and 1584.

§ 1570.103 Content.

(a) *Security program.* Except as otherwise approved by TSA, each owner/operator required to have a security program must address each of the security program requirements identified in subpart B to 49 CFR parts 1580, 1582, and 1584.

(b) *Use of appendices.* The owner/operator may comply with the requirements referenced in paragraph (a) of this section by including in its security program, as an appendix, any document that contains the information required by the applicable subpart B, including procedures, protocols or memorandums of understanding related to external agency response to security incidents or events. The appendix must be referenced in the corresponding section(s) of the security program.

§ 1570.105 Responsibility for Determinations.

(a) *Higher-risk operations.* While TSA has determined the criteria for applicability of the requirements in subpart B to 49 CFR parts 1580, 1582, and 1584 based on risk-assessments for freight railroad, public transportation system, passenger railroad, or over-the-road (OTRB) owner/operators are required to determine if the applicability requirements apply to them using the criteria identified in 49 CFR 1580.101, 1582.101, and 1584.101. Owner/operators are required to notify TSA of applicability within 30 days of [Insert effective date of final rule in the **Federal Register**].

(b) *New or modified operations.* If an owner/operator commences new operations or modifies existing operations after [Insert date of publication of final rule in the **Federal Register**], that person is responsible for determining whether the new or modified operations would meet the applicability determinations in subpart B to 49 CFR parts 1580, 1582, or 1584 and must notify TSA no later than 90 calendar days before commencing operations or implementing modifications.

§ 1570.107 Recognition of prior or established security measures or programs.

Previously provided security training may be credited towards satisfying the

requirements of this subchapter provided the owner/operator—

(a) Obtains a complete record of such training and validates the training meets requirements of §§ 1580.115, 1582.115, or 1584.115 of this subchapter as it relates to the function of the individual security-sensitive employee and the training was provided within the schedule required for recurrent training.

(b) Retains a record of such training in compliance with the requirements of § 1570.121 of this part.

§ 1570.109 Submission and approval.

(a) *Submission of security program.* Each owner/operator required under parts 1580, 1582, or 1584 of this subchapter to adopt and carry out a security program must submit it to TSA for approval in a form and manner prescribed by TSA.

(b) *Security training deadlines.* Except as otherwise directed by TSA, each owner/operator required under subpart B to parts 1580, 1582, or 1584 of this subchapter to develop a security training program must—

(1) Submit its program to TSA for approval no later than 90 calendar days after [insert effective date of final rule in the **Federal Register**].

(2) If commencing or modifying operations so as to be subject to the requirements of subpart B to 49 CFR parts 1580, 1582, or 1584 after [Insert effective date of final rule in the **Federal Register**], submit a training program to TSA no later than 90 calendar days before commencing new or modified operations.

(c) *TSA approval.* (1) No later than 60 calendar days after receiving the proposed security program required by subpart B to 49 CFR parts 1580, 1582, and 1584, TSA will either approve the program or provide the owner/operator with written notice to modify the program to comply with the applicable requirements of this subchapter. TSA will notify the owner/operator if it needs an extension of time to approve the program or provide the owner/operator with written notice to modify the program to comply with the applicable requirements of this subchapter.

(2) *Notice to modify.* If TSA provides the owner/operator with written notice to modify the security program to comply with the applicable requirements of this subchapter, the owner/operator must provide a modified security program to TSA for approval within the timeframe specified by TSA.

(3) TSA may request additional information, and the owner/operator must provide the information within the time period TSA prescribes. The 60-day period for TSA approval or modification will begin when the owner/operator provides the additional information.

(g) *Petition for reconsideration.* Within 30 days of receiving the notice to modify, the owner/operator may file a petition for reconsideration under § 1570.119 of this part.

§ 1570.111 Implementation schedules.

(a) *Initial security training.* (1) Once TSA approves an owner/operator's security training program, the owner/operator must provide initial security training to a security-sensitive employee—

(2) No later than one year after the date of approval if the employee is employed to perform a security-sensitive function on the date TSA approves the program.

(3) No later than 60 calendar days after the employee first performs a security-sensitive job function if performance of a security-sensitive job function is initiated after TSA approves the program.

(4) No later than the 60th calendar day of employment performing a security-sensitive function, aggregated over a consecutive 12-month period, if the security-sensitive job function is performed intermittently.

(b) *Recurrent security training.* Each owner/operator must provide annual recurrent security training to each employee performing a security-sensitive job function not later than the anniversary calendar month of the employee's initial security training. If the owner/operator provides the recurrent security training in the month of, the month before, or the month after it is due, the employee is considered to have taken the training in the month it is due. Recurrent training must use the most recent iteration of any training materials submitted to, and approved by, TSA.

(c) *Extensions of time.* TSA may grant an extension of time for implementing a security program identified in subpart B to parts 1580, 1582, and 1584 of this subchapter upon a showing of good cause. The owner/operator must request the extension of time in writing and TSA must receive the request within a reasonable time before the due date to be extended; an owner/operator may request an extension after the expiration of a due date by sending a written request describing why the failure to meet the due date was excusable. TSA will respond to the request in writing.

§ 1570.113 Amendments requested by owner/operator.

(a) *Requirement to request amendment.* Each owner/operator required under parts 1580, 1582, or 1584 of this subchapter to adopt and carry out a security program must submit a request to amend its security program if, after approval, changes expected to have a duration of 60 calendar days or more have occurred to the—

(1) Ownership or control of the operations; and/or

(2) Measures, training, or staffing described in the security program.

(b) *Schedule for requesting amendment.* The owner/operator must file the request for an amendment with TSA no later than 45 calendar days before the proposed amendment takes effect, unless TSA allows a shorter time period.

(c) *TSA approval.* (1) Within 30 calendar days after receiving a proposed amendment, TSA will, in writing, either approve or deny the request to amend. TSA will notify the owner/operator if it needs an extension of time to consider the proposed amendment.

(2) TSA may approve an amendment to a security program if TSA determines that it is in the interest of the public and transportation security and the proposed amendment provides the level of security required under this subchapter. TSA may request additional information from the owner/operator before rendering a decision.

(d) No later than 30 calendar days after receiving a denial, the owner/operator may file a petition for reconsideration under § 1570.119 of this part.

§ 1570.115 Amendments required by TSA.

(a) *Notification of requirement to amend.* TSA may require amendments to a security program in the interest of the public and transportation security, including any new information about emerging threats, or methods for addressing emerging threats, as follows:

(1) TSA will notify the owner/operator of the proposed amendment, fixing a period of not less than 30 calendar days within which the owner/operator may submit written information, views, and arguments on the amendment.

(2) After TSA considers all relevant material received, TSA will notify the owner/operator of any amendment adopted or rescind the notice.

(b) *Effective date of amendment.* If TSA adopts the amendment, it becomes effective not less than 30 calendar days after the owner/operator receives the notice of amendment, unless the owner/

operator disagrees with the proposed amendment and files a petition for reconsideration under § 1570.119 of this part no later than 15 calendar days before the effective date of the amendment. A timely petition for reconsideration stays the effective date of the amendment.

(c) *Emergency amendments.* If TSA determines that there is an emergency requiring immediate action in the interest of the public or transportation security, TSA may issue an amendment, without the prior notice and comment procedures in paragraph (a) of this section, effective without stay on the date the covered owner/operator receives notice of it. In such a case, TSA will incorporate in the notice a brief statement of the reasons and findings for the amendment to be adopted. The owner/operator may file a petition for reconsideration under § 1570.119 of this part; however, this does not stay the effective date of the emergency amendment.

§ 1570.117 Alternative measures.

(a) If in TSA's judgment, the overall security of transportation provided by an owner/operator subject to the requirements of 49 CFR parts 1580, 1582, or 1584 are not diminished, TSA may approve alternative measures.

(b) Each owner/operator requesting alternative measures must file the request for approval in a form and manner prescribed by TSA. The filing of such a request does not affect the owner/operator's responsibility for compliance while the request is being considered.

(c) TSA may request additional information, and the owner/operator must provide the information within the time period TSA prescribes. Within 30 calendar days after receiving a request for alternative measures and all requested information, TSA will, in writing, either approve or deny the request.

(d) If TSA finds that the use of the alternative measures is in the interest of the public and transportation security, it may grant the request subject to any conditions TSA deems necessary. In considering the request for alternative measures, TSA will review all relevant factors including—

(1) The risks associated with the type of operation, for example, whether the owner/operator transports hazardous materials or passengers within a high threat urban area, whether the owner/operator transports passengers and the volume of passengers transported, or whether the owner/operator hosts a passenger operation.

(2) Any relevant threat information.

(3) Other circumstances concerning potential risk to the public and transportation security.

(e) No later than 30 calendar days after receiving a denial, the owner/operator may petition for reconsideration under § 1570.119 of this part.

§ 1570.119 Petitions for reconsideration.

(1) If an owner/operator seeks to petition for reconsideration of a determination, required modification, denial of a request for amendment by the owner/operator, denial to rescind a TSA-required amendment, or denial of an alternative measure, the owner/operator must submit a written petition for reconsideration that includes a statement and any supporting documentation explaining why the owner/operator believes TSA's decision is incorrect.

(2) Upon review of the petition for reconsideration, the Administrator or designee will dispose of the petition by affirming, modifying, or rescinding its previous decision. This is considered a final agency action.

§ 1570.121 Recordkeeping and availability.

(a) *Retention.* Each owner/operator required to have a security program under subpart B to parts 1580, 1582, and 1584 of this subchapter must—

(1) Retain security training records for each individual trained for no less than five years from the date of training that, at a minimum—

(i) Includes employee's full name, job title or function, date of hire, and date of initial and recurrent security training; and

(ii) Identifies the date, course name, course length, and list of topics addressed for the security training most recently provided in each of the areas required under §§ 1580.115, 1582.115, and 1584.115 of this subchapter.

(2) Retain records of initial and recurrent security training for no less than five years from the date of training.

(3) Provide records to current and former employees upon request and at no charge as necessary to provide proof of training.

(b) *Electronic records.* Each owner/operator required to retain records under this section may keep them in electronic form. An owner/operator may maintain and transfer records through electronic transmission, storage, and retrieval provided that the electronic system provides for the maintenance of records as originally submitted without corruption, loss of data, or tampering.

(c) *Protection of SSI.* Each owner/operator must restrict the distribution, disclosure, and availability of security sensitive information, as identified in part 1520 of this chapter, to persons with a need to know. The owner/operator must refer requests for such information by other persons to TSA.

(d) *Availability.* Each owner/operator must make the records available to TSA upon request for inspection and copying.

Subpart C—Operations

§ 1570.201 Security Coordinator.

(a) Except as provided in paragraph (b) of this section, each owner/operator identified in §§ 1580.1, 1582.1, and 1584.101 of this subchapter must designate and use a primary and at least one alternate Security Coordinator.

(b) An owner/operator described in § 1580.101(a)(5) or § 1582.101(a)(4) of this subchapter must designate and use a primary and at least one alternate Security Coordinator, only if notified by TSA in writing that a threat exists concerning that type of operation.

(c) The Security Coordinator and alternate(s) must be appointed at the corporate level.

(d) Each owner/operator required to have a Security Coordinator must provide in writing to TSA the names, U.S. citizenship status, titles, phone number(s), and email address(es) of the Security Coordinator and alternate Security Coordinator(s) within 7 calendar days of the effective date of this rule, commencement of operations, or change in any of the information required by this section.

(e) Each owner/operator required to have a Security Coordinator must ensure that at least one Security Coordinator—

(1) Serves as the primary contact for intelligence information and security-related activities and communications with TSA. Any individual designated as a Security Coordinator may perform other duties in addition to those described in this section.

(2) Is accessible to TSA on a 24-hours a day, 7 days a week basis.

(3) Coordinates security practices and procedures internally and with appropriate law enforcement and emergency response agencies.

§ 1570.203 Reporting significant security concerns.

(a) Each owner/operator identified in §§ 1580.1, 1582.1, and 1584.101 of this subchapter must report, within 24 hours of initial discovery, any potential threats and significant security concerns involving transportation-related operations in the United States or transportation to, from, or within the United States as soon as possible by the methods prescribed by TSA.

(b) Potential threats or significant security concerns encompass incidents, suspicious activities, and threat information including, but not limited to, the categories of reportable events listed in Appendix A to this part.

(c) Information reported must include the following, as available and applicable:

(1) The name of the reporting individual and contact information, including a telephone number or email address.

(2) The affected freight or passenger train, transit vehicle, motor vehicle, station, terminal, rail hazardous materials facility, or other facility or infrastructure, including identifying information and current location.

(3) Scheduled origination and termination locations for the affected freight or passenger train, transit vehicle, or motor vehicle—including departure and destination city and route.

(4) Description of the threat, incident, or activity, including who has been notified and what action has been taken.

(5) The names, other available biographical data, and/or descriptions (including vehicle or license plate information) of individuals or motor vehicles known or suspected to be involved in the threat, incident, or activity.

(6) The source of any threat information.

Subpart D—Security Threat Assessments

§ 1570.301 Fraudulent use or manufacture; responsibilities of persons.

(a) No person may use or attempt to use a credential, security threat assessment, access control medium, or identification medium issued or conducted under this subchapter that was issued or conducted for another person.

(b) No person may make, produce, use or attempt to use a false or fraudulently created access control medium, identification medium or security threat assessment issued or conducted under this subchapter.

(c) No person may tamper or interfere with, compromise, modify, attempt to circumvent, or circumvent TWIC access control procedures.

(d) No person may cause or attempt to cause another person to violate paragraphs (a)–(c) of this section.

§ 1570.303 Inspection of credential.

(a) Each person who has been issued or possesses a TWIC must present the TWIC for inspection upon a request from TSA, the Coast Guard, or other authorized DHS representative; an authorized representative of the National Transportation Safety Board; or a Federal, State, or local law enforcement officer.

(b) Each person who has been issued or who possesses a TWIC must allow his or her TWIC to be read by a reader and must submit his or her reference biometric, such as a fingerprint, and any other required information, such as a PIN, to the reader, upon a request from TSA, the Coast Guard, other authorized DHS representative; or a Federal, State, or local law enforcement officer.

§ 1570.305 False statements regarding security background checks by public transportation agency or railroad carrier.

(a) *Scope.* This section implements sections 1414(e) (6 U.S.C. 1143) and 1522(e) (6 U.S.C. 1170) of the ''Implementing Recommendations of the 9/11 Commission Act of 2007,'' Public Law 110–53 (121 Stat. 266, Aug. 3, 2007).

(b) *Definitions.* In addition to the terms in §§ 1500.3, 1500.5, and 1503.202 of subchapter A and § 1570.3 of subchapter D of this chapter, the following terms apply to this part:

Covered individual means an employee of a public transportation agency or a contractor or subcontractor of a public transportation agency or an employee of a railroad carrier or a contractor or subcontractor of a railroad carrier.

Security background check means reviewing the following for the purpose of identifying individuals who may pose a threat to transportation security, national security, or of terrorism:

(1) Relevant criminal history databases.

(2) In the case of an alien (as defined in sec. 101 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)), the relevant databases to determine the status of the alien under the immigration laws of the United States.

(3) Other relevant information or databases, as determined by the Secretary of Homeland Security.

(c) *Prohibitions.* (1) A public transportation agency or a contractor or subcontractor of a public transportation agency may not knowingly misrepresent to an employee or other relevant person, including an arbiter involved in a labor arbitration, the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary of Homeland Security related to security background check requirements for covered individuals when conducting a security background check.

(2) A railroad carrier or a contractor or subcontractor of a railroad carrier may not knowingly misrepresent to an employee or other relevant person, including an arbiter involved in a labor arbitration, the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary of Homeland Security related to security background check requirements for covered individuals when conducting a security background check.

Appendix A to Part 1570—Reporting of Significant Security Concerns

Category	Description
Breach, Attempted Intrusion, and/or Interference	Unauthorized personnel attempting to or actually entering a restricted area or secure site relating to a transportation facility or conveyance owned, operated, or used by an owner/operator subject to this part. This includes individuals entering or attempting to enter by impersonation of authorized personnel (for example, police/security, janitor, vehicle owner/operator). Activity that could interfere with the ability of employees to perform duties to the extent that security is threatened.
Misrepresentation	Presenting false, or misusing, insignia, documents, and/or identification, to misrepresent one's affiliation with an owner/operator subject to this part to cover possible illicit activity that may pose a risk to transportation security.
Theft, Loss, and/or Diversion	Stealing or diverting identification media or badges, uniforms, vehicles, keys, tools capable of compromising track integrity, portable derails, technology, or classified or sensitive security information documents which are proprietary to the facility or conveyance owned, operated, or used by an owner/operator subject to this part.

Category	Description
Sabotage, Tampering, and/or Vandalism	Damaging, manipulating, or defeating safety and security appliances in connection with a facility, infrastructure, conveyance, or routing mechanism, resulting in the compromised use or the temporary or permanent loss of use of the facility, infrastructure, conveyance or routing mechanism. Placing or attaching a foreign object to a rail car(s).
Cyber Attack	Compromising, or attempting to compromise or disrupt the information/technology infrastructure of an owner/operator subject to this part.
Expressed or Implied Threat	Communicating a spoken or written threat to damage or compromise a facility/infrastructure/conveyance owned, operated, or used by an owner/operator subject to this part (for example, a bomb threat or active shooter).
Eliciting Information	Questioning that may pose a risk to transportation or national security, such as asking one or more employees of an owner/operator subject to this part about particular facets of a facility's conveyance's purpose, operations, or security procedures.
Testing or Probing of Security	Deliberate interactions with employees of an owner/operator subject to this part or challenges to facilities or systems owned, operated, or used by an owner/operator subject to this part that reveal physical, personnel, or cyber security capabilities.
Photography	Taking photographs or video of facilities, conveyances, or infrastructure owned, operated, or used by an owner/operator subject to this part in a manner that may pose a risk to transportation or national security. Examples include taking photographs or video of infrequently used access points, personnel performing security functions (for example, patrols, badge/vehicle checking), or security-related equipment (for example, perimeter fencing, security cameras).
Observation or Surveillance	Demonstrating unusual interest in facilities or loitering near conveyances, railcar routing appliances or any potentially critical infrastructure owned or operated by an owner/operator subject to this part in a manner that may pose a risk to transportation or national security. Examples include observation through binoculars, taking notes, or attempting to measure distances.
Materials Acquisition and/or Storage	Acquisition and/or storage by an employee of an owner/operator subject to this part of materials such as cell phones, pagers, fuel, chemicals, toxic materials, and/or timers that may pose a risk to transportation or national security (for example, storage of chemicals not needed by an employee for the performance of his or her job duties).
Weapons Discovery, Discharge, or Seizure	Weapons or explosives in or around a facility, conveyance, or infrastructure of an owner/operator subject to this part that may present a risk to transportation or national security (for example, discovery of weapons inconsistent with the type or quantity traditionally used by company security personnel).
Suspicious Items or Activity	Discovery or observation of suspicious items, activity or behavior in or around a facility, conveyance, or infrastructure of an owner/operator subject to this part that results in the disruption or termination of operations (for example, halting the operation of a conveyance while law enforcement personnel investigate a suspicious bag, briefcase, or package).

■ 11. Revise part 1580 to read as follows:

PART 1580—FREIGHT RAIL TRANSPORTATION SECURITY

Subpart A—General

Sec.
1580.1 Scope.
1580.3 Terms used in this part.
1580.5 Preemptive effect.

Subpart B—Security Programs

Sec.
1580.101 Applicability.
1580.103 [Reserved]
1580.105 [Reserved]
1580.107 [Reserved]
1580.109 [Reserved]
1580.111 [Reserved]
1580.113 Security training program general requirements.
1580.115 Security training and knowledge for security-sensitive employees.

Subpart C—Operations

Sec.
1580.201 Applicability.
1580.203 Location and shipping information.
1580.205 Chain of custody and control requirements.
1580.207 Harmonization of federal regulation of nuclear facilities.

Subpart D [Reserved]

Appendix A to Part 1580—High Threat Urban Areas (HTUAs)

Appendix B to Part 1580—Security-Sensitive Job Functions For Freight Rail

Authority: 6 U.S.C. 1162 and 1167; 49 U.S.C. 114.

Subpart A—General

§ 1580.1 Scope.

(a) Except as provided in paragraph (b) of this section, this part includes requirements for the following persons. Specific sections in this part provide detailed requirements.

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper.

(3) Each rail hazardous materials receiver located within an HTUA.

(4) Each freight railroad carrier serving as a host railroad to a freight railroad operation described in paragraph (a)(1) of this section or a passenger operation described in § 1582.1 of this subchapter.

(5) Each owner/operator of private rail cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(b) This part does not apply to a freight railroad carrier that operates rolling equipment only on track inside an installation that is not part of the general railroad system of transportation.

§ 1580.3 Terms used in this part.

In addition to the terms in §§ 1500.3, 1500.5, and 1503.202 of subchapter A and § 1570.3 of subchapter D of this chapter, the following terms apply to this part:

Class I means Class I as assigned by regulations of the Surface Transportation Board (STB) (49 CFR part 1201; General Instructions 1–1).

A rail car is *attended* if an employee—

(1) Is physically located on-site in reasonable proximity to the rail car;

(2) Is capable of promptly responding to unauthorized access or activity at or near the rail car, including immediately contacting law enforcement or other authorities; and

(3) Immediately responds to any unauthorized access or activity at or near the rail car either personally or by contacting law enforcement or other authorities.

Document the transfer means documentation uniquely identifying that the rail car was attended during the transfer of custody, including:

(1) Car initial and number.

(2) Identification of individuals who attended the transfer (names or uniquely identifying employee number).

(3) Location of transfer.

(4) Date and time the transfer was completed.

High threat urban area (HTUA) means, for purposes of this part, an area comprising one or more cities and surrounding areas including a 10-mile buffer zone, as listed in Appendix A to this part 1580.

Maintains positive control means that the rail hazardous materials receiver and the railroad carrier communicate and cooperate with each other to provide for the security of the rail car during the physical transfer of custody. *Attending* the rail car is a component of maintaining positive control.

Rail security-sensitive materials (RSSM) means—

(1) A rail car containing more than 2,268 kg (5,000 lbs.) of a Division 1.1, 1.2, or 1.3 (explosive) material, as defined in 49 CFR 173.50;

(2) A tank car containing a material poisonous by inhalation as defined in 49 CFR 171.8, including anhydrous ammonia, Division 2.3 gases poisonous by inhalation as set forth in 49 CFR 173.115(c), and Division 6.1 liquids meeting the defining criteria in 49 CFR 173.132(a)(1)(iii) and assigned to hazard zone A or hazard zone B in accordance with 49 CFR 173.133(a), excluding residue quantities of these materials; and

(3) A rail car containing a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

Residue means the hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors.

Security-sensitive employee means an employee who performs—

(1) Service subject to the Federal hours of service laws (49 U.S.C. chapter 211), regardless of whether the employee actually performs such service during a particular duty tour; or

(2) One or more of the security-sensitive job functions identified in Appendix B to this part where the security-sensitive function is performed in the United States or in direct support of the common carriage of persons or property between a place in the United States and any place outside of the United States.

§ 1580.5 Preemptive effect.

Under 49 U.S.C. 20106, issuance of the regulations in this subchapter preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local security hazard; that is not incompatible with a law, regulation, or order of the U.S. Government; and that does not unreasonably burden interstate commerce. For example, under 49 U.S.C. 20106, issuance of 49 CFR 1580.205 preempts any State or tribal law, rule, regulation, order or common law requirement covering the same subject matter.

Subpart B—Security Programs

§ 1580.101 Applicability.

This subpart applies to each of the following owner/operators:

(a) Described in § 1580.1(a)(1) of this part that is a Class I freight railroad.

(b) Described in § 1580.1(a)(1) of this part that transports one or more of the categories and quantities of RSSM in an HTUA.

(c) Described in § 1580.1(a)(4) of this part that serves as a host railroad to a freight railroad described in paragraph (a) of (b) of this section or a passenger operation described in § 1582.101 of this subchapter.

§ 1580.103 [Reserved]

§ 1580.105 [Reserved]

§ 1580.107 [Reserved]

§ 1580.109 [Reserved]

§ 1580.111 [Reserved]

§ 1580.113 Security training program general requirements.

(a) *Security training program required.* Each owner/operator identified in § 1580.101 of this part is required to adopt and carry out a security training program under this subpart.

(b) *General requirements.* The security training program must include the following information:

(1) Name of owner/operator.

(2) Name, title, telephone number, and email address of the primary individual to be contacted with regard to review of the security training program.

(3) Number, by specific job function category identified in Appendix B to this part, of security-sensitive employees trained or to be trained.

(4) Implementation schedule that identifies a specific date by which initial and recurrent security training required by § 1570.111 of this part will be completed.

(5) Location where training program records will be maintained.

(6) Curriculum or lesson plan, learning objectives, and method of delivery (such as instructor-led or computer-based training) for each course used to meet the requirements of § 1580.115 of this part. TSA may request additional information regarding the curriculum during the review and approval process.

(7) Plan for ensuring supervision of untrained security-sensitive employees performing functions identified in Appendix B to this part.

(8) Plan for notifying employees of changes to security measures that could change information provided in previously provided training.

(9) Method(s) for evaluating the effectiveness of the security training program in each area required by § 1580.115 of this part.

(c) *Relation to other training.* (1) Training conducted by owner/operators to comply other requirements or standards, such as emergency preparedness training required by the Department of Transportation (DOT) (49 CFR part 239) or other training for communicating with emergency responders to arrange the evacuation of passengers, may be combined with and used to satisfy elements of the training requirements in this subpart.

(2) If the owner/operator submits a security training program that relies on pre-existing or previous training materials to meet the requirements of subpart B, the program submitted for approval must include an index, organized in the same sequence as the requirements in this subpart.

(d) *Submission and Implementation.* The owner/operator must submit and implement the security training program in accordance with the schedules identified in §§ 1570.109 and 1570.111 of this subchapter.

§ 1580.115 Security training and knowledge for security-sensitive employees.

(a) *Training required for security-sensitive employees.* No owner/operator required to have a security training program under § 1580.101 of this part may use a security-sensitive employee to perform a function identified in Appendix B to this part, unless that individual has received training as part of a security training program approved by TSA under 49 CFR part 1570, subpart B, or is under the direct supervision of a security-sensitive employee who has received the training required by this section.

(b) *Limits on use of untrained employees.* Notwithstanding paragraph (a) of this section, a security-sensitive employee may not perform a security-sensitive function for more than sixty (60) calendar days without receiving security training.

(c) *Prepare.* (1) Each owner/operator must ensure that each of its security-sensitive employees with position- or function-specific responsibilities under the owner/operator's security program has knowledge of how to fulfill those responsibilities in the event of a security threat, breach, or incident to ensure—

(i) Employees with responsibility for transportation security equipment and systems are aware of their responsibilities and can verify the equipment and systems are operating and properly maintained; and

(ii) Employees with other duties and responsibilities under the company's security plans and/or programs, including those required by Federal law, know their assignments and the steps or resources needed to fulfill them.

(2) Each employee who performs any security-related functions under § 1580.205 of this subpart must be provided training specifically applicable to the functions the employee performs. As applicable, this training must address—

(i) Inspecting rail cars for signs of tampering or compromise, IEDs, suspicious items, and items that do not belong;

(ii) Identification of rail cars that contain rail security-sensitive materials, including the owner/operator's procedures for identifying rail security-sensitive material cars on train documents, shipping papers, and in computer train/car management systems; and

(iii) Procedures for completing transfer of custody documentation.

(d) *Observe.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge of the observational skills necessary to recognize—

(1) Suspicious and/or dangerous items (such as substances, packages, or conditions (for example, characteristics of an IED and signs of equipment tampering or sabotage);

(2) Combinations of actions and individual behaviors that appear suspicious and/or dangerous, inappropriate, inconsistent, or out of the ordinary for the employee's work environment which could indicate a threat to transportation security; and

(3) How a terrorist or someone with malicious intent may attempt to gain sensitive information or take advantage of vulnerabilities.

(e) *Assess.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge necessary to—

(1) Determine whether the item, individual, behavior, or situation requires a response as a potential terrorist threat based on the respective transportation environment; and

(2) Identify appropriate responses based on observations and context.

(f) *Respond.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge of how to—

(1) Appropriately report a security threat, including knowing how and when to report internally to other employees, supervisors, or management, and externally to local, state, or federal agencies according to the owner/operator's security procedures or other relevant plans;

(2) Interact with the public and first responders at the scene of the threat or incident, including communication with passengers on evacuation and any specific procedures for individuals with disabilities and the elderly; and

(3) Use any applicable self-defense devices or other protective equipment provided to employees by the owner/operator.

Subpart C—Operations

§ 1580.201 Applicability.

This subpart applies to the following:

(1) Each owner/operator described in paragraph (a)(1) of § 1580.1 of this part that transports one or more of the categories and quantities of rail security-sensitive materials.

(2) Each owner/operator described in paragraphs (a)(2) and (3) of § 1580.1 of this part.

§ 1580.203 Location and shipping information.

(a) *General Requirement.* Each owner/operator described in § 1580.201 of this part must have procedures in place to determine the location and shipping information for each rail car under its physical custody and control that contains one or more of the categories and quantities of rail security-sensitive materials.

(b) *Required Information.* The location and shipping information must include the following:

(1) The rail car's current location by city, county, and state, including, for freight railroad carriers, the railroad milepost, track designation, and the time that the rail car's location was determined.

(2) The rail car's routing, if a freight railroad carrier.

(3) A list of the total number of rail cars containing rail security-sensitive materials, broken down by—

(i) The shipping name prescribed for the material in column 2 of the table in 49 CFR 172.101;

(ii) The hazard class or division number prescribed for the material in column 3 of the table in 49 CFR 172.101; and

(iii) The identification number prescribed for the material in column 4 of the table in 49 CFR 172.101.

(4) Each rail car's initial and number.

(5) Whether the rail car is in a train, rail yard, siding, rail spur, or rail hazardous materials shipper or receiver facility, including the name of the rail yard or siding designation.

(c) *Timing-Class I Freight Railroad Carriers.* Upon request by TSA, each Class I freight railroad carrier described in paragraph (a) of this section must provide the location and shipping information to TSA no later than—

(1) Five minutes if the request applies to a single (one) rail car; and

(2) Thirty minutes if the request concerns multiple rail cars or a geographic region.

(d) *Timing-Other than Class I Freight Railroad Carriers.* Upon request by TSA, all owner/operators described in paragraph (a) of this section, other than Class I freight railroad carriers, must provide the location and shipping information to TSA no later than 30 minutes, regardless of the number of cars covered by the request.

(e) *Method.* All owner/operators described in paragraph (a) of this section must provide the requested location and shipping information to TSA by one of the following methods:

(1) Electronic data transmission in spreadsheet format.

(2) Electronic data transmission in Hyper Text Markup Language (HTML) format.

(3) Electronic data transmission in Extensible Markup Language (XML).

(4) Facsimile transmission of a hard copy spreadsheet in tabular format.

(5) Posting the information to a secure Web site address approved by TSA.

(6) Another format approved by TSA.

(f) *Telephone Number.* Each owner/operator described in § 1580.201 of this part must provide a telephone number for use by TSA to request the information required in paragraph (b) of this section.

(1) The telephone number must be monitored at all times.

(2) A telephone number that requires a call back (such as an answering service, answering machine, or beeper device) does not meet the requirements of this paragraph.

§ 1580.205 Chain of custody and control requirements.

(a) *Within or outside of an HTUA, rail hazardous materials shipper transferring to carrier.* Except as provided in paragraph (g) of this section, at each location within or outside of an HTUA, a rail hazardous materials shipper transferring custody of a rail car containing one or more of the categories and quantities of rail security-sensitive materials to a freight railroad carrier must do the following:

(1) Physically inspect the rail car before loading for signs of tampering, including closures and seals; other signs that the security of the car may have been compromised; and suspicious items or items that do not belong, including the presence of an improvised explosive device.

(2) Keep the rail car in a rail secure area from the time the security inspection required by paragraph (a)(1) of this section or by 49 CFR 173.31(d), whichever occurs first, until the freight railroad carrier takes physical custody of the rail car.

(3) Document the transfer of custody to the railroad carrier in hard copy or electronically.

(b) *Within or outside of an HTUA, carrier receiving from a rail hazardous materials shipper.* At each location within or outside of an HTUA where a freight railroad carrier receives from a rail hazardous materials shipper custody of a rail car containing one or more of the categories and quantities of rail security-sensitive materials, the freight railroad carrier must document the transfer in hard copy or electronically and perform the required security inspection in accordance with 49 CFR 174.9.

(c) *Within an HTUA, carrier transferring to carrier.* Within an HTUA, whenever a freight railroad carrier transfers a rail car containing one or more of the categories and quantities of rail security-sensitive materials to another freight railroad carrier, each freight railroad carrier must adopt and carry out procedures to ensure that the rail car is not left unattended at any time during the physical transfer of custody. These procedures must include the receiving freight railroad carrier performing the required security inspection in accordance with 49 CFR 174.9. Both the transferring and the receiving railroad carrier must document the transfer of custody in hard copy or electronically.

(d) *Outside of an HTUA, carrier transferring to carrier.* Outside an HTUA, whenever a freight railroad carrier transfers a rail car containing one or more of the categories and quantities of rail security-sensitive materials to another freight railroad carrier, and the rail car containing this hazardous material may subsequently enter an HTUA, each freight railroad carrier must adopt and carry out procedures to ensure that the rail car is not left unattended at any time during the physical transfer of custody. These procedures must include the receiving railroad carrier performing the required security inspection in accordance with 49 CFR 174.9. Both the transferring and the receiving railroad carrier must document the transfer of custody in hard copy or electronically.

(e) *Within an HTUA, carrier transferring to rail hazardous materials receiver.* A freight railroad carrier delivering a rail car containing one or more of the categories and quantities of rail security-sensitive materials to a rail hazardous materials receiver located within an HTUA must not leave the rail car unattended in a non-secure area until the rail hazardous materials receiver accepts custody of the rail car. Both the railroad carrier and the rail hazardous materials receiver must document the transfer of custody in hard copy or electronically.

(f) *Within an HTUA, rail hazardous materials receiver receiving from carrier.* Except as provided in paragraph (j) of this section, a rail hazardous materials receiver located within an HTUA that receives a rail car containing one or more of the categories and quantities of rail security-sensitive materials from a freight railroad carrier must—

(1) Ensure that the rail hazardous materials receiver or railroad carrier maintains positive control of the rail car during the physical transfer of custody of the rail car;

(2) Keep the rail car in a rail secure area until the car is unloaded; and

(3) Document the transfer of custody from the railroad carrier in hard copy or electronically.

(g) *Within or outside of an HTUA, rail hazardous materials receiver rejecting car.* This section does not apply to a rail hazardous materials receiver that does not routinely offer, prepare, or load for transportation by rail one or more of the categories and quantities of rail security-sensitive materials. If such a receiver rejects and returns a rail car containing one or more of the categories and quantities of rail security-sensitive materials to the originating offeror or shipper, the requirements of this section do not apply to the receiver. The requirements of this section do apply to any railroad carrier to which the receiver transfers custody of the rail car.

(h) *Document retention.* Covered entities must maintain the documents required under this section for at least 60 calendar days and make them available to TSA upon request.

(i) *Rail secure area.* The rail hazardous materials shipper and the rail hazardous materials receiver must use physical security measures to ensure that no unauthorized individual gains access to the rail secure area.

(j) *Exemption for rail hazardous materials receivers.* A rail hazardous materials receiver located within an HTUA may request from TSA an exemption from some or all of the requirements of this section if the receiver demonstrates that the potential risk from its activities is insufficient to warrant compliance with this section. TSA will consider all relevant circumstances, including the following:

(1) The amounts and types of all hazardous materials received.

(2) The geography of the area surrounding the receiver's facility.

(3) Proximity to entities that may be attractive targets, including other businesses, housing, schools, and hospitals.

(4) Any information regarding threats to the facility.

(5) Other circumstances that indicate the potential risk of the receiver's facility does not warrant compliance with this section.

§ 1580.207 Harmonization of federal regulation of nuclear facilities.

TSA will coordinate activities under this subpart with the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) with respect to regulation of rail hazardous materials shippers and receivers that are also licensed or regulated by the NRC or DOE under the Atomic Energy Act of 1954, as amended, to maintain consistency with the requirements imposed by the NRC and DOE.

Appendix A to Part 1580—High Threat Urban Areas (HTUAs)

State	Urban area	Geographic areas
AZ	Phoenix Area	Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and a 10-mile buffer extending from the border of the combined area.
CA	Anaheim/Santa Ana Area.	Anaheim, Costa Mesa, Garden Grove, Fullerton, Huntington Beach, Irvine, Orange, Santa Ana, and a 10-mile buffer extending from the border of the combined area.
	Bay Area	Berkeley, Daly City, Fremont, Hayward, Oakland, Palo Alto, Richmond, San Francisco, San Jose, Santa Clara, Sunnyvale, Vallejo, and a 10-mile buffer extending from the border of the combined area.
	Los Angeles/Long Beach Area.	Burbank, Glendale, Inglewood, Long Beach, Los Angeles, Pasadena, Santa Monica, Santa Clarita, Torrance, Simi Valley, Thousand Oaks, and a 10-mile buffer extending from the border of the combined area.
	Sacramento Area	Elk Grove, Sacramento, and a 10-mile buffer extending from the border of the combined area.
	San Diego Area	Chula Vista, Escondido, and San Diego, and a 10-mile buffer extending from the border of the combined area.
CO	Denver Area	Arvada, Aurora, Denver, Lakewood, Westminster, Thornton, and a 10-mile buffer extending from the border of the combined area.
DC	National Capital Region	National Capital Region and a 10-mile buffer extending from the border of the combined area.
FL	Fort Lauderdale Area	Fort Lauderdale, Hollywood, Miami Gardens, Miramar, Pembroke Pines, and a 10-mile buffer extending from the border of the combined area.
	Jacksonville Area	Jacksonville and a 10-mile buffer extending from the city border.
	Miami Area	Hialeah, Miami, and a 10-mile buffer extending from the border of the combined area.
	Orlando Area	Orlando and a 10-mile buffer extending from the city border.
	Tampa Area	Clearwater, St. Petersburg, Tampa, and a 10-mile buffer extending from the border of the combined area.
GA	Atlanta Area	Atlanta and a 10-mile buffer extending from the city border.
HI	Honolulu Area	Honolulu and a 10-mile buffer extending from the city border.
IL	Chicago Area	Chicago and a 10-mile buffer extending from the city border.
IN	Indianapolis Area	Indianapolis and a 10-mile buffer extending from the city border.
KY	Louisville Area	Louisville and a 10-mile buffer extending from the city border.
LA	Baton Rouge Area	Baton Rouge and a 10-mile buffer extending from the city border.
	New Orleans Area	New Orleans and a 10-mile buffer extending from the city border.
MA	Boston Area	Boston, Cambridge, and a 10-mile buffer extending from the border of the combined area.
MD	Baltimore Area	Baltimore and a 10-mile buffer extending from the city border.
MI	Detroit Area	Detroit, Sterling Heights, Warren, and a 10-mile buffer extending from the border of the combined area.
MN	Twin Cities Area	Minneapolis, St. Paul, and a 10-mile buffer extending from the border of the combined entity.
MO	Kansas City Area	Independence, Kansas City (MO), Kansas City (KS), Olathe, Overland Park, and a 10-mile buffer extending from the border of the combined area.
	St. Louis Area	St. Louis and a 10-mile buffer extending from the city border.
NC	Charlotte Area	Charlotte and a 10-mile buffer extending from the city border.
NE	Omaha Area	Omaha and a 10-mile buffer extending from the city border.
NJ	Jersey City/Newark Area.	Elizabeth, Jersey City, Newark, and a 10-mile buffer extending from the border of the combined area.
NV	Las Vegas Area	Las Vegas, North Las Vegas, and a 10-mile buffer extending from the border of the combined entity.
NY	Buffalo Area	Buffalo and a 10-mile buffer extending from the city border.
	New York City Area	New York City, Yonkers, and a 10-mile buffer extending from the border of the combined area.
OH	Cincinnati Area	Cincinnati and a 10-mile buffer extending from the city border.
	Cleveland Area	Cleveland and a 10-mile buffer extending from the city border.
	Columbus Area	Columbus and a 10-mile buffer extending from the city border.
	Toledo Area	Oregon, Toledo, and a 10-mile buffer extending from the border of the combined area.
OK	Oklahoma City Area	Norman, Oklahoma and a 10-mile buffer extending from the border of the combined area.
OR	Portland Area	Portland, Vancouver, and a 10-mile buffer extending from the border of the combined area.
PA	Philadelphia Area	Philadelphia and a 10-mile buffer extending from the city border.
	Pittsburgh Area	Pittsburgh and a 10-mile buffer extending from the city border.
TN	Memphis Area	Memphis and a 10-mile buffer extending from the city border.
TX	Dallas/Fort Worth/Arlington Area.	Arlington, Carrollton, Dallas, Fort Worth, Garland, Grand Prairie, Irving, Mesquite, Plano, and a 10-mile buffer extending from the border of the combined area.
	Houston Area	Houston, Pasadena, and a 10-mile buffer extending from the border of the combined entity.
	San Antonio Area	San Antonio and a 10-mile buffer extending from the city border.
WA	Seattle Area	Seattle, Bellevue, and a 10-mile buffer extending from the border of the combined area.
WI	Milwaukee Area	Milwaukee and a 10-mile buffer extending from the city border.

Appendix B to Part 1580—Security-Sensitive Functions for Freight Rail

This table identifies security-sensitive job functions for owner/operators regulated under this part. All employees performing security-sensitive functions are ''security-sensitive employees'' for purposes of this rule and must be trained.

Categories	Security-sensitive job functions for freight rail	Examples of job titles applicable to these functions*
A. Operating a vehicle	1. Employees who operate or directly control the movements of locomotives or other self-powered rail vehicles.	
	2. Train conductor, trainman, brakeman, or utility employee or performs acceptance inspections, couples and uncouples rail cars, applies handbrakes, or similar functions.	
	3. Employees covered under the Federal hours of service laws as "train employees." *See* 49 U.S.C. 21101(5) and 21103.	Engineer, conductor.
B. Inspecting and maintaining vehicles.	Employees who inspect or repair rail cars and locomotives	Carman, car repairman, car inspector, engineer, conductor.
C. Inspecting or maintaining building or transportation infrastructure.	1. Employees who—	Signalman, signal maintainer, trackman, gang foreman, bridge and building laborer, roadmaster, bridge, and building inspector/operator.
	a. Maintain, install, or inspect communications and signal equipment	
	b. Maintain, install, or inspect track and structures, including, but not limited to, bridges, trestles, and tunnels.	
	2. Employees covered under the Federal hours of service laws as "signal employees." *See* 49 U.S.C. 21101(3) and 21104.	
D. Controlling dispatch or movement of a vehicle.	1. Employees who—	Yardmaster, dispatcher, block operator, bridge operator.
	a. Dispatch, direct, or control the movement of trains.	
	b. Operate or supervise the operations of moveable bridges..	
	c. Supervise the activities of train crews, car movements, and switching operations in a yard or terminal..	
	2. Employees covered under the Federal hours of service laws as "dispatching service employees." *See* 49 U.S.C. 21101(2) and 21105.	
E. Providing security of the owner/operator's equipment and property.	Employees who provide for the security of the railroad carrier's equipment and property, including acting as a railroad police officer (as that term is defined in 49 CFR 207.2)..	Police officer, special agent; patrolman; watchman; guard.
F. Loading or unloading cargo or baggage.	Includes, but is not limited to, employees that load or unload hazardous materials.	Service track employee.
G. Interacting with travelling public (on board a vehicle or within a transportation facility).	Employees of a freight railroad operating in passenger service	Conductor, engineer, agent.
H. Complying with security programs or measures, including those required by federal law.	1. Employees who serve as security coordinators designated in § 1570.201 of this subchapter, as well as any designated alternates or secondary security coordinators.	Security coordinator, train master, assistant train master, roadmaster, division roadmaster.
	2. Employees who—	
	a. Conduct training and testing of employees when the training or testing is required by TSA's security regulations..	
	b. Perform inspections or operations required by § 1580.205 of this subchapter..	
	c. Manage or direct implementation of security plan requirements.	

*These job titles are provided solely as a resource to help understand the functions described; whether an employee must be trained is based upon the function, not the job title.

■ 12. Add part 1582 to read as follows:

PART 1582—PUBLIC TRANSPORTATION AND PASSENGER RAILROAD SECURITY

Subpart A—General

Sec.
1582.1 Scope.
1582.3 Terms used in this part.
1582.5 Preemptive effect.

Subpart B—Security Programs

1582.101 Applicability.
1582.103 [Reserved]
1582.105 [Reserved]
1582.107 [Reserved]
1582.109 [Reserved]
1582.111 [Reserved]
1582.113 Security training program general requirements.
1582.115 Security training and knowledge for security-sensitive employees.

Subpart C—[Reserved]

Appendix A to Part 1582—Public Transportation Agencies

Appendix B to Part 1582—Security-Sensitive Job Functions For Public Transportation and Passenger Railroads

Authority: 6 U.S.C. 1134 and 1137; 49 U.S.C. 114.

Subpart A—General

§ 1582.1 Scope.

(a) Except as provided in paragraph (b) of this section, this part includes requirements for the following persons. Specific sections in this part provide detailed requirements.

(1) Each passenger railroad carrier.

(2) Each public transportation agency.

(3) Each operator of a rail transit system that is not operating on track that is part of the general railroad system of transportation, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

(4) Each tourist, scenic, historic, and excursion rail owner/operator, whether operating on or off the general railroad system of transportation.

(b) This part does not apply to a ferry system required to conduct training pursuant to 46 U.S.C. 70103.

§ 1582.3 Terms used in this part.

In addition to the terms in §§ 1500.3, 1500.5, and 1503.202 of subchapter A and § 1570.3 of subchapter D of this chapter, the following term applies to this part.

Security-sensitive employee means an employee whose responsibilities for the owner/operator include one or more of the security-sensitive job functions identified in Appendix B to this part if

the security-sensitive function is performed in the United States or in direct support of the common carriage of persons or property between a place in the United States and any place outside of the United States.

§ 1582.5 Preemptive effect.

Under 49 U.S.C. 20106, issuance of the passenger railroad and public transportation regulations in this subchapter preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local security hazard; that is not incompatible with a law, regulation, or order of the U.S. Government; and that does not unreasonably burden interstate commerce.

Subpart B—Security Programs

§ 1582.101 Applicability.

The requirements of this subpart apply to the following:

(1) Amtrak (also known as the National Railroad Passenger Corporation).

(2) Each owner/operator identified in Appendix A to this part.

(3) Each owner/operator described in § 1582.1(a)(1) through (3) of this part that serves as a host railroad to a freight operation described in § 1580.301 of this subchapter or to a passenger train operation described in paragraph (a)(1) or (a)(2) of this section.

§ 1582.103 [Reserved]

§ 1582.105 [Reserved]

§ 1582.107 [Reserved]

§ 1582.109 [Reserved]

§ 1582.111 [Reserved]

§ 1582.113 Security training program general requirements.

(a) *Security training program required.* Each owner/operator identified in § 1582.101 of this part is required to adopt and carry out a security training program under this subpart.

(b) *General requirements.* The security training program must include the following information:

(1) Name of owner/operator.

(2) Name, title, telephone number, and email address of the primary individual to be contacted with regard to review of the security training program.

(3) Number, by specific job function category identified in Appendix B to this part, of security-sensitive employees trained or to be trained.

(4) Implementation schedule that identifies a specific date by which initial and recurrent security training required by § 1570.111 of this subchapter will be completed.

(5) Location where training program records will be maintained.

(6) Curriculum or lesson plan, learning objectives, and method of delivery (such as instructor-led or computer-based training) for each course used to meet the requirements of § 1582.115 of this part. TSA may request additional information regarding the curriculum during the review and approval process.

(7) Plan for ensuring supervision of untrained security-sensitive employees performing functions identified in Appendix B to this part.

(8) Plan for notifying employees of changes to security measures that could change information provided in previously provided training.

(9) Method(s) for evaluating the effectiveness of the security training program in each area required by § 1582.115 of this part.

(c) *Relation to other training.* (1) Training conducted by owner/operators to comply other requirements or standards, such as emergency preparedness training required by the Department of Transportation (DOT) (49 CFR part 239) or other training for communicating with emergency responders to arrange the evacuation of passengers, may be combined with and used to satisfy elements of the training requirements in this subpart.

(2) If the owner/operator submits a security training program that relies on pre-existing or previous training materials to meet the requirements of subpart B, the program submitted for approval must include an index, organized in the same sequence as the requirements in this subpart.

(d) *Submission and Implementation.* The owner/operator must submit and implement the security training program in accordance with the schedules identified in §§ 1570.109 and 1570.111 of this subchapter.

§ 1582.115 Security training and knowledge for security-sensitive employees.

(a) *Training required for security-sensitive employees.* No owner/operator required to have a security training program under § 1582.101 of this part may use a security-sensitive employee to perform a function identified in Appendix B to this part unless that individual has received training as part of a security training program approved by TSA under 49 CFR part 1570, subpart B, or is under the direct supervision of a security-sensitive employee who has received the training required by this section.

(b) *Limits on use of untrained employees.* Notwithstanding paragraph (a) of this section, a security-sensitive employee may not perform a security-sensitive function for more than sixty (60) calendar days without receiving security training.

(c) *Prepare.* Each owner/operator must ensure that each of its security-sensitive employees with position- or function-specific responsibilities under the owner/operator's security program have knowledge of how to fulfill those responsibilities in the event of a security threat, breach, or incident to ensure—

(1) Employees with responsibility for transportation security equipment and systems are aware of their responsibilities and can verify the equipment and systems are operating and properly maintained; and

(2) Employees with other duties and responsibilities under the company's security plans and/or programs, including those required by Federal law, know their assignments and the steps or resources needed to fulfill them.

(d) *Observe.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge of the observational skills necessary to recognize—

(1) Suspicious and/or dangerous items (such as substances, packages, or conditions (for example, characteristics of an IED and signs of equipment tampering or sabotage);

(2) Combinations of actions and individual behaviors that appear suspicious and/or dangerous, inappropriate, inconsistent, or out of the ordinary for the employee's work environment which could indicate a threat to transportation security; and

(3) How a terrorist or someone with malicious intent may attempt to gain sensitive information or take advantage of vulnerabilities.

(e) *Assess.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge necessary to—

(1) Determine whether the item, individual, behavior, or situation requires a response as a potential terrorist threat based on the respective transportation environment; and

(2) Identify appropriate responses based on observations and context.

(f) *Respond.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge of how to—

(1) Appropriately report a security threat, including knowing how and when to report internally to other

employees, supervisors, or management, and externally to local, state, or federal agencies according to the owner/operator's security procedures or other relevant plans;

(2) Interact with the public and first responders at the scene of the threat or incident, including communication with passengers on evacuation and any specific procedures for individuals with disabilities and the elderly; and

(3) Use any applicable self-defense devices or other protective equipment provided to employees by the owner/operator.

Subpart C [Reserved]

Appendix A to Part 1582—Determinations for Public Transportation and Passenger Railroads

State	Urban area	Systems
CA	Bay Area	Alameda-Contra Costa Transit District (AC Transit).
		Altamont Commuter Express (ACE).
		San Francisco Bay Area Rapid Transit District (BART).
		Central Contra Costa Transit Authority.
		Golden Gate Bridge, Highway and Transportation District (GGBHTD).
		Peninsula Corridor Joint Powers Board (PCJPB) (Caltrain).
		San Francisco Municipal Railway (MUNI) (San Francisco Municipal Transportation Agency).
		San Mateo County Transit Authority (SamTrans).
		Santa Clara Valley Transportation Authority (VTA).
		Transbay Joint Powers Authority.
	Greater Los Angeles Area (Los Angeles/Long Beach and Anaheim/Santa Ana UASI Areas).	City of Los Angeles Department of Transportation (LADOT).
		Foothill Transit.
		Long Beach Transit (LBT).
		Los Angeles County Metropolitan Transportation Authority (LACMTA).
		Montebello Bus Lines (MBL).
		Omnitrans (OMNI).
		Orange County Transportation Authority (OCTA).
		Santa Monica's Big Blue Bus (Big Blue Bus).
		Southern California Regional Rail Authority (Metrolink).
DC/MD/VA	Greater National Capital Region (National Capital Region and Baltimore UASI Areas).	Arlington Rapid Transit.
		City of Alexandria (Alexandria Transit Company) (Dash).
		Fairfax County Department of Transportation—Fairfax Connector Bus System.
		Maryland Transit Administration (MTA).
		Montgomery County Department of Transportation (Ride-On Montgomery County Transit).
		Potomac and Rappahannock Transportation Commission.
		Prince George's County Department of Public Works and Transportation (The Bus).
		Virginia Railway Express (VRE).
		Washington Metropolitan Area Transit Authority (WMATA).
GA	Atlanta Area	Georgia Regional Transportation Authority (GRTA).
		Metropolitan Atlanta Rapid Transit Authority (MARTA).
IL/IN	Chicago Area	Chicago Transit Authority (CTA).
		Northeast Illinois Commuter Railroad Corporation (Metra/NIRCRC).
		Northern Indiana Commuter Transportation District (NICTD).
		PACE Suburban Bus Company.
MA	Boston Area	Massachusetts Bay Transportation Authority (MBTA).
NY/NJ/CT	New York City/Northern New Jersey Area (New York City and Jersey City/Newark UASI Areas).	Connecticut Department of Transportation (CDOT).
		Connecticut Transit (Hartford Division and New Haven Divisions of CTTransit).
		Metropolitan Transportation Authority (All Agencies).
		New Jersey Transit Corp. (NJT).
		New York City Department of Transportation.
		Port Authority of New York and New Jersey (PANYNJ) (excluding ferry).
		Westchester County Department of Transportation Bee-Line System (The Bee-Line System).
PA/NJ	Philadelphia Area	Delaware River Port Authority (DRPA)—Port Authority Transit Corporation (PATCO).
		Delaware Transit Corporation (DTC).
		New Jersey Transit Corp. (NJT) (covered under NY).
		Pennsylvania Department of Transportation.
		Southeastern Pennsylvania Transportation Authority (SEPTA).

Appendix B to Part 1582—Security-Sensitive Job Functions For Public Transportation and Passenger Railroads

This table identifies security-sensitive job functions for owner/operators regulated under this part. All employees performing security-sensitive functions are ''security-sensitive employees'' for purposes of this rule and must be trained.

Categories	Security-sensitive job functions for public transportation and passenger railroads (PTPR)
A. Operating a vehicle	1. Employees who— a. Operate or control the movements of trains, other rail vehicles, or transit buses. b. Act as train conductor, trainman, brakeman, or utility employee or performs acceptance inspections, couples and uncouples rail cars, applies handbrakes, or similar functions. 2. Employees covered under the Federal hours of service laws as ''train employees.'' *See* 49 U.S.C. 21101(5) and 21103.
B. Inspecting and maintaining vehicles	Employees who— 1. Perform activities related to the diagnosis, inspection, maintenance, adjustment, repair, or overhaul of electrical or mechanical equipment relating to vehicles, including functions performed by mechanics and automotive technicians. 2. Provide cleaning services to vehicles owned, operated, or controlled by an owner/operator regulated under this subchapter.
C. Inspecting or maintaining building or transportation infrastructure.	Employees who— 1. Maintain, install, or inspect communication systems and signal equipment related to the delivery of transportation services. 2. Maintain, install, or inspect track and structures, including, but not limited to, bridges, trestles, and tunnels. 3. Provide cleaning services to stations and terminals owned, operated, or controlled by an owner/operator regulated under this subchapter that are accessible to the general public or passengers. 4. Provide maintenance services to stations, terminals, yards, tunnels, bridges, and operation control centers owned, operated, or controlled by an owner/operator regulated under this subchapter. 5. Employees covered under the Federal hours of service laws as ''signal employees.'' *See* 49 U.S.C. 21101(4) and 21104.
D. Controlling dispatch or movement of a vehicle.	Employees who— 1. Dispatch, report, transport, receive or deliver orders pertaining to specific vehicles, coordination of transportation schedules, tracking of vehicles and equipment. 2. Manage day-to-day management delivery of transportation services and the prevention of, response to, and redress of service disruptions. 3. Supervise the activities of train crews, car movements, and switching operations in a yard or terminal. 4. Dispatch, direct, or control the movement of trains or buses. 5. Operate or supervise the operations of moveable bridges. 6. Employees covered under the Federal hours of service laws as ''dispatching service employees.'' *See* 49 U.S.C. 21101(2) and 21105.
E. Providing security of the owner/operator's equipment and property.	Employees who— 1. Provide for the security of PTPR equipment and property, including acting as a police officer. 2. Patrol and inspect property of an owner/operator regulated under this subchapter to protect the property, personnel, passengers and/or cargo.
F. Loading or unloading cargo or baggage	Employees who load, or oversee loading of, property tendered by or on behalf of a passenger on or off of a portion of a train that will be inaccessible to the passenger while the train is in operation.
G. Interacting with travelling public (on board a vehicle or within a transportation facility).	Employees who provide services to passengers on-board a train or bus, including collecting tickets or cash for fares, providing information, and other similar services. Including: 1. On-board food or beverage employees. 2. Functions on behalf of an owner/operator regulated under this subchapter that require regular interaction with travelling public within a transportation facility, such as ticket agents.
H. Complying with security programs or measures, including those required by federal law.	1. Employees who serve as security coordinators designated in § 1570.201 of this subchapter, as well as any designated alternates or secondary security coordinators. 2. Employees who— a. Conduct training and testing of employees when the training or testing is required by TSA's security regulations. b. Manage or direct implementation of security plan requirements.

■ 13. Add part 1584 to read as follows:

PART 1584—HIGHWAY AND MOTOR CARRIERS

Subpart A—General

Sec.

1584.1 Scope.
1584.3 Terms used in this part.

Subpart B—Security Programs

1584.101 Applicability.
1584.103 [Reserved]
1584.105 [Reserved]
1584.107 [Reserved]

1584.109 [Reserved]
1584.111 [Reserved]
1584.113 Security training program general requirements.
1584.115 Security training and knowledge for security-sensitive employees.

Subpart C [Reserved]

Appendix A to Part 1584—Urban Area Determinations for Over-The-Road Buses

Appendix B to Part 1584—Security-Sensitive Job Functions For Over-the-Road Buses

Authority: 6 U.S.C. 1181 and 1184; 49 U.S.C. 114.

Subpart A—General

§ 1584.1 Scope.

This part includes requirements for persons providing transportation by an over-the-road bus (OTRB). Specific sections in this part provide detailed requirements.

§ 1584.3 Terms used in this part.

In addition to the terms in §§ 1500.3, 1500.5, and 1503.202 of subchapter A and § 1570.3 of subchapter D of this chapter, the following term applies to this part.

Security-sensitive employee means an employee whose responsibilities for the owner/operator include one or more of the security-sensitive job functions identified in Appendix B to this part where the security-sensitive function is performed in the United States or in direct support of the common carriage of persons or property between a place in the United States and any place outside of the United States.

Subpart B—Security Programs

§ 1584.101 Applicability.

The requirements of this subpart apply to each OTRB owner/operator providing fixed-route service that originates, travels through, or ends in a geographic location identified in Appendix A to this part.

§ 1584.103 [Reserved]

§ 1584.105 [Reserved]

§ 1584.107 [Reserved]

§ 1584.109 [Reserved]

§ 1584.111 [Reserved]

§ 1584.113 Security training program general requirements.

(a) *Security training program required.* Each owner/operator identified in § 1584.101 of this part is required to adopt and carry out a security training program under this subpart.

(b) *General requirements.* The security training program must include the following information:

(1) Name of owner/operator.

(2) Name, title, telephone number, and email address of the primary individual to be contacted with regard to review of the security training program.

(3) Number, by specific job function category identified in Appendix B to this part, of security-sensitive employees trained or to be trained.

(4) Implementation schedule that identifies a specific date by which initial and recurrent security training required by § 1570.111 of this subchapter will be completed.

(5) Location where training program records will be maintained.

(6) Curriculum or lesson plan, learning objectives, and method of delivery (such as instructor-led or computer-based training) for each course used to meet the requirements of § 1584.115 of this part. TSA may request additional information regarding the curriculum during the review and approval process.

(7) Plan for ensuring supervision of untrained security-sensitive employees performing functions identified in Appendix B to this part.

(8) Plan for notifying employees of changes to security measures that could change information provided in previously provided training.

(9) Method(s) for evaluating the effectiveness of the security training program in each area required by § 1584.115 of this part.

(c) *Relation to other training.* (1) Training conducted by owner/operators to comply other requirements or standards may be combined with and used to satisfy elements of the training requirements in this subpart.

(2) If the owner/operator submits a security training program that relies on pre-existing or previous training materials to meet the requirements of subpart B, the program submitted for approval must include an index, organized in the same sequence as the requirements in this subpart.

(d) *Submission and Implementation.* The owner/operator must submit and implement the security training program in accordance with the schedules identified in §§ 1570.109 and 1570.111 of this subchapter.

§ 1584.115 Security training and knowledge for security-sensitive employees.

(a) *Training required for security-sensitive employees.* No owner/operator required to have a security training program under § 1584.101 of this part may use a security-sensitive employee to perform a function identified in Appendix B to this part unless that individual has received training as part of a security training program approved by TSA under 49 CFR part 1570, subpart B, or is under the direct supervision of a security-sensitive employee who has received the training required by this section.

(b) *Limits on use of untrained employees.* Notwithstanding paragraph (a) of this section, a security-sensitive employee may not perform a security-sensitive function for more than sixty (60) calendar days without receiving security training.

(c) *Prepare.* Each owner/operator must ensure that each of its security-sensitive employees with position- or function-specific responsibilities under the owner/operator's security program have knowledge of how to fulfill those responsibilities in the event of a security threat, breach, or incident to ensure—

(1) Employees with responsibility for transportation security equipment and systems are aware of their responsibilities and can verify the equipment and systems are operating and properly maintained; and

(2) Employees with other duties and responsibilities under the company's security plans and/or programs, including those required by Federal law, know their assignments and the steps or resources needed to fulfill them.

(d) *Observe.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge of the observational skills necessary to recognize—

(1) Suspicious and/or dangerous items (such as substances, packages, or conditions (for example, characteristics of an IED and signs of equipment tampering or sabotage);

(2) Combinations of actions and individual behaviors that appear suspicious and/or dangerous, inappropriate, inconsistent, or out of the ordinary for the employee's work environment which could indicate a threat to transportation security; and

(3) How a terrorist or someone with malicious intent may attempt to gain sensitive information or take advantage of vulnerabilities.

(e) *Assess.* Each owner/operator must ensure that each of its security-sensitive employees has knowledge necessary to—

(1) Determine whether the item, individual, behavior, or situation requires a response as a potential terrorist threat based on the respective transportation environment; and

(2) Identify appropriate responses based on observations and context.

(f) *Respond.* Each owner/operator must ensure that each of its security-

sensitive employees has knowledge of how to—

(1) Appropriately report a security threat, including knowing how and when to report internally to other employees, supervisors, or management, and externally to local, state, or federal agencies according to the owner/operator's security procedures or other relevant plans;

(2) Interact with the public and first responders at the scene of the threat or incident, including communication with passengers on evacuation and any specific procedures for individuals with disabilities and the elderly; and

(3) Use any applicable self-defense devices or other protective equipment provided to employees by the owner/operator.

Subpart C [Reserved]

Appendix A to Part 1584—Urban Area Determinations for Over-the-Road Buses

State	Urban area	Geographic areas
CA	Anaheim/Los Angeles/Long Beach/Santa Ana Areas.	Los Angeles and Orange Counties.
	San Diego Area	San Diego County.
	San Francisco Bay Area	Alameda, Contra Costa, Marin, San Francisco, and San Mateo Counties.
DC (VA, MD, and WV).	National Capital Region	District of Columbia; Counties of Calvert, Charles, Frederick, Montgomery, and Prince George's, MD; Counties of Arlington, Clarke, Fairfax, Fauquier, Loudoun, Prince William, Spotsylvania, Stafford, and Warren County, VA; Cities of Alexandria, Fairfax, Falls Church, Fredericksburg, Manassas, and Manassas Park City, VA; Jefferson County, WV.
IL/IN	Chicago Area	Counties of Cook, DeKalb, DuPage, Grundy, Kane, Kendall, Lake, McHenry, and Will, IL; Counties of Jasper, Lake, Newton, and Porter, IN; Kenosha County, WI.
MA	Boston Area	Counties of Essex, Norfolk, Plymouth, Suffolk, Middlesex, MA; Counties of Rockingham and Strafford, NH.
NY (NJ and PA)	New York City/Jersey City/Newark Area.	Counties of Bronx, Kings, Nassau, New York, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester, NY; Counties of Bergen, Essex, Hudson, Hunterdon, Ocean, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, and Union, NJ; Pike County, PA.
PA (DE and NJ)	Philadelphia Area/Southern New Jersey.	Counties of Burlington, Camden, and Gloucester, NJ; Counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia, PA; New Castle County, DE; Cecil County, MD; Salem County, NJ.
TX	Dallas Fort Worth/Arlington Area.	Collin, Dallas, Delta, Denton, Ellis, Hunt, Kaufman, Rockwall, Johnson, Parker, Tarrant, and Wise Counties, TX.
	Houston Area	Austin, Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, San Jacinto, and Waller Counties, TX.

Appendix B to Part 1584—Security-Sensitive Job Functions For Over-the-Road Buses

This table identifies security-sensitive job functions for owner/operators regulated under this part. All employees performing security-sensitive functions are ''security-sensitive employees'' for purposes of this rule and must be trained.

Categories	Security-sensitive job functions for over-the-road buses
A. Operating a vehicle	Employees who have a commercial driver's license (CDL) and operate an OTRB.
B. Inspecting and maintaining vehicles	Employees who— 1. Perform activities related to the diagnosis, inspection, maintenance, adjustment, repair, or overhaul of electrical or mechanical equipment relating to vehicles, including functions performed by mechanics and automotive technicians. 2. Does not include cleaning or janitorial activities.
C. Inspecting or maintaining building or transportation infrastructure.	Employees who— 1. Provide cleaning services to areas of facilities owned, operated, or controlled by an owner/operator regulated under this subchapter that are accessible to the general public or passengers. 2. Provide cleaning services to vehicles owned, operated, or controlled by an owner/operator regulated under this part (does not include vehicle maintenance). 3. Provide general building maintenance services to buildings owned, operated, or controlled by an owner/operator regulated under this part.
D. Controlling dispatch or movement of a vehicle.	Employees who— 1. Dispatch, report, transport, receive or deliver orders pertaining to specific vehicles, coordination of transportation schedules, tracking of vehicles and equipment. 2. Manage day-to-day delivery of transportation services and the prevention of, response to, and redress of disruptions to those services. 3. Perform tasks requiring access to or knowledge of specific route information.
E. Providing security of the owner/operator's equipment and property.	Employees who patrol and inspect property of an owner/operator regulated under this part to protect the property, personnel, passengers and/or cargo.
F. Loading or unloading cargo or baggage	Employees who load, or oversee loading of, property tendered by or on behalf of a passenger on or off of a portion of a bus that will be inaccessible to the passenger while the vehicle is in operation.

Categories	Security-sensitive job functions for over-the-road buses
G. Interacting with travelling public (on board a vehicle or within a transportation facility).	Employees who— 1. Provide services to passengers on-board a bus, including collecting tickets or cash for fares, providing information, and other similar services. 2. Includes food or beverage employees, tour guides, and functions on behalf of an owner/operator regulated under this part that require regular interaction with travelling public within a transportation facility, such as ticket agents.
H. Complying with security programs or measures, including those required by federal law.	1. Employees who serve as security coordinators designated in § 1570.201 of this subchapter, as well as any designated alternates or secondary security coordinators. 2. Employees who— a. Conduct training and testing of employees when the training or testing is required by TSA's security regulations. b. Manage or direct implementation of security plan requirements.

Dated: November 18, 2016.

Huban A. Gowadia,

Deputy Administrator.

[FR Doc. 2016–28298 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Chapter XII

[Docket No. TSA–2016–0002]

RIN 1652–AA56

Surface Transportation Vulnerability Assessments and Security Plans (VASP)

AGENCY: Transportation Security Administration, DHS.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Transportation Security Administration (TSA) is issuing this ANPRM to request public comments on several topics relevant to the development of surface transportation vulnerability assessment and security plan regulations mandated by the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act). Based on its regular interaction with stakeholders, TSA assumes many higher-risk railroads (freight and passenger), public transportation agencies, and over-the-road buses (OTRBs) have implemented security programs with security measures similar to those identified by the 9/11 Act's regulatory requirements. In general, TSA is requesting information on three types of issues. First, existing practices, standards, tools, or other resources used or available for conducting vulnerability assessments and developing security plans. Second, information on existing security measures, including whether implemented voluntarily or in response to other regulatory requirements, and the potential impact of additional requirements on operations. Third, information on the scope/cost of current security systems and other measures used to provide security and mitigate vulnerabilities. This information is necessary for TSA to establish the current baseline, estimate cost of implementing the statutory mandate, and develop appropriate performance standards.

While TSA will review and consider all comments submitted, TSA invites responses to a number of specific questions posed in the ANPRM. See the Comments Invited section under **SUPPLEMENTARY INFORMATION** that follows.

DATES: Submit comments by February 14, 2017.

ADDRESSES: You may submit comments, identified by the TSA docket number to this rulemaking, to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, using any one of the following methods:

Electronically: You may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail, In Person, or Fax: Address, hand-deliver, or fax your written comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; fax (202) 493–2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Harry Schultz (TSA Office of Security Policy and Industry Engagement) or Traci Klemm (TSA Office of the Chief Counsel) at telephone (571) 227–3531 or email to *VASPPOLICY@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this rulemaking action. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you would like TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. TSA will stamp the date on the postcard and mail it to you.

TSA will file all comments to our docket address, as well as items sent to the address or email under **FOR FURTHER INFORMATION CONTACT**, in the public docket, except for comments containing confidential information and sensitive security information (SSI).[1] Should you wish your personally identifiable information redacted prior to filing in the docket, please so state. TSA will consider all comments that are in the docket on or before the closing date for

[1] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

Specific Questions

In general, TSA seeks comments on the broad areas outlined within this ANPRM and approaches TSA can take to integrate existing requirements and voluntarily initiated programs to enhance security as intended by the statutory requirements this rulemaking will fulfill. TSA also seeks comments on how this rulemaking could be implemented to meet the requirements of the law in a manner that maximizes benefits without imposing excessive, unjustified, or unnecessary costs.

Specific questions are included in this ANPRM immediately following the discussion of the relevant issues. TSA asks that commenters provide as much information as possible. In some areas, TSA requests very specific information. Whenever possible, please provide citations and copies of any relevant studies or reports on which you rely, as well as any additional data which supports your comment. It is also helpful to explain the basis and reasoning underlying your comment. TSA appreciates any information provided. While complete answers are preferable, TSA recognizes that providing detailed comments on every question could be burdensome and will consider all comments, regardless of whether the response is complete. Each commenting party should include the identifying number of the specific question(s) to which it is responding. To assist commenters, a fillable template with all of the questions in sequential order is included in the docket. Commenters can download the template, complete it, and then upload it to the docket or submit a hard copy as directed under **ADDRESSES**.

TSA will use comments to make decisions regarding the content and direction of the notice of proposed rulemaking (NPRM). TSA also requests additional comments and information not addressed by these questions that would promote an understanding of the implications of imposing a VASP regulatory requirement. TSA does not expect that every commenter will be able to answer every question. Please respond to those questions you feel able to answer or that address your particular issue.

TSA encourages responses from all interested entities, not just the transportation sectors to which this rulemaking would apply. Each comment filed by a party, other than public transportation agencies, railroads, or OTRB companies, or their representatives, should explain the commenter's interest in this rulemaking and how their comments may assist in TSA's development of the regulation.

Handling of Confidential or Proprietary Information and SSI Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in the **FOR FURTHER INFORMATION CONTACT** section.

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In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Abbreviations and Terms Used in This Document

17 SAIs—17 Security and Emergency Preparedness Action Items for Transit Agencies
AAR—Association of American Railroads
AMTRAK—National Railroad Passenger Corporation
ANPRM—Advance Notice of Proposed Rulemaking
APTA—American Public Transportation Association
BASE—Baseline Assessment for Security Enhancement
CSRs—Corporate Security Reviews
DOT—Department of Transportation
DHS—Department of Homeland Security
EXIS—Exercise Information System
FEMA—Federal Emergency Management Agency
FMCSA—Federal Motor Carrier Safety Administration
FRA—Federal Railroad Administration
FTA—Federal Transit Administration
HMR—Hazardous Materials Regulations
HSA—Homeland Security Act of 2002
HSAS—Homeland Security Advisory System
HSEEP—Homeland Security Exercise and Evaluation Program
HTUA—High-Threat Urban Area
I–STEP—Intermodal Security Training and Exercise Program
NCIPP—National Critical Infrastructure Prioritization Program
NPRM—Notice of Proposed Rulemaking
NTAS—National Terrorism Advisory System
NY MTA—New York Metropolitan Transportation Authority
OMB—Office of Management and Budget
OTRB—Over-the-Road Bus
OAs—Oversight Agencies
PHMSA—Pipeline and Hazardous Materials Safety Administration
PPD—Presidential Policy Directive
PRA—Paperwork Reduction Act of 1995

PTPR—Public Transportation and Passenger Railroads
RSSM—Rail Security-Sensitive Materials
RTAs—Rail Transit Agencies
SMARToolbox—Security Measures and Resources Toolbox
SSI—Sensitive Security Information
SSO—State Safety Oversight
STB—Surface Transportation Board
TSA—Transportation Security Administration
TSGP—Transit Security Grant Program
T–START—Transportation Security Template and Assessment Review Toolkit
TWIC—Transportation Worker Identification Credential
UASI—Urban Area Security Initiative
VASP—Vulnerability Assessments and Security Plans

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I. Introduction

This ANPRM is part of a series of rulemakings applicable to public transportation and passenger railroads (PTPR) systems, freight railroads, and OTRBs to comply with requirements of the 9/11 Act.[2] The 9/11 Act requires TSA to promulgate regulations involving: (1) Security training of frontline employees,[3] (2) vulnerability assessments and security plans,[4] and (3) employee vetting.[5]

This ANPRM is limited to the requirements for VASP regulations. Through this ANPRM, TSA is seeking comments on: (1) Requirements for vulnerability assessments of security systems and operations and critical assets/infrastructure, (2) requirements for security plans, and (3) resources or other required programs that TSA should consider as relevant for meeting these requirements. Knowledgeable and constructive input from railroads, public transportation agencies, OTRB operators, their representative associations, labor unions, state and local governments, and the general public who rely on these systems is critical for developing a regulation with the proper balance between costs and benefits.

By imposing VASP requirements on higher-risk railroads, public transportation agencies, and OTRBs, this rulemaking should establish a uniform base of vulnerability assessments and security plans for security systems and operations, as well as critical assets and/or infrastructure that these owner/operators may own or control.

TSA believes the VASP regulations should consider current voluntarily implemented security measures and operational issues in establishing performance standards for compliance. To that end, TSA is seeking specific information to assist in developing effective regulatory policies, resources for implementation, and valid cost estimates. To provide context for the questions, this ANPRM is organized to include requests for comment immediately following discussions of the relevant issues.

TSA is requesting public comment and data to assist in identifying the current baseline in order to determine the incremental cost of compliance with the assessment and planning elements required by the 9/11 Act. In general, TSA is particularly interested in data from surface transportation owner/operators who currently have security plans specifically based on a vulnerability or similar assessment. For example, TSA needs data on the cost of conducting an assessment (if not conducted by TSA), cost of developing a security plan, and the types and cost of risk-reduction or mitigation measures. While TSA has gathered significant information in these areas as part of its ongoing rulemaking efforts, there are some areas where it would be helpful to validate cost elements and ensure our understanding of the existing baseline is current. The requests for comment seek information to close these information gaps.

As discussed below, TSA is concerned about the impact of this regulation based on the diversity of surface transportation owner/operators, which could include large (national) companies, publicly owned systems, and small businesses. While not required, TSA asks commenters to include information regarding the nature and size of the business. Information on the nature of the business operation of the person commenting will help TSA better understand and analyze the information provided. Failure to include this specific information will not preclude the agency's consideration of the information submitted.

II. Background

A. Surface Transportation

The surface transportation rules required by the 9/11 Act must address a decentralized, diffuse, complex, and evolving terrorist threat in the context of an inherently open and diverse transportation system. The U.S. surface transportation network is immense, consisting of public transportation systems, passenger and freight railroads, highways, motor carrier operators, pipelines, and maritime facilities. The New York Metropolitan Transportation Authority (NY MTA) alone transports over 11 million passengers daily and represents just one of the more than 6,800 U.S. public transit agencies for which TSA has oversight, ranging from very small bus-only systems in rural areas to very large multi-modal systems in urban areas like the NY MTA. More than 500 individual freight railroads operate on nearly 140 thousand miles of track carrying essential goods. Eight million large capacity commercial trucks and almost 4 thousand commercial bus companies travel on the

[2] Public Law 110–53, 121 Stat. 266 (Aug. 3, 2007).

[3] *Id.* secs. 1408, 1517, and 1534. For a discussion regarding the applicability of the 9/11 Act to these proposed rules, see Section II of this ANPRM.

[4] 9/11 Act secs. 1405, 1512, and 1531. *See also* Section II of this ANPRM.

[5] 9/11 Act secs. 1411, 1520, and 1531(e)(2). *See also* Section II of this ANPRM.

4 million miles of roadway in the United States and on more than 600 thousand highway bridges and through 350 tunnels greater than 300 feet in length. Surface transportation operators carry approximately 750 million intercity bus passengers and 10 billion passenger trips on public transportation each year. Securing such diverse surface transportation systems in a society that depends upon the free movement of people and commerce is a complex undertaking that requires extensive collaboration with surface transportation operators.

Unlike the aviation mode of transportation, direct responsibility to secure surface transportation systems falls primarily on the system owners and operators. In further contrast to aviation, surface transportation systems are, by nature, open systems. Surface transportation systems can be national and privately held companies, public transportation systems owned and operated by the government, or a family-owned business with two buses. Regardless of the size of the business, surface transportation owner/operators are in the best position to know their facilities and their operational challenges. As a whole, these owner/operators have spent billions of dollars of their own funds to secure critical infrastructure, provide uniformed law enforcement and specialty security teams, and conduct operational activities and deterrence efforts.

Security and emergency response planning is not new to surface transportation owner/operators; they have been working under DOT [6] and DHS [7] regulations. Although DOT's regulations relate primarily to safety, many safety activities and programs also benefit security and help to reduce risk. In the surface environment, TSA has built upon these standards to improve security programs with minimal regulations.

B. TSA's Role and Responsibility

TSA is responsible for assessing security risks for any mode of transportation, developing appropriate security measures for dealing with those risks, and ensuring implementation of those measures.[8] Assessments include analysis of intelligence information and on-site reviews of transportation systems and operations. TSA works collaboratively with its surface stakeholders to enhance information sharing and develop security measures and best practices appropriate for the operational environment. DHS provides funding to support information sharing and implementation of security measures. This funding supports information sharing and analysis centers (ISACs) that facilitate threat warning and incident reporting for railroads, public transportation systems, and over-the-road buses. In addition, TSA works with DHS to develop and implement a risk-based determination for allocation of Federal grant funds. Eligible surface transportation owner/operators can supplement their own investment in security, using this funding to identify and mitigate operational vulnerabilities.

TSA can also ensure implementation through promulgation of regulations.[9] For example, the Rail Transportation Security regulation (published in 2008 and codified at 49 CFR part 1580) requires all rail systems (freight, passenger, and public transportation) to appoint rail security coordinators [10] and report significant security concerns to TSA through the Transportation Security Operations Center (located at the ''Freedom Center'').[11] In addition, freight railroads are required to report (upon request by TSA) the location and shipping information for rail cars containing certain hazardous materials and provide ''chain of custody'' to ensure security of those materials when transported through high-risk areas.[12]

C. The 9/11 Act

The 9/11 Act includes numerous mandates related to surface transportation security. These requirements include development of security strategies, reporting on implementation, information sharing, civil penalties, Visible Intermodal Prevention and Response teams, security assessments, grant programs for security enhancements, a national security exercise program, background check programs, protection for employees reporting security violations, public outreach campaigns, and studies on particular hazards and threats.[13]

As previously noted, the 9/11 Act also mandates that TSA require VASP for higher-risk public transportation agencies, railroads, and OTRBs; security training of their frontline employees; and, employee background checks.[14] TSA is addressing these requirements in three separate, but related, rulemakings.[15] The docket for this ANPRM includes a table aligning the statutory provisions for VASP across the three modes (public transportation, railroads, and OTRBs).

D. Applicability

For purposes of this ANPRM, TSA is limiting the scope of its request for comments related to applicability. As previously noted, the VASP rulemaking is part of a series of rulemakings to implement requirements of the 9/11 Act. As the first of these rulemakings published by TSA, the Security Training NPRM provides the general structure, including proposed applicability and the framework for a regulatory program. TSA intends for the applicability proposed in the Security Training NPRM to apply generally to the three

[6] For example, the Pipeline and Hazardous Materials Safety Administration regulates the transportation of hazardous materials in commerce, including requirements for safety and security training and for security planning (49 CFR parts 171–180); the Federal Railroad Administration regulates passenger train emergency preparedness (49 CFR parts 200–299); and the Federal Transit Administration requires system safety programs for rail transit agencies (49 CFR part 659).

[7] For example, the Transportation Worker Identification Credential (TWIC) program is a TSA and U.S. Coast Guard initiative in the United States. For more information, see *https://www.tsa.gov/for-industry/twic.* A TWIC is required for workers who need access to secure areas of the nation's maritime facilities and vessels. TSA conducts a security threat assessment (background check) to determine a person's eligibility and issues the credential. U.S. citizens and immigrants in certain immigration categories may apply for the credential. Most mariners licensed by the U.S. Coast Guard also require a credential. *See* 49 CFR part 1572. The National Protection and Programs Directorate of DHS regulates the security of certain high-risk chemical facilities in the United States. *See* 6 CFR part 27.

[8] *See* 49 U.S.C. 114(d) and (f), codifying provisions of the Aviation and Transportation Security Act (ATSA), Public Law 107–71, 115 Stat. 597 (Nov. 19, 2001). ATSA created TSA and made it the primary federal agency responsible to enhance security for all modes of transportation. Section 403(2) of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135 (Nov. 25, 2002), transferred all functions related to transportation security, including those of the Secretary of Transportation and the Under Secretary of Transportation for Security related to TSA, to the Secretary of Homeland Security. Pursuant to DHS, ''Delegation to the Administrator of the Transportation Security Administration,'' Delegation Number 7060.2 (Nov. 5, 2003), the Secretary delegated to the Administrator, subject to the Secretary's guidance and control, the authority vested in the Secretary with respect to TSA, including that in sec. 403(2) of the HSA.

[9] 49 U.S.C. 114(l)(1).

[10] 49 CFR 1580.101 and 1580.201.

[11] 49 CFR 1580.105 and 1580.203.

[12] 49 CFR 1580.107.

[13] *See* 9/11 Act, at Title XII (Transportation Security Planning and Information Sharing), Title XIII (Transportation Security Enhancements), Title XIV (Public Transportation Security), and Title XV (Surface Transportation Security).

[14] *See* 9/11 Act secs. 1405, 1512, and 1531 for VASP requirements; secs. 1408, 1517, and 1534 for employee security training requirements; and secs. 1411 and 1520 for employee vetting requirements. The statutory mandates for VASP in secs. 1512, and 1531 also include a requirement to conduct security threat assessments of security coordinators.

[15] TSA published an NPRM to implement requirements related to employee security training, titled ''Security Training Programs for Surface Transportation Employees,'' published elsewhere in this issue of the **Federal Register**. TSA will address requirements for employee vetting in a separate NPRM. *See* Fall 2016 Unified Agenda, RIN 1652–AA69.

related rulemakings.[16] In other words, the higher-risk PTPR, freight railroad, and OTRB owner/operators required to have a security-training program (surface owner/operators) would also be required to conduct vulnerability assessments, implement security plans, and implement requirements for employee vetting (security threat assessments).

Consistent with the proposed applicability for the Security Training NPRM, TSA assumes the VASP requirements would apply to—

- Class 1 railroads (as assigned by regulations of the Surface Transportation Board (STB) (49 CFR part 1201; General Instructions 1–1);
- Railroads transporting rail security-sensitive materials (RSSM) [17] in a high-threat urban area (HTUA);
- Railroads hosting higher-risk rail operations (including freight railroads and the intercity or commuter systems);
- PTPR systems identified as higher-risk operating in one of the following eight regions (geographically consistent with designations under the Urban Area Security Initiative (UASI)): San Francisco Bay area, Los Angeles/Long Beach and Anaheim/Santa Ana areas, National Capital Region and Baltimore areas, Atlanta area, Chicago area, Boston area, New York City and Jersey City/Newark areas, and Philadelphia area;
- Amtrak (the Security Training NPRM includes a list of systems); and
- OTRB owner/operators providing fixed-route service to, through, or from one of the following areas (geographically consistent with designations under the UASI): Anaheim/Los Angeles/Long Beach/Santa Ana areas, San Diego area, San Francisco Bay area, National Capital Region, Boston area, New York City/Jersey City/Newark area, Philadelphia area/Southern New Jersey area, Dallas/Fort Worth/Arlington area, Chicago area, and Houston area.

As TSA has included a full discussion of the proposed and alternative applicability options in the Security Training NPRM, as well as an opportunity to comment, that discussion is not duplicated as part of this ANPRM. Later in this ANPRM, however, a specific request for comments is included for the impact on small businesses. TSA will consider all comments received on this ANPRM.

III. Rulemaking Context

The baseline of security for surface transportation has been substantially enhanced since the 9/11 Act was enacted through programs (including some required by the 9/11 Act), and the cooperative and collaborative relationship between TSA and the surface transportation industry. These relationships have led to enhanced security through development of best practices, sharing of information (both reporting of security-related incidents by the industry, intelligence sharing by the government, and other efforts such as the ISACs), and security programs and measures to strengthen and enhance the security of surface transportation networks.

The VASP regulations will be part of this broad and sustained effort to develop and maintain an enhanced security baseline for surface transportation as well as strengthening the security of nationally significant critical assets. Understanding the scope of these efforts is essential to this rulemaking as the 9/11 Act specifically authorizes TSA to recognize existing procedures, protocols, and standards that can be used to meet all or part of the regulatory requirements for assessments and planning.[18] Additional information on a few of these programs is provided below.

A. Grant Programs

The 9/11 Act authorized funding for surface security enhancements specifically for PTPR, freight railroads, and OTRB owner/operators.[19] To the extent funds are appropriated for this purpose, TSA provides the Federal Emergency Management Agency (FEMA) with subject matter expertise, assisting in the development of risk determinations, review of investment justifications, and other aspects of the surface transportation security grant programs. These grants support surface transportation risk-reduction or mitigation measures by applying Federal funding to critical security projects. Between fiscal years (FYs) 2006 and 2016, DHS awarded more than $2.4 billion in transportation security grant funding to freight railroad carriers and operators, OTRB operators, the trucking community, and public mass transit owners and operators, including Amtrak, and their dedicated law enforcement providers. Congress appropriated $100 million in FY 2016, from which DHS awarded $87 million for mass transit, $10 million for passenger rail, and $3 million for motor coach security grants.

TSA assumes surface transportation owner/operators will incorporate security measures and other security enhancements funded by these grant programs into security programs complying with the regulatory requirements mandated by the 9/11 Act. This assumption recognizes requirements in the authorizing statutes for these grant programs, which all prioritized funding for meeting 9/11 Act requirements for security training, assessments, and planning.

B. Intermodal Security Training and Exercise Program

The 9/11 Act also required development of a security exercise program to ''assess[ ] and improv[e] the capabilities'' of surface modes ''to prevent, prepare for, mitigate against, respond to, and recover from acts of terrorism.'' [20] TSA implemented this requirement through the Intermodal Security Training and Exercise Program (I–STEP). I–STEP brings public and private sector partners together to exercise, train, share information, and address transportation security issues to protect travelers, commerce, and infrastructure. Through the program, TSA facilitates modal and intermodal exercises and workshops throughout the country. The program also provides training support to help modal operators meet their training objectives. The Exercise Information System (EXIS) is an online tool developed by TSA, which leverages the concept of I–STEP in support of all operators, but particularly those operators that may be less competitive for I–STEP exercises because they are lower risk systems.

C. Department of Transportation Regulations

1. Hazardous Material Regulations

DOT modes also have regulatory programs that may be relevant to

[16] The Security Training NPRM incorporates all of requirements in current 49 CFR part 1580. The rail operations subject to the requirements in current part 1580 is broader than the proposed applicability for rail operations in the Security Training NPRM. To the extent an owner/operator must comply with requirements in current part 1580, applicability proposed in the Security Training NPRM would not affect that obligation. For example, if a railroad is required to have a security coordinator under current part 1580, but is not within the scope of proposed applicability for security training, they must still have a security coordinator. TSA anticipates capturing this additional security coordinator population in the related rulemaking for vetting requirements, consistent with the 9/11 Act's requirement to conduct security threat assessments of all security coordinators. *See* 9/11 Act secs. 1512(e)(2) and 1531(e)(2).

[17] *See* definition in proposed 49 CFR 1580.3 of the Security Training NPRM, which is consistent with the definition in current 49 CFR 1580.100(b).

[18] *See* 9/11 Act secs. 1405(i), 1512(j), and 1531(i).

[19] *See* 9/11 Act secs. 1406(a)(2) (public transportation security assistance), 1513(a)(2) (railroads), 1514(b) (Amtrak), and 1532(f)(1) (OTRBs).

[20] *See* 9/11 Act secs. 1407, 1516 and 1533. *See also* sec. 114 of the Security and Accountability for Every Port Act of 2006 (SAFE Port Act), Public Law 109–347, 120 Stat. 1884, 1896–97 (Oct. 13, 2006).

meeting VASP requirements. For example, every freight railroad transporting at least one of the hazardous materials that trigger applicability under 49 CFR part 172 (known as the Hazardous Materials Regulations (HMR)) is required to have and adhere to a security plan. While the security plan requirements of the HMR may not be identical to the requirements in the 9/11 Act, TSA anticipates that freight railroad owner/operators may be able to use plans developed and implemented under the HMR to satisfy a portion of TSA's VASP regulations.

2. Transit Safety and Security

The Federal Transit Administration (FTA) has responsibility for managing State oversight for rail transit agencies (RTAs). Under 49 CFR part 659, State Oversight Agencies (SOAs) must require the rail transit agencies to develop and implement a written system safety program plan and system security plan that complies with requirements in 49 CFR part 659.

Part 659 requires SOAs to approve and annually review the rail transit agency system safety and security plans. Moreover, the SOAs must require covered agencies to develop and document a process for the performance of ongoing internal safety and security reviews as part of their plans. Finally, the SOAs themselves must conduct on-site reviews of system safety program plan and system security plan implementation.

The FTA has announced its intent to rescind part 659.[21] On March 16, 2016, the FTA published a safety-focused final rule, adding part 674 to their regulations to supersede part 659.[22] The safety requirements of part 674 took effect April 15, 2016. The FTA has stated its intent to rescind the security requirements in part 659 no later than April 15, 2019,[23] noting TSA's responsibility for rulemakings related to security of public transportation.[24] It also noted that RTAs may continue to implement measures to secure their operations and assets, but it is no longer the requirement of the SOAs to oversee those measures.[25]

The security measures that RTAs have implemented because of requirements under part 659 may be similar to what TSA proposes within the parameters set by the 9/11 Act. As with freight rail, TSA anticipates that PTPR owner/operators may be able to use plans developed and implemented under these DOT regulatory requirements to satisfy a portion of TSA's VASP regulations.

3. Emergency Preparedness Plans

The Federal Railroad Administration (FRA) safety standards require emergency preparedness plans by railroads connected with the operation of passenger trains (including freight carriers hosting passenger rail operations). Under 49 CFR part 239, these railroads must implement emergency preparedness plans that include: Communication measures (including notification to on-board crewmembers and passengers about the nature of the emergency and control center personnel of outside emergency responders and adjacent rail modes of transportation); passenger evacuation in emergency situations; employee training and qualification; joint operations; tunnel safety; liaison with emergency responders; on-board emergency equipment; and, passenger safety information. In the Security Training NPRM, TSA proposes to allow training required by 49 CFR 239.101(a)(2) to be combined with other training in order to partially or fully meet requirements under § 1580.115(f) or § 1582.115(f) of that NPRM.[26] TSA expects that portions of the emergency response plans developed under part 239 could be equally relevant for satisfying some of the VASP requirements.

D. 17 Security and Emergency Action Items

Following the events of September 11, 2001, FTA developed security and emergency preparedness resources and provided technical assistance to transit agencies across the United States, including the ''Top 20 Security and Emergency Preparedness Action Items for Transit Agencies'' (published in 2003). In 2006, FTA and TSA collaborated to update and consolidate the FTA list into 17 Security and Emergency Preparedness Action Items for Transit Agencies (17 SAIs).

In 2012, FTA and TSA revised the 17 SAIs to ensure alignment with changes TSA was implementing in its assessment program. These changes added cyber-security as a topic, replaced the color-coded Homeland Security Advisory System (HSAS) with the National Terrorism Advisory System (NTAS), and revised and highlighted the priorities of risk management and risk information gathering and analysis. All changes reflected consultation with the industry through TSA's Mass Transit Sector Coordinating Council, chaired by the American Public Transportation Association (APTA).

The 17 SAIs reflect the high-level priority topics included in a security and emergency preparedness program, appropriately scaled to risk environment and operations. Table 1 identifies the current 17 SAIs.

TABLE 1—17 SECURITY AND EMERGENCY PREPAREDNESS ACTION ITEMS

Management and Accountability	1. Establish written system security programs (SSPs) and emergency management operations/response plans.
	2. Define roles and responsibilities for security and emergency preparedness.
	3. Ensure that operations and maintenance supervisors, forepersons, and managers are held accountable for security issues under their control.
	4. Coordinate security and emergency operations/response plan(s) with local and regional agencies.
Security and Emergency Response Training	5. Establish and maintain a security and emergency training program.
National Terrorism Advisory System (NTAS)	6. Establish plans and protocols to respond to the NTAS alert levels.
Public Awareness	7. Implement and reinforce a public security and emergency awareness program.
Risk Management and Information Sharing	8. Establish and use a risk management process.
Risk Information Collection and Sharing	9. Establish and use an information sharing process for threat and intelligence information.
Drills and Exercises	10. Conduct tabletop exercises and functional drills.

[21] *See* 81 FR 14230 (Mar. 16, 2016) (adding part 674 to title 49 of the CFR).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 14233.

[25] *Id.*

[26] Titled ''Security Training Programs for Surface Transportation Employees,'' published elsewhere in this issue of the **Federal Register**.

TABLE 1—17 SECURITY AND EMERGENCY PREPAREDNESS ACTION ITEMS—Continued

Cybersecurity	11. Develop a comprehensive cyber-security strategy.
Facility Security, Access Controls, and Background Investigations	12. Control access to security critical facilities with identification (ID) badges for all visitors, employees, and contractors.
	13. Conduct physical security inspections.
	14. Conduct background investigations of employees and contractors.
Document Control	15. Control access to documents of security critical systems and facilities.
	16. Process for handling and access to SSI.
Security Program Audits	17. Establish and conduct security program audits.

E. Baseline Assessment for Security Enhancement Program

In 2006, TSA established the BASE program, through which TSA inspectors conduct a thorough security assessment of public transportation agencies, passenger railroads, bus companies, and trucking companies. To conduct an assessment, inspectors ask a series of questions to develop a ''snapshot'' of current security measures (questions are slightly different for each mode). Within the relevant SAI categories, TSA applies numerical values to the level of implementation of an effective security measure. Final SAI scores quantify the entity's comprehensive transportation security posture.

TSA collaborates with owner/operators to develop options that could help mitigate a security-related vulnerability relative to the industry standard and identifies resources that TSA or other areas of the Federal government can provide to support raising the security baseline. The results of these assessments inform TSA policies and development of best practices to align such policy and program priorities with industry-wide security weaknesses. For example, during the interaction with owner/operators as part of a BASE assessment, TSA obtains information about whether specific measures for addressing identified issues are feasible within the specific-type of operation. TSA uses this information to develop alternative tools to enhance security. As TSA identifies industry-wide security weaknesses, the information informs priorities, policies, and programs. For example, TSA has used BASE statistics to recommend funding priorities to FEMA in an effort to ensure allocation priorities are consistent with identified industry-wide security weaknesses in light of current risks. In 2007, TSA's review of the industry-wide scores in the training category of the BASE assessments indicated deficiencies. Based on this information, DHS prioritized frontline employee training within the Transit Security Grant Program (TSGP).

In FY 2011, TSA's review of BASE scores and discussions with industry revealed deficiencies at nationally critical infrastructure assets that were not being addressed at all, or as quickly as they could be. TSA worked with FEMA to overhaul the TSGP framework to prioritize these assets (''Top Transit Asset List'') for funding through a wholly competitive process.[27] DHS subsequently awarded over $565 million to protect critical infrastructure assets. This funding resulted in increased preventive security for over 80 percent of nationally critical infrastructure assets.

In addition, as an initial requirement for grant eligibility, applicants must validate they have an updated security plan based on a security assessment, such as the BASE. They then must align all requests for funding (investment justifications) with items identified in the security assessment or security plan.

In FY 2015, TSA Inspectors completed 92 BASE assessments on mass transit and passenger rail agencies, of which 13 resulted in Gold Standard Awards for those entities achieving overall excellence in security program management. In 2012, TSA expanded the BASE program to the highway and motor carrier[28] mode and has since conducted over 400 reviews of highway and motor carrier operators, with 98 reviews conducted in FY 2015. On average, TSA conducts approximately 150 reviews on mass transit and highway and motor carrier operators each year, with numerous reviews in various stages of completion for FY 2016.

F. Transportation Security Template and Assessment Review Toolkit

The Transportation Security Template and Assessment Review Toolkit (T–START) is a resource created by TSA to assist owner/operators in developing effective security practices and in the construction of a security plan. The current version of T–START incorporates the BASE assessment for the highway mode. It is available for small companies, political subdivisions, or governmental entities having ownership or control over large systems (such as school buses), and large companies with national coverage. T–START currently includes five modules that walk the owner/operator's representative through the process of understanding security management and risk, a tool for conducting assessments, identification of risk-reduction, or mitigation options through awareness of industry ''best practices'' and other options developed by TSA, and a template for developing a security plan, the final crucial step toward an effective security program. T–START is currently scoped to address highway transportation security issues.

G. Security Measures and Resources Toolbox

The Security Measures and Resources Toolbox (SMARToolbox) is a resource to help surface transportation professionals identify relevant insights, security measures, and smart practices to increase their security baseline. The SMARToolbox is not a set of standards, rules, or regulations; rather, it is a compilation of smart security practices developed by industry, for industry across all modes of surface transportation. The heart of the SMARToolbox is a searchable, modifiable database of security measures identified by surface transportation professionals as valuable to their organization's operations. The SMARToolbox aligns security measures with category filters to allow for various searches by, among other things, mode, threat scenario, and core capability. TSA intends this database to be a resource for the industry to assess the value of implementing various security measures into transportation systems. To augment the usefulness of the security measures database, the SMARToolbox also offers resources designed to facilitate implementation of the measures (for example, implementation checklists and self-assessment functions).

[27] *See* FEMA, ''FY 2012 Transit Security Grant Program,'' available at *https://www.fema.gov/fy-2012-transit-security-grant-program.*

[28] *See* 77 FR 31632 (May 29, 2012) (60-day notice for Information Collection Request (ICR) for more information on expanding the BASE to highway and motor carrier transportation).

H. Terrorism Risk Analysis and Security Management Plan Developed by the Association of American Railroads

As an industry, the railroads have undertaken efforts to enhance the security and resiliency of the freight rail transportation system. In the aftermath of the 9/11 terrorist attacks, the railroad industry worked closely with local, State, and Federal officials and used their own police forces; the railroads increased inspections and patrols, restricted access to key facilities, briefly suspended freight traffic in the New York City area, and changed certain operational practices as anti-terrorist measures.

The Association of American Railroads (AAR) developed the Railroad Risk Analysis and Security Plan (AAR Plan) in April 2003 in response to the terrorist attacks, and as a proactive measure in collaboration with DHS to address perceived security vulnerabilities within the freight rail system. TSA anticipates that freight railroad owner/operators who have participated in this AAR initiative would use the results of those security assessments to expedite their compliance with the proposed requirements in the VASP regulations.

The AAR created five critical action teams, each for a specific area of concern within the rail industry.[29] The critical action teams examined and prioritized all railroad assets, vulnerabilities, and threats, and identified countermeasures. As part of the AAR Plan, the industry developed four threat-based alert levels, laying out progressively higher levels of action for the industry to implement in the event of certain security situations.

The AAR Plan provides an overall framework for industry-wide security measures while leaving the actual implementation up to each individual railroad carrier. Carriers used the plan as a guidance document to create security management plans for their respective company addressing their unique security concerns. The industry sees the AAR Plan as a living document reflecting changes in risk. As appropriate based on a continuous risk assessment process, they update and revise the plan.

I. Best Practices Developed by the American Public Transportation Association

APTA has instituted a Standards Development Program. Four working groups within the program have developed security oriented recommended practices for use by public transit agencies. The four working groups are focused on the following issues:

- Control and Communications Security;
- Emergency Management;
- Enterprise Cybersecurity; and
- Infrastructure & Systems Security.

Through these working groups, APTA has published white papers and recommended practices.[30]

J. Security and Emergency Preparedness Plans

Both the commercial bus industry and public transportation agencies have created documents, which they named ''Security and Emergency Preparedness Plans (SEPP).'' Commercial OTRB companies created and distributed the OTRB SEPP in 2005. This document contained a proposed security assessment matrix and a template for creation of a company-wide security plan. TSA used the SEPP as the foundation for the T–START, discussed in section III.F.

In 2008, APTA released a SEPP with recommended security practices for public transit agencies and guidance for the creation of agency security assessments and protective plans. Both of these resources optimize—within the constraints of time, cost, and operational effectiveness—the protection of employees and passengers.

The SEPP meets several objectives: (1) Achieving a level of security performance and emergency readiness that meets or exceeds the needs of similarly-sized operations; (2) increasing and strengthening a company's involvement in safety and security; (3) developing and implementing an assessment program focused on improving physical security and emergency response; (4) expanding security awareness and emergency management training for employees, volunteers, first responders, and contractors, and (5) enhancing security and emergency preparedness coordination with applicable local, State, and Federal agencies.

IV. Assessments

A. General

The 9/11 Act's requirements for ''vulnerability assessments'' address both operations and assets. As shown in Diagram A, conducting such an assessment is a two-step process: (1) Assessments of security systems and operations and (2) assessments of critical assets.

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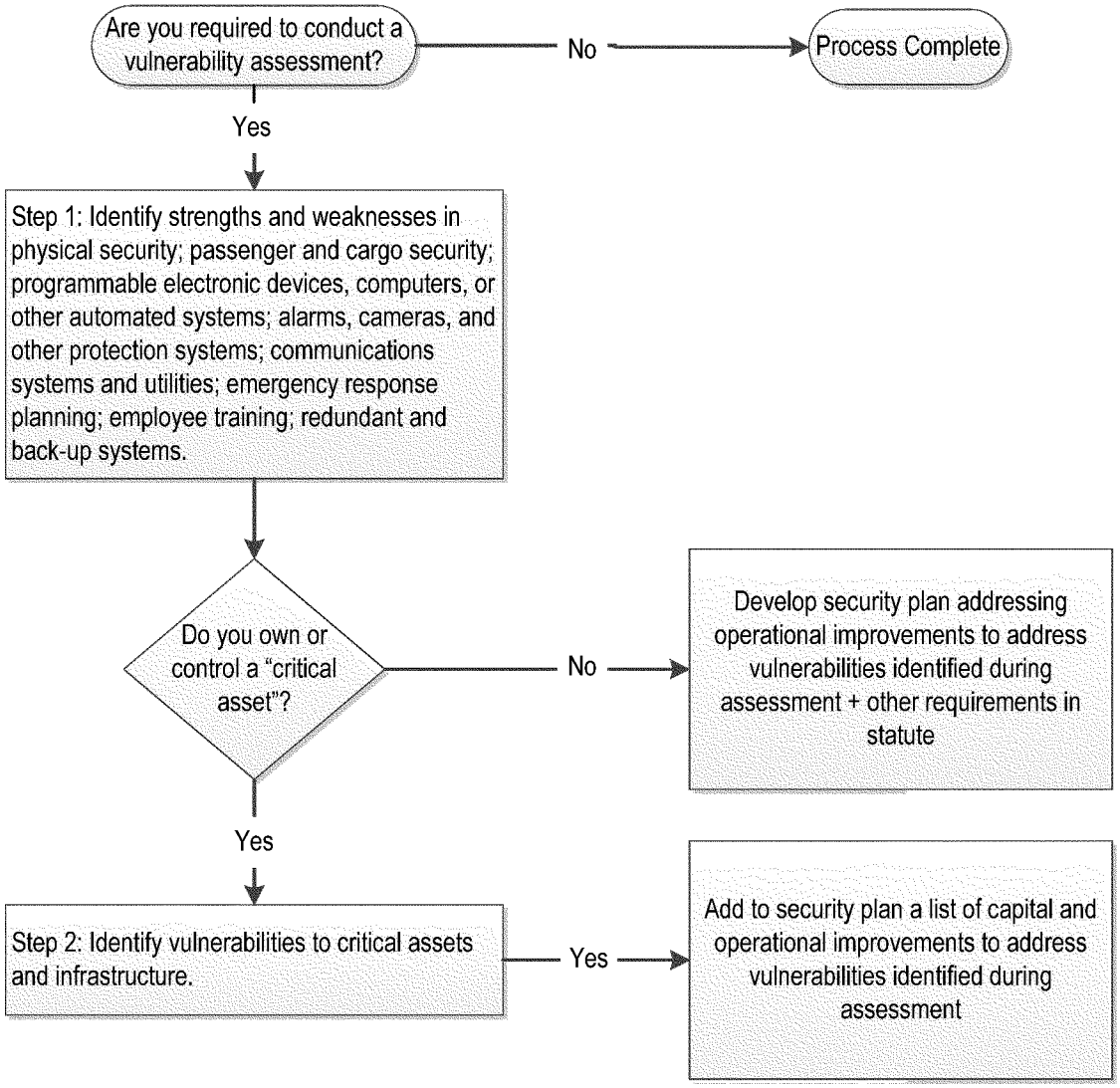
[29] These action teams focus on critical security issues for railroad systems, including hazardous materials, information technology, communications, and military movements.

[30] More information on these standards can be found at *http://www.apta.com/resources/standards/Pages/default.aspx.*

Diagram A: Assessment to Planning Process



TSA understands that submitting information about weaknesses in security systems/operations and critical asset protection may raise concerns regarding the public availability of the information. Under TSA's regulations for SSI,[31] all vulnerability assessments ''directed, created, held, funded, or approved by'' TSA are SSI.[32] Similar provisions apply to security programs or contingency plans ''issued, established, required, received, or approved'' by TSA.[33] Generally, access to SSI is strictly limited to those persons with a need to know, as defined in 49 CFR 1520.11, and to those persons to whom TSA grants specific access authorization under 49 CFR 1520.15. Pursuant to statute,[34] there is limited access to specific SSI in Federal district court proceedings to civil litigants who do not otherwise have a need to know under part 1520. This requirement only affects TSA's application of its non-disclosure policy in civil proceedings in Federal district court; it does not affect TSA administrative, State, or other Federal proceedings.

B. Assessments of Security Systems and Operations

A vulnerability assessment of security systems and operations is the foundation for an effective security program, including understanding the threat, identification of risk-reduction or mitigation measures, resource allocation decisions, employee training, drills and/or exercises to test preparedness and planning, and reassessments to determine areas for change or improvement. As noted in Diagram B, assessment is part of a cyclical process.

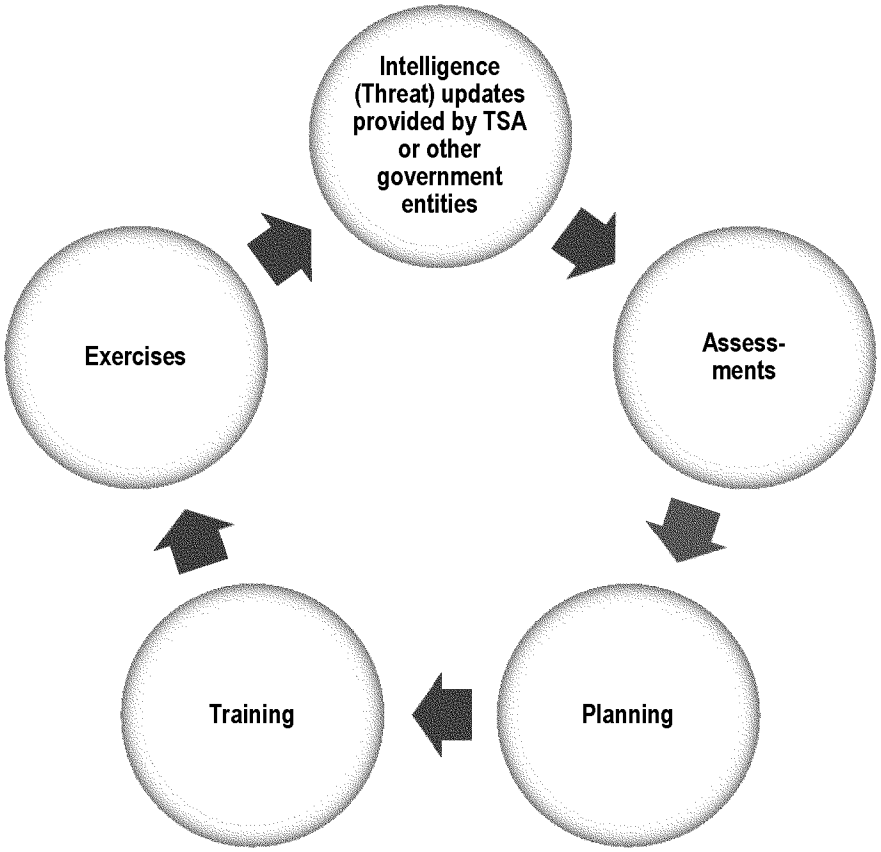
[31] *See* 49 CFR part 1520.

[32] *Id.* at 1520.5(b)(5).

[33] *Id.* at 1520.5(b)(1).

[34] *See* Department of Homeland Security Appropriations Act, 2007, Public Law 109–295, sec. 525(d), 120 Stat. 1355 (Oct. 4, 2006). Section 525 is uncodified, but Congress has reenacted the provisions in sec. 525(d) in each subsequent Department of Homeland Security Appropriations Act. Currently, the provision can be found at Public Law 114–113, div. F, sec. 510(a), 129 Stat. 2242, 2513 (Dec. 18, 2015, continued to December 9, 2016), by the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Public Law 114–223, sec. 101(6) (Sept. 30, 2016).

Diagram B. Security Program Process



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Collecting and analyzing information on deficiencies and weaknesses is a critical first step in managing and mitigating risks as it enables surface owner/operators to detect and manage security vulnerabilities. As assessment results, current intelligence/threat and other relevant information, and after-action reports of drills/exercises is fed into the planning cycle, surface owner/operators can better direct resources towards effective risk management.

C. Identifying Performance Standards for Assessments of Security Systems and Operations

TSA considers the BASE to be an important resource for developing the VASP regulations. The scope of the BASE program is fundamentally consistent with the 9/11 Act's requirements for assessments of security systems and operations.[35] Using the categories identified in Table 1 for the 17 SAIs, Table 2 crosswalks the categories for the 17 SAIs with the 9/11 Act's requirements for security assessments. In addition, the program and the assessment questions are familiar to many of the owner/operators who may be subject to these regulations.[36]

TABLE 2—CROSSWALK BETWEEN 9/11 ACT ASSESSMENT REQUIREMENTS AND 17 SAIS

9/11 Act requirement	17 SAIs category
Identification and evaluation of emergency response planning and other vulnerabilities related to passenger/cargo security.	Risk Management and Information Sharing.
Identify weaknesses in emergency response planning related to passenger/cargo security.	Management and Accountability. National Terrorism Advisory System (NTAS). Public Awareness Risk Information Collection and Sharing.
Identify weaknesses in employee training and emergency response planning.	Security and Emergency Response Training. Drills and Exercises.
Identification of weaknesses in the security of programmable electronic devices, computers, or other automated systems; alarms, cameras, and other protection systems; and communication systems and utilities needed for security purposes.	Cybersecurity.

[35] The current PTPR BASE is based on the 17 SAIs developed jointly by FTA and TSA. The highway BASE has 20 SAIs. In the past, TSA conducted Corporate Security Reviews (CSRs) for freight railroads, which were similar to the BASE. The CSR had fewer items. While the numbers may vary, the issues are generally the same (with the exception of some issues unique to a particular mode). Therefore, for purposes of this ANPRM, TSA will use 17 SAIs as a generic term for all of them.

[36] TSA is providing an appropriately detailed sample of questions in the docket for this rulemaking for commenters who are not familiar with the BASE.

TABLE 2—CROSSWALK BETWEEN 9/11 ACT ASSESSMENT REQUIREMENTS AND 17 SAIS—Continued

9/11 Act requirement	17 SAIs category
Identification of vulnerabilities to critical assets and infrastructure and weaknesses in physical security.	Facility Security, Access Controls, and Background Investigations.

While the questions used for a BASE assessment do not establish or identify performance standards, they could be the starting point for developing appropriate performance standards. For example, the 9/11 Act requires an assessment of strengths and weaknesses in emergency response planning. Currently, the BASE includes the following ''yes'' or ''no'' questions relevant to this requirement:

• Does the plan address personnel security, facility security, vehicle security, and Threat/Vulnerability Management?

• Does the plan include methods to identify and actively monitor the goals and objectives for the security program?

• Does the plan include a written policy statement that endorses and adopts the policies and procedures of the plan? Does top management, such as the agency's chief executive, approve and sign the plan?

• Does the plan address protection and response for critical systems?

• Does the plan clearly identify responsibilities (or reference other documents establishing procedures) for the management of security incidents by the operations control center (or dispatch center) or other formal process?

• Does the plan clearly identify (or reference other documents establishing) plans, procedures, or protocols for responding to security events with external agencies (such as law enforcement, local EMA, fire departments, etc.)?

• Has the owner/operator partnered with local law enforcement/first responders to develop active shooter procedures or protocols?

• Does the security plan contain or reference other documents that establish procedures or protocols for responding to active shooter events?

• Does the security plan contain or reference other documents that establish protocols addressing specific threats from: (1) Improvised Explosive Devices (IED), and (2) Weapons of Mass Destruction (chemical, biological, radiological hazards)?

• Does the security plan integrate visible, random security measures, based on employee-type, to introduce unpredictability into security activities for deterrent effect?

• Does the security plan require consideration of security before implementation of extensions, major projects, new vehicles and equipment procurement, and other capital projects?

• Does the security plan include or reference other documents adopting Crime Prevention Through Environmental Design (CPTED) or similar security-focused preventive principles as part of the agency's engineering practices?

• Does the security plan require an annual review?

• Does the owner/operator produce periodic reports reviewing its progress in meeting its security plan goals and objectives?

• Has the company conducted, and documented, an annual review of the security plan within the preceding 12 months?

• Does the security plan outline a process for securing review for updates and necessary approval of updates to the security plan?

Beginning with these ''yes'' or ''no'' questions, TSA could develop qualitative standards to help a surface owner/operator determine whether its security measure is weak, adequate, or strong based on how effective it is. Answers to those questions would help the surface owner/operator identify weaknesses in its security measures and inform development and prioritization of risk-reduction measures.

For surface owner/operators that have conducted vulnerability assessments of security systems/operations, TSA seeks comment on the following questions:

1. Have you conducted a vulnerability assessment of your security system/operations within the last three (3) years?

2. If yes, did TSA conduct the assessment as part of the BASE program? If not TSA, did an independent auditor or company employees conduct the audit? How long did it to take to perform this assessment? How many individuals were involved in conducting the assessments (please provide information on the time and personnel costs for those essential to the assessment process, such as man-hours, permanent employees or contractor cost, etc.)?

3. How frequently do you update assessments of security systems/operations? Do you have internal or other requirements to update assessments? Are these requirements based on a schedule or changes to operations, assets and infrastructure, or threat information? How much time do these updates take?

4. Was the assessment of security systems/operations site-specific, system-wide, or both?

5. What resources or tools did you use for conducting your assessment?

6. What features of those resources or tools were most useful?

7. If the evaluation assesses operational security processes, such as training and operations, what methodologies or criteria are used to evaluate these processes?

8. What types of questions or other criteria were used to help identify strengths and weaknesses? Which of these were most relevant to your operations?

9. Do you use the results of the assessment for developing security plans, or emergency response plans, continuity of operations plans, etc.? Please describe how the assessment is used.

10. Was the assessment conducted in order to meet other Federal requirements (such as grant eligibility) or other standards? If so, please provide a description or source for those requirements or standards?

11. How can other required assessments addressing security systems/operations be used to satisfy TSA's regulatory requirements? For example, how relevant are FRA emergency preparedness requirements, PHMSA security plan requirements, and FTA's requirements? What standards should TSA use to determine if those plans meet TSA's requirements?

12. How could TSA ensure a surface owner/operator is in compliance with other agency requirements if it permits those measures to satisfy the requirements of TSA's regulation?

13. What barriers and/or challenges to conducting this assessment did you encounter?

D. Determination of Critical Assets and Infrastructure

As previously noted, the 9/11 Act requires a vulnerability assessment of critical assets/infrastructure. The statute does not provide criteria for determining whether an asset is

''critical.'' [37] Depending on the criteria, TSA could either require surface owner/operators to self-determine critical assets/infrastructure or inform surface owner/operators of a TSA-determination of criticality. The different approaches have significant impacts on the cost/benefits of vulnerability assessments, as well as the scope of required risk-reduction measures implemented as part of a security plan.

Self-determination of critical assets would require surface owner/operators to determine whether an asset is critical. Such a process would likely require owner/operators to first identify all of their assets (at least in the categories identified by the 9/11 Act) then use TSA-provided criteria to determine if any of those assets are critical. TSA would need to provide a tool or other measures to ensure consistent application of the criteria across all regulated parties.

A self-determination approach to criticality is likely to capture assets that may be critical from a business perspective, but not necessarily critical from the perspective of national security. This is a significant cost issue as identification of critical assets carries with it the regulatory burden to conduct a vulnerability assessment of the asset and implement appropriate risk-reduction measures to address any identified vulnerabilities, even if the asset is not critical from a national security perspective.

To address this concern, TSA could limit the requirement to ''nationally critical assets and infrastructure'' as determined by TSA. This determination would begin with a definition of national criticality. While there have been many efforts to define critical infrastructure and refine lists of critical assets in order to apply the appropriate protective measures since the terrorist attacks of 9/11. TSA finds the definition in Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 [38] has particular resonance as it was developed within the context of protecting assets from terrorist attack:

> In this section, the term ''critical infrastructure'' means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.[39]

This definition was adopted by reference in the Homeland Security Act of 2002 [40] and is used for the definition of ''critical infrastructure'' in the Presidential Policy Directive (PPD) on ''Critical Infrastructure Security and Resilience'' (PPD–21, issued Feb. 12, 2013) which replaces Homeland Security Presidential Directive 7.

Within the scope of such a definition, TSA would need to consider the criteria necessary for identifying nationally critical assets. For purposes of identifying a list of ''nationally significant surface critical infrastructure,'' TSA has developed similar criteria in consultation with intelligence analysts and the industry. Such criteria consider location of the asset and the direct consequences of an act that incapacitates or destroys the asset.

Other possible criteria for consideration include those developed under the National Critical Infrastructure Prioritization Program (NCIPP). Identification and prioritization of critical infrastructure for purposes of the NCIPP consider the destruction or disruption of infrastructure that could have catastrophic national or regional consequences. This determination provides the foundation for infrastructure protection and risk reduction programs and activities executed by DHS and its public and private sector partners. Table 3 provides the considerations for Level 1 and Level 2 under the NCIPP.

TABLE 3—NCIPP CATEGORIES

Impact	Level 1 (all sectors)	Level 2 (all sectors excluding agriculture and food)
Casualties	Greater than 5000 prompt fatalities	Greater than 2500 prompt fatalities.
Economic Consequences	Greater than $75 billion in first year	Greater than $25 billion in first year.
Mass evacuations	Prolonged absence of greater than 3 months	Prolonged absence of greater than 1 month.
Security capabilities	Severe degradation of Nation's national security capabilities including intelligence and defense functions, but excluding military facilities.	

For purposes of this rulemaking, surface owner/operators would only be notified if they owned or controlled an asset identified by TSA as nationally significant. For example, surface owner/operators may not own or have any operational control over the stations, terminals, or bridges they use for their operations.[41]

But TSA also recognizes that lack of ownership or control does not obviate the need to consider security. Operations of a surface owner/operator may rely on transportation infrastructure at risk based on its iconic significance. That risk could also apply to those who use it. While the surface owner/operator may not be able to reduce the risk for the asset, it can take measures to reduce the risk for its system when using that asset.

TSA seeks comments on the following questions:

14. Should TSA use other standards to determine criticality? If so, please provide alternative standards.

15. If alternative standards were provided in response to Question 14, what types of assets or infrastructure would be determined as critical using the alternative standards? Answers containing SSI should be submitted according to the directions under **SUPPLEMENTARY INFORMATION**.

16. Would the alternative standards provided in response to Question 14 result in a criticality designation for any or all of the assets and infrastructure identified in secs. 1512(d)(1)(A) and 1531(d)(1(A) of the 9/11 Act? *See* docket for this rulemaking for a table that aligns

[37] The 9/11 Act includes a list of critical asset types to be considered, as appropriate, but does not describe the criteria that would make them ''critical.'' *See* 9/11 Act secs. 1405(a)(3)(A), 1512(d)(1)(A), and 1531(d)(1)(A).

[38] Public Law 107–56, 115 Stat. 272 (Oct. 26, 2001).

[39] *Id.* at sec. 1016(e) (codified at 42 U.S.C. 5195c(e)).

[40] Public Law 107–296, sec. 2(4), 116 Stat. 2135, 2140 (Nov. 25, 2002) (codified at 6 U.S.C. 101(4)).

[41] Notwithstanding its authority to regulate all aspects of the transportation system, there are no current plans to apply the requirements to entities not identified as surface owner/operators in the Security Training NPRM.

the 9/11 Act's requirements across the three modes.

17. If TSA were to adopt a broader list of assets and infrastructure—such as all of those identified in secs. 1512(d)(1)(A) or 1531(d)(1)(A) of the 9/11 Act—are some inappropriate for inclusion because the cost associated with assessments and planning would result in a corresponding benefit to surface transportation security? Are there some that are rarely, if ever, under the ownership or control of the owner/operators that would be subject to the rule's requirements?

18. What type of information and technical assistance would you need from TSA to facilitate conducting a vulnerability assessment?

For entities currently conducting self-determinations of critical assets and infrastructure, TSA seeks comments on the following questions:

19. How do you make the determination of criticality? For example, should TSA use criteria such as traffic volume (such as ton-miles over or through, passenger trains, daily ridership, and/or number of shipments) or some other criteria associated with network criticality?

20. What is the cost of this process (how many hours, permanent employee or contractor, are required, etc.)?

21. Do you use the determination of criticality for development of general continuity of operations plans?

E. Identifying Performance Standards for Assessments of Critical Assets and Infrastructure

While there are many ways to complete an intelligence driven, risk-based vulnerability assessment for critical assets, they all rely on some form of subjective ranking system to identify and evaluate specified strengths and weaknesses. For example, a surface owner/operator could prioritize the threats relative to the asset as highly likely, somewhat likely, possible, unlikely, or improbable. Such owner/operator could then rate vulnerabilities (perhaps on a scale from very low to high), based on subjective decisions regarding how easy it would be to exploit that vulnerability given current operations. The owner/operator could also rate the consequence based on the type of threat. Combining all three ratings into an overall risk score helps identify the greatest risks in order to focus energies and limited resources on related vulnerabilities.

TSA is seeking information on appropriate resources that can inform development of performance standards for vulnerability assessments. Known resources include DHS tools, such as the framework of the Integrated Rapid Visual Screening (IRVS); issues addressed in questions related to asset protection that are part of a BASE assessment; and standards developed by the American Public Transportation Association (APTA).

For surface owner/operators that have conducted vulnerability assessments of critical assets and infrastructure, TSA seeks comments on the following questions:

22. Did you perform the vulnerability assessment on specific assets? If so, what assets? What criteria did you use to determine which assets to assess?

23. How long did it to take to perform this assessment? How many individuals were involved in conducting the assessments? Please provide information on the time and personnel costs for those essential to the assessment process, such as man-hours, permanent employees or contractor cost, etc.

24. Do you use the results of the vulnerability assessment for developing security plans, or emergency response plans, continuity of operations plans, etc.? Please describe how the assessment is used.

25. How frequently do you update vulnerability assessments? Do you have internal or other requirements to update assessments? Are these requirements based on a schedule or changes to operations, assets and infrastructure, or threat information?

26. Did you perform the vulnerability assessment in order to meet other Federal requirements (such as grant eligibility) or other standards? If so, please provide a description or source for those requirements or standards.

27. How can other required assessments be used to satisfy TSA's regulatory requirements? For example, how relevant are FRA emergency preparedness requirements or other DOT-modal requirements? What standards should TSA use to determine if that assessment meets TSA's requirements?

28. How could TSA ensure a surface owner/operator is complying with other regulatory requirements if it permits actions taken under those requirements to satisfy a TSA regulation? For example, if a passenger railroad is required to develop and implement emergency evacuation planning under 49 CFR part 239 and wants to use that planning to satisfy a requirement that may be in the final VASP rule, how would TSA know whether the railroad is, in fact, complying with requirements imposed by the FRA? The fact that the FRA has not penalized an owner/operator for non-compliance is not a guarantee that the owner/operator is complying with the FRA requirements.

29. What barriers and/or challenges to conducting this assessment did you encounter?

V. Security Plans

Regulations imposing security plan requirements have a direct impact on operations. Thus, any rulemaking effort must recognize that measures beneficial to security may have a negative impact on operations. The purpose of this ANPRM is to solicit the input and data necessary for TSA to develop a proposed rule that ensures the level of security intended by the 9/11 Act without having an unintended impact on operations.

A. Identifying Performance Standards for Security Plans

For purposes of this ANPRM, TSA has grouped the 9/11 Act's specific requirements for security plans into the following categories:

- Results of security and vulnerability assessments and list of capital and operational improvements necessary to address identified vulnerabilities.
- Specific procedures to be implemented or used to prevent and detect unauthorized access to restricted areas designated by the owner/operator.
- Identification of measures to be implemented in response to emergencies or periods of heightened security, including—
  - A coordinated response plan that establishes procedures for appropriate interaction with State, local, and tribal law enforcement agencies, emergency responders, and Federal officials in order to coordinate security measures and plans for response in the event of a terrorist threat, attack, or other transportation security-related incident;
  - Specific procedures to be implemented or used by the owner/operator in response to a terrorist attack, including evacuation and communication plans that include individuals with disabilities; and
  - Additional measures to be adopted to address weaknesses in incident management identified during reviews, drills, or exercises testing emergency response.
- Identification of any redundant and backup systems that the owner/operator will use to ensure the continuity of operations of critical assets and infrastructure in the event of a terrorist attack or other transportation security-related incident.

As previously noted in Table 2, there is a correlation between the 17 SAIs and the 9/11 Act's requirements. As with the security assessment (covering security

systems and operations), the quantitative questions used in the BASE could be used as a starting point for developing qualitative performance standards for security plans.

For surface owner/operators that have security plans, TSA seeks comments on the following questions:

30. Does your security plan address the issues discussed at the beginning of this section?

31. Is your security plan site-specific, system or corporate-wide, or both?

32. Did you use a vulnerability or similar assessment (BASE or other) to develop a security plan? If not BASE, please describe the assessment. If so, what is the process for incorporating the results into your planning process and development of risk-reduction or mitigation measures (or investment justifications for grant purposes)? What levels of management are involved in reviewing the results of the assessment and making decisions regarding security planning related to those results?

33. How long did it to take to develop the security plan? How many individuals were involved in the planning process? Please provide information on the time and personnel costs for those essential to the planning process, including man-hours, permanent employee and/or contractor cost, etc.

34. How frequently do you update your security plan? Do you have internal requirements to update plans based on a schedule or changes to operations, assets and infrastructure, or threat information?

35. Does your security plan exist in order to meet other Federal requirements (such as grant eligibility) or other standards? If so, please provide a description or source for those requirements or standards.

36. How can other required plans be used to satisfy TSA regulatory requirements? For example, how relevant are FRA emergency preparedness requirements, PHMSA security plan requirements, and FTA's requirements? What standards should TSA use to determine if those plans meet TSA's requirements?

37. How could TSA ensure a surface owner/operator is in compliance with other agency requirements if it permits those measures to satisfy the requirements of TSA's regulation?

38. What barriers or challenges to developing and implementing a security plan did you encounter?

B. Tools and Other Resources

TSA is considering modifying T–START to provide a resource to owner/operators subject to the VASP regulations. As discussed in section III.F of this ANPRM, T–START currently includes several modules that cover the assessment and planning cycle for the highway mode. The revised T–START would include modules consistent with requirements TSA incorporates into a final VASP rule and be applicable to PTPR and freight railroads, with modules that are relevant to the specific type of operation. TSA would provide this tool at no cost to surface owner/operators. For those not within the scope of applicability, T–START would provide guidance to them for conducting assessments and developing plans.[42]

TSA seeks comments on the following questions:

39. Have you used T–START to conduct assessments or develop a security plan?

40. What features of T–START or other resources or tools were most useful?

41. Did the availability of T–START or other similar resources reduce the time necessary to conduct assessments or develop security plans? If so, please provide an estimate of the savings in time and personnel.

42. What other types of information, tools, and/or technical assistance could TSA provide to facilitate compliance with the VASP regulation? If you identified barriers or challenges in conducting vulnerability assessments or developing/implementing security plans in response to questions 13, 29, and/or 38, please provide specific suggestions on how TSA could provide information, tools, or other technical assistance in overcoming those barriers and/or challenges.

43. If you have not used T–START, please describe the programs, tools, or resources you have used.

44. Are there assessment/planning tools or resources that TSA should consider as relevant for developing the VASP proposed rule? If so, please provide names and sources.

C. Risk-Reduction or Mitigation Measures

As previously noted, the 9/11 Act specifies that security plans must include results of security and vulnerability assessments and list of capital and operational improvements necessary to address identified vulnerabilities.

TSA seeks comments on the following questions:

45. What security measures have owner/operators implemented to address weaknesses in either security of systems/operations or security of critical assets relevant to the requirements of the 9/11 Act (for example, measures to strengthen security of systems/operations and equipment).

TABLE 4—LIST OF POSSIBLE RISK-REDUCTION OR MITIGATION MEASURES

Cameras (please provide information on the brand, model, requirement, etc.).	Speakers (public address systems or emergency communication systems).
Employee background checks.	Access control (such as Jersey barriers, automated gates, etc.).
Lighting	Dedicated law enforcement or other security personnel.
ID card reader/badging systems.	Signage.
Screening technologies (such as metal detectors, random baggage checks, etc.).	Intrusion detection systems.
Canine teams	Other (specify measure).

46. What data can you provide on the cost of purchase, implementation, and on-going maintenance of these measures, as appropriate? If possible, for each of the types of possible risk-reduction or mitigation measures identified in Table 4, please provide information on—

(a) Whether the company has installed this type of measure;

(b) How does the company use this measure (is it used randomly, in specific locations based on risk, or system-wide); and

(c) What are the costs associated with implementing this measure (purchase cost, installation, on-going maintenance, replacement, monitoring, etc.)?

47. Do your security measures include provisions for adding contracted security services in the event of elevated alert levels?

48. For those that have implemented security measures, can you provide data regarding implementation schedules (time between identification of the need, commitment to addressing it as part of planning, and actual full implementation or installation)?

49. What data sources are available for identifying industry standards relevant to implementation of risk-reduction or mitigation measures?

[42] The 9/11 Act requires TSA to provide guidance to owner/operators not within the high-risk tier. *See* 9/11 Act secs. 1512(b)(1) and 1531(b)(1).

VI. Drills and Exercises

The 9/11 Act includes ''[l]ive situational training exercises . . .'' as a program element of the Security Training NPRM.[43] TSA decided not to include this requirement in the Security Training NPRM because it is inconsistent with the DHS methodology for exercises. The Homeland Security Exercise and Evaluation Program (HSEEP)—an exercise support program that focuses on the need to test planning and preparedness—focuses on the need to test effectiveness of the overall plan. By testing planning and preparedness, the drills and/or exercises reveal any weaknesses in training. Furthermore, the HSEEP does not require every exercise to be full-scale, live, and situational in order to be an effective test of the security plan. Many resources and methods are available to test the effectiveness of the plan and the preparedness of the organization and its employees to implement it other than full-scale, live, situational exercises. These range from seminars and workshops to basic or advanced tabletop exercises.

TSA is also concerned that a requirement to conduct live, situational exercises would impose a regulatory burden that owner/operators could not meet because they do not control all of the resources necessary for a live situational exercise, such as first responders, medical support, and other local and State government participation.

TSA seeks comments on the following questions:

50. To what extent do you have access to EXIS or other resources for conducting drills and/or exercises?

51. Have you participated in an I–STEP exercise?

52. Have you used EXIS as a resource for conducting drills and/or exercises?

53. If not through I–STEP or EXIS, how often do you conduct or participate in drills and/or exercises, what job positions participate, and what are the costs (development, implementation, after-action analysis, and reports)?

54. Based upon your experience with drills and exercises, are they an adequate method for assessing effectiveness of employee training, or are additional assessment tools needed for assessments?

55. Based on your experience, what are the most effective types of drills and/or exercises for testing preparedness, including identifying weaknesses in training?

56. Do you regularly use ''after action reports'' to modify security measures and procedures or make other operational or capital changes to improve security?

VII. Updates

The 9/11 Act specifies that owner/operators must update assessments and security plans on a regular basis. For public transportation, the 9/11 Act stipulates annual updates, including updates to assessments, improvement priorities, and security plans as appropriate. Eligibility for funding under the TSGP requires: (1) An assessment within three years before the request for funding, and (2) all requests for funding must be consistent with addressing vulnerabilities identified in that assessment. For railroads and OTRB owner/operators, the 9/11 Act requires updates to the assessment no later than three years after initial approval of the assessments or plans required in the regulation and at least once every five years after that date.

In a provision applicable to all aspects of the regulatory security program, the Security Training NPRM proposes requiring surface owner/operators to request amendments to their programs (training, assessment, or planning) whenever there are changes to their operations, measures, training, or staffing. TSA would also be able to require updates if, for example, new threat information indicates the necessity of review and modification of security measures. TSA also anticipates the necessity for updates if there are significant changes to operations or assets, such as expanding operations, changes to routes, or modifications to hazardous materials designated as high-risk for transport.

TSA requests comments on the following questions:

57. How often do surface owner/operators update their assessments (either security systems/operations or critical assets)? Please include in your response information on the time and personnel costs for those essential to the updating process, such as man-hours, permanent employees or contractor cost, etc.

58. How frequently do these updates of assessments require changes to emergency response, safety, or security plans? If there are changes required, what types of changes do you typically make?

59. Are these updates required by other Federal or State regulations? If so, please provide a citation and any other relevant information regarding the requirement.

VIII. Accountable Executive

Every transportation system, whether plane, train, or bus, must make decisions for budgeting, allocating funds, and planning for the future. Recognizing the diversity of business organization and ownership represented by the scope of this rulemaking, TSA anticipates that the need to identify a decision-maker who has responsibility over the process for approving assessments and plans within the context of making decisions regarding organization, operations, and allocation of resources. This ''accountable executive,'' and any relevant boards or equivalent entities with which this individual may work, needs to have awareness of the risks (threats, vulnerabilities, and potential consequences) relevant to its security systems/operations and critical assets. Having responsibility to approve assessments submitted to TSA ensures this information can be used as part of informed, deliberate, and transparent decisions regarding the commitments made in the security plan.

Based on a review of how the term ''accountable executive'' is defined within various business contexts, TSA anticipates defining the term as a person responsible for implementation and security-related decisions, including allocation of corporate resources related to security. The ''accountable executive'' should be a single, identifiable person who has ultimate responsibility for the owner/operator's compliance with the security plan requirements, including obtaining written validation that the plan has been reviewed and approved by senior management (board of directors or equivalent entity). TSA also expects that this person will serve as the primary point of contact for TSA during the review and approval process of the security plan.

TSA seeks comment on the following questions:

60. Should the ''accountable executive'' be a chief executive officer or equivalent rather than an executive designated for this purpose?

61. For entities within the applicability proposed in the Security Training NPRM, do you have an accountable executive? What level is this person within the corporate structure? What other responsibilities does this person have? Do you have some other process for ensuring senior management is made aware of the results of the assessment, approves its transmittal to TSA, and approves the security plan?

[43] *See* secs. 1408(c)(7) (public transportation), 1517(c)(8) (freight rail), and 1534(c)(8) (OTRB).

IX. Considerations for Small Owner/Operators

While TSA recognizes the administrative burden on small owner/operators,[44] the statute requires TSA to apply the requirements based on risk, not size of the operations. As a result, small PTPR systems that feed into larger systems covered by the applicability could be required to conduct assessments, develop a security plan, and implement related security measures. Similarly, the requirements could affect small OTRB owner/operators.

TSA anticipates that owner/operators of larger systems or fleets would develop an organization-wide approach for their assessments and plans, addressing different perspectives of operations, safety, planning, engineering, budget, and information technology along with the need to enhance and sustain security. TSA is considering whether owner/operators of smaller systems or operations would need to take a simpler approach in developing an assessment and plan and implementing security measures. If so, the regulation would need to consider owner/operators of smaller systems or operations could use information that is already largely on-hand or readily available to meet the same performance standards applied to larger companies.

TSA seeks comments on the following questions:

62. As TSA has determined that the higher-risk is associated with where the transportation occurs, not size of the company providing the transportation, what options are there for minimizing the burden on small owner/operators without reducing the intended security benefit?

63. How should the VASP requirements apply to owner/operators who rely on the security of an asset or infrastructure owned by a third party?

64. What are the barriers for surface owner/operators with a smaller scope of operation—other than costs—to develop and implement a more comprehensive security program or plan with specific security measures, training, and assets?

65. How can TSA ensure consistent application of the standards or performance criteria of its rulemaking in light of the dynamic population to which the requirements would apply—large, small, publicly owned, small budgets, large tax-based budgets, etc.?

X. Estimating the Benefits and Cost of Requirements

Executive Orders 12866 and 13563 direct agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, tailor a regulation to impose the least burden on society consistent with obtaining the regulatory objectives, and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits.

Consistent with the requirements in these executive orders, TSA seeks comment on the following questions:

66. For those who are already conducting vulnerability assessments and developing/implementing security plans, what are the security benefits? What would be the security benefits of a consistent, national standard for VASP?

67. TSA seeks information from the public in order to assist it in assessing the cost of alternative regulatory approaches for implementing the VASP regulations. For example, for commenters who suggest that TSA consider adopting certain security performance criteria or objective standards for measuring the security of assets and infrastructure or security systems/operations, what information do you have to assist TSA in assessing the incremental cost of adopting your suggestion? TSA is interested in information to assist it in assessing the full cost of the suggestion, such as the cost for owner/operators to collect and assess information and the cost to take action based on the information.

68. Likewise, TSA seeks information from the public to assist TSA in assessing the potential benefits of alternative regulatory approaches for implementing the VASP regulations. For example, for commenters who suggest that TSA consider adopting certain security performance criteria or objective standards for measuring the security of assets and infrastructure or security systems/operations, what information do you have to assist TSA in assessing the incremental benefit[45] from adopting your suggestion?

69. What resources (for example, people, Web sites, organizations, companies) could be useful if TSA has difficulty obtaining accurate and timely data on public transportation systems, railroads, or OTRB modes necessary for developing a valid estimate of potential costs for compliance with a proposed VASP regulation? TSA specifically seeks data on employee wages, cost of equipment, and population data on companies within an industry or transportation mode.

XI. Next Steps and Public Participation

This ANPRM seeks input from the public on these topics to ensure that the NPRM to follow addresses all relevant information, provides the explanations necessary to understand the proposed requirements, and appropriately estimates costs. It is important that freight railroad, PTPR, and OTRB owner/operators, other organizations, as well as interested members of the public potentially affected by a final rule, take this opportunity to share thoughts, concerns, ideas, and general comments on the topics presented.

After TSA reviews the comments collected through this ANPRM, TSA will prepare and publish an NPRM that reflects TSA's analysis of the statutory requirements and relevant issues, as well as comments received from the public through this ANPRM. Once TSA publishes the NPRM, stakeholders and the public will have another opportunity to provide comments that TSA will take into consideration before issuing a final rule.

Dated: November 18, 2016.

Huban A. Gowadia,

Deputy Administrator.

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BILLING CODE 9110–05–P

[44] The Small Business Administration (SBA) sets a threshold of $15.0 million in annual receipts for bus systems and mixed-mode transit systems, and 1,500 employees for short line railroads. *See* 13 CFR 121.201.

[45] When requesting the assessment of an incremental benefit, TSA is referring to the additional benefits of the alternative the commenter is proposing compared to what TSA is proposing and compared to not taking any action at all.

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Part IV

Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedures for Cooking Products; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2012–BT–TP–0013]

RIN 1904–AC71

Energy Conservation Program: Test Procedures for Cooking Products

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

ACTION: Final rule.

SUMMARY: On August 22, 2016, the U.S. Department of Energy (DOE) issued a supplemental notice of proposed rulemaking to amend the test procedure for conventional cooking products. That proposed rulemaking serves as the basis for this final rule. Specifically, this final rule amends DOE's test procedure for conventional electric cooking tops to incorporate by reference the relevant sections from European standard EN 60350–2:2013 ''Household electric cooking appliances Part 2: Hobs—Methods for measuring performance'' (EN 60350–2:2013). This final rule also includes methods for testing non-circular electric surface units, electric surface units with flexible concentric cooking zones, and full-surface induction cooking tops based on EN 60350–2:2013. In addition, DOE extends the test methods in EN 60350–2:2013 to measure the energy consumption of gas cooking tops by correlating test equipment diameter to burner input rate, including input rates that exceed 14,000 British thermal units per hour. This final rule also includes methods to calculate annual energy consumption and integrated annual energy consumption for conventional cooking tops based on the water-heating test method and provides updates to the sampling plan requirements. The final rule includes minor technical clarifications to the gas heating value correction and other grammatical changes to the regulatory text in the cooking products test procedure that do not alter the substance of the existing test methods. This final rule also repeals the regulatory provisions establishing the test procedure for conventional ovens under the Energy Policy and Conservation Act. DOE has determined that the conventional oven test procedure does not accurately represent consumer use as it favors conventional ovens with low thermal mass and does not capture cooking performance-related benefits due to increased thermal mass of the oven cavity.

DATES: The effective date of this rule is January 17, 2017. The final rule changes will be mandatory for representations of energy or power consumption of cooking products on or after June 14, 2017. The incorporation by reference of certain publications listed in this rule is approved by the Director of the **Federal Register** as of January 17, 2017.

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 *www.regulations.gov.* All documents in the docket are listed in the *www.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 *https://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-TP-0013.* The docket 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 the Appliance and Equipment Standards Program staff at (202) 586–6636 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone: (202) 586–6590. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone: (202) 256–7432. Email: *Francine.Pinto@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: This final rule incorporates by reference certain sections of the following industry standard into 10 CFR part 430:

(1) EN 60350–2:2013 ''Household electric cooking appliances, Part 2: Hobs—Methods for measuring performance'', July 2013.

• Copies of EN 60350–2:2013, a European standard approved by the European Committee for Electrotechnical Standardization (CENELEC), can be obtained from the British Standards Institute (BSI Group), 389 Chiswick High Road, London, W4 4AL, United Kingdom, or by going to *http://shop.bsigroup.com/.*

See section IV.N for a further discussion of this standard.

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I. Authority and Background

Conventional cooking products are included in the list of ''covered products'' for which the U.S. Department of Energy (DOE) is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6292(a)(10)) DOE's energy conservation standards and test procedures for conventional cooking products are currently prescribed at 10 CFR 430.32(j) and 10 CFR 430.23(i), respectively. The following sections discuss DOE's authority to establish test procedures for conventional cooking products and

relevant background information regarding DOE's consideration of test procedures for this equipment.

A. Authority

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, *et seq.;* ''EPCA'' or, ''the Act'') [1] sets forth a variety of provisions designed to improve energy efficiency. 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 cooking products,[2] and specifically conventional cooking tops [3] and conventional ovens,[4] the primary subject of this document. (42 U.S.C. 6292(a)(10))

Under EPCA, the 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 (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) making representations about the efficiency of those products. Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA.

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. EPCA provides that any 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 a proposed test procedure and offer the public an opportunity to present oral and written comments on it. (42 U.S.C. 6293(b)(2))

Finally, 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 any 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)) DOE recognizes that the test procedure amendments adopted in this final rule will affect the measured energy use of some conventional cooking products. However, the current energy conservation standards for conventional cooking products are a prescriptive design standard prohibiting constant burning pilots for all gas cooking products manufactured on or after April 9, 2012. (10 CFR 430.32(j)) Because there are currently no performance-based standards for conventional cooking products, the EPCA provisions discussed in this preamble do not apply to this rulemaking.

DOE is currently considering amendments to the existing Federal energy conservation standards for conventional cooking products in a concurrent rulemaking, (Docket No. EERE–2014–BT–STD–0005). DOE will use the test procedure amendments adopted in this final rule as the basis for standards development in the concurrent energy conservation standards rulemaking.

DOE is establishing in this final rule that use of the amended test procedure for compliance with DOE energy conservation standards or representations with respect to energy consumption of conventional cooking products is required on the compliance date of any revised energy conservation standards, which are being considered in a concurrent rulemaking (Docket No. EERE–2014–BT–STD–0005). The existing test procedure for conventional cooking products must be used for any representations related to standby mode and off mode energy consumption of conventional cooking tops, but not including combined cooking products. Any representation related to energy or power consumption of cooking products made 180 days after the publication of this final rule in the **Federal Register**, including for combined cooking products, must be based upon results generated under the amended test procedure.

This final rule fulfills DOE's obligation to periodically review its test procedures under 42 U.S.C. 6293(b)(1)(A). DOE anticipates that its next evaluation of this test procedure will occur in a manner consistent with the timeline set out in this provision.

B. Background

DOE's test procedures for conventional cooking tops, conventional ovens, and microwave ovens are codified at appendix I to subpart B of 10 CFR part 430 (appendix I).

DOE established the test procedures for conventional cooking products in a final rule published in the **Federal Register** on May 10, 1978. 43 FR 20108, 20120–20128. DOE revised its test procedures for cooking products to more accurately measure their efficiency and energy use, and published the revisions as a final rule in 1997. 62 FR 51976 (Oct. 3, 1997). These test procedure amendments included: (1) A reduction in the annual useful cooking energy; (2) a reduction in the number of self-cleaning oven cycles per year; and (3) incorporation of portions of International Electrotechnical Commission (IEC) Standard 705–1988, ''Methods for measuring the performance of microwave ovens for household and similar purposes,'' and Amendment 2–1993 for the testing of microwave ovens. *Id.* The test procedures for conventional cooking products establish provisions for determining estimated annual operating cost, cooking efficiency (defined as the ratio of cooking energy output to cooking energy input), and energy factor (defined as the ratio of annual useful cooking energy output to total annual energy input). 10 CFR 430.23(i); appendix I. These provisions for conventional cooking products are not currently used for compliance with any energy conservation standards because the present standards are design requirements; in addition, there is no EnergyGuide [5] labeling program for cooking products.

DOE subsequently conducted a rulemaking to address standby and off mode energy consumption, as well as

[1] All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015).

[2] DOE's regulations define ''cooking products'' as one of the following classes: Conventional ranges, conventional cooking tops, conventional ovens, microwave ovens, microwave/conventional ranges and other cooking products. (10 CFR 430.2)

[3] Conventional cooking top means a class of kitchen ranges and ovens which is a household cooking appliance consisting of a horizontal surface containing one or more surface units which include either a gas flame or electric resistance heating. (10 CFR 430.2)

[4] Conventional oven means a class of kitchen ranges and ovens which is a household cooking appliance consisting of one or more compartments intended for the cooking or heating of food by means of either a gas flame or electric resistance heating. It does not include portable or countertop ovens which use electric resistance heating for the cooking or heating of food and are designed for an electrical supply of approximately 120 volts. (10 CFR 430.2)

[5] For more information on the EnergyGuide labeling program, see: *www.access.gpo.gov/nara/cfr/waisidx_00/16cfr305_00.html.*

certain active mode testing provisions, for residential dishwashers, dehumidifiers, and conventional cooking products. DOE published a final rule on October 31, 2012 (77 FR 65942, the October 2012 Final Rule), adopting standby and off mode provisions that satisfy the EPCA requirement that DOE include measures of standby mode and off mode power in its test procedures for residential products, if technically feasible. (42 U.S.C. 6295(gg)(2)(A))

1. The January 2013 TP NOPR

On January 30, 2013, DOE published a notice of proposed rulemaking (NOPR) (78 FR 6232, the January 2013 TP NOPR) proposing amendments to appendix I that would allow for measuring the active mode energy consumption of induction cooking products (*i.e.,* conventional cooking tops equipped with induction heating technology for one or more surface units [6] on the cooking top). DOE proposed to incorporate induction cooking tops by amending the definition of ''conventional cooking top'' to include induction heating technology. Furthermore, DOE proposed to require for all cooking tops the use of test equipment compatible with induction technology. Specifically, DOE proposed to replace the solid aluminum test blocks currently specified in the test procedure for cooking tops with hybrid test blocks comprising two separate pieces: an aluminum body and a stainless steel base. In the January 2013 TP NOPR, DOE also proposed amendments to include a clarification that the test block size be determined using the smallest dimension of the electric surface unit. 78 FR 6232, 6234 (Jan. 30, 2013).

2. The December 2014 TP SNOPR

On December 3, 2014, DOE published a supplemental notice of proposed rulemaking (SNOPR) (79 FR 71894, the December 2014 TP SNOPR), modifying its proposal from the January 2013 TP NOPR for measuring the energy efficiency of induction cooking tops. DOE proposed to add a layer of thermal grease between the stainless steel base and aluminum body of the hybrid test block to facilitate heat transfer between the two pieces. DOE also proposed additional test equipment for electric surface units with large diameters (both induction and electric resistance) and gas cooking top burners with high input rates. 79 FR 71894 (Dec. 3, 2014). In addition, DOE proposed methods to test non-circular electric surface units, electric surface units with flexible concentric cooking zones, and full-surface induction cooking tops. *Id.*

In the December 2014 TP SNOPR, DOE also proposed to incorporate methods for measuring conventional oven volume, clarify that the existing oven test block must be used to test all ovens regardless of input rate, and provide a method to measure the energy consumption and efficiency of conventional ovens equipped with an oven separator. 79 FR 71894 (Dec. 3, 2014). On July 3, 2015, DOE published a final rule addressing the test procedure amendments for conventional ovens only. (80 FR 37954, the July 2015 TP Final Rule).

3. The August 2016 TP SNOPR

On August 22, 2016, DOE published an additional SNOPR (81 FR 57374, the August 2016 TP SNOPR) in which DOE modified its proposal from the December 2014 TP SNOPR for testing conventional cooking tops. Based on review of the public comments received in response to the December 2014 TP SNOPR and a series of manufacturer interviews conducted in February and March 2015 to discuss key concerns regarding the hybrid test block method proposed in the December 2014 TP SNOPR, DOE withdrew its proposal for testing conventional cooking tops with a hybrid test block. Instead, DOE proposed to amend its test procedure for conventional electric cooking tops to incorporate by reference the relevant selections from European standard EN 60350–2:2013 ''Household electric cooking appliances Part 2: Hobs—Methods for measuring performance'' (EN 60350–2:2013). DOE also revised its proposals for testing non-circular electric surface units, electric surface units with flexible concentric cooking zones, and full-surface induction cooking tops. In addition, DOE proposed to extend the test methods in EN 60350–2:2013 to measure the energy consumption of gas cooking tops by correlating test equipment diameter to burner input rate, including input rates that exceed 14,000 British thermal units per hour (Btu/h). DOE also proposed to modify the calculations of conventional cooking top annual energy consumption (AEC) and integrated annual energy consumption (IAEC) to account for the proposed water-heating test method. Additionally, in the August 2016 TP SNOPR, DOE proposed to incorporate by reference certain test structures for conventional cooking tops contained in American National Standards Institute (ANSI) Z21.1–2016 ''Household cooking gas appliances'' (ANSI Z21.1–2016) and addressed minor technical changes that did not alter the substance of the existing test methods. 81 FR 57374, 57376–57377 (Aug. 22, 2016).

With regard to conventional ovens, DOE determined that, based on further review of public comments and data provided by manufacturers, the conventional oven test procedure does not accurately represent consumer use as it favors conventional ovens with low thermal mass and does not capture cooking performance-related benefits due to increased thermal mass of the oven cavity. As a result, DOE also proposed in the August 2016 TP SNOPR to repeal the regulatory provisions establishing the test procedures of conventional ovens. 81 FR 57374, 57376 (Aug. 22, 2016).

In response to the August 2016 TP SNOPR, DOE received multiple comments urging it to extend the comment period. The Association of Home Appliance Manufacturers (AHAM) commented that the test procedure proposed in the August 2016 TP SNOPR is completely different from DOE's previously proposed versions, and that a 30-day comment period does not provide sufficient time for interested parties to comment. AHAM stated that because DOE's proposal is completely new, it should be treated as a NOPR pursuant to 42 U.S.C. 6293(b)(2) with no less than 60 days for public comment, including the opportunity to provide oral comments. AHAM also opposed the development of test procedures and proposed standards in parallel, and commented that DOE should finalize the test procedure before continuing with proposed standards. According to AHAM, manufacturers were required to divide their resources to address the concurrent proposals, and thus were given insufficient time to respond to either. AHAM stated that, as a result, DOE has denied interested parties the opportunity to evaluate the accuracy, repeatability, reproducibility and test burden of the proposed test procedure, which AHAM claimed DOE has not assessed itself. (AHAM, No. 30 at pp. 2, 3, 6, 7)

AHAM also asserted that the brief comment period does not provide interested parties with enough time to identify potential ambiguities in the test procedure, which it believes would lead to numerous requests for guidance after the test procedure is finalized, some of which could impact the measured energy use and DOE's interpretation of the anti-backsliding rule (42 U.S.C. 6295(o)(1)). AHAM also cautioned DOE about enforcement challenges due to manufacturers and third-party

[6] The term surface unit refers to burners for gas cooking tops, electric resistance heating elements for electric cooking tops, and inductive heating elements for induction cooking tops.

laboratories different interpretations of the test procedure. (AHAM, No. 30 at pp. 4–5, 7)

AHAM described conducting a round robin testing program to understand and evaluate the water-heating test method in the draft version of IEC Standard 60350–2 Edition 2.0 ''Household electric cooking appliances–Part 2: Hobs–Method for measuring performance'' (IEC 60350–2),[7] which is similar to the water-heating test method DOE has proposed. AHAM noted that the round robin testing for electric cooking tops was scheduled to be completed by December 2016. AHAM also noted that it further plans to evaluate the repeatability and reproducibility of DOE's proposed test procedure for gas cooking tops, and expects to complete a smaller-scale round robin testing program for gas cooking tops by mid-January 2017. AHAM does not expect this testing to be completed in the comment period provided in the August 2016 TP SNOPR and requested that DOE extend the comment period until January 31, 2017. AHAM also noted that because DOE's proposed test procedure differs from the international version of the water-heating test procedure that was used in AHAM's round robin testing program, AHAM's results cannot evaluate to what extent DOE's modifications to the test method will add variation to test results. (AHAM, No. 23 at pp. 1, 4–5, 6; AHAM, No. 30 at p. 3)

Furthermore, AHAM stated that if DOE continues to develop the test procedure and standards in parallel, DOE should issue a notice of data availability and/or supplemental proposed test procedure to address AHAM's comments, conduct additional testing, and gather more information. AHAM stated that DOE should provide no fewer than 30 days to comment on that notice, and preferably 60 days if changes are significant. (AHAM, No. 30 at pp. 2, 8)

GE Appliances, a Haier Company (GE), Whirlpool Corporation (Whirlpool), and Sub-Zero Group, Inc. (Sub-Zero) supported AHAM's comments. (GE, No. 31 at p. 1; Whirlpool, No. 29 at p. 1; Sub-Zero, No. 25 at p. 1) Sub-Zero added that requiring interested parties to substantively comment concurrently on both a new test procedure and a proposed standard for previously unregulated products is significantly burdensome to the industry. (Sub-Zero, No. 25 at p. 1) GE also commented that at the time it submitted comments on the August 2016 TP SNOPR, it had been able to obtain results for only approximately 25 percent of its models, for reasons including the lack of availability of test vessels and difficulty in obtaining valid test runs. GE commented that DOE should pause the rulemaking process and engage in additional outreach with manufacturers to ensure that the issues raised by AHAM are appropriately evaluated and addressed. (GE, No. 31 at pp. 1–2)

Southern California Gas Company (SCGC), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE) (collectively, the Southern California investor-owned utilities (SoCal IOUs)) also commented that the proposed water-heating test method represents a significant change from DOE's previously proposed hybrid block test method and, as a result, DOE should extend the comment period to allow time for interested parties to evaluate the test procedure. (SoCal IOUs, No. 27 at p. 3) The American Gas Association (AGA) and American Public Gas Association (APGA) similarly stated that their comments will not be as comprehensive as they would have been if DOE had extended the comment period. (AGA and APGA, No. 26 at pp. 1–2)

DOE considered and evaluated water-heating test methods based on the IEC test procedure as part of the January 2013 TP NOPR and December 2014 TP SNOPR. 78 FR 6232, 6239–6241 (Jan. 30, 2013); 79 FR 71894, 71900–71903 (Dec. 3, 2014). As a result, DOE does not consider its proposal in the August 2016 TP SNOPR to be completely new and warranting treatment as a NOPR.

As discussed in section III.C.2 of this final rule, DOE is not requiring that each setting of the multi-ring surface unit be tested independently. Instead, DOE is aligning the test provisions with EN 60350–2:2013 to require testing of the largest measured diameter of multi-ring surface units only, unless an additional test vessel category is needed to meet the test vessel selection requirements in section 7.1.Z3 of EN 60350–2:2013, as explained in III.C.1. In that case, one of the smaller-diameter settings of the multi-ring surface unit that matches the next best-fitting test vessel diameter must be tested. As a result, the test procedure adopted in this final rule is equivalent to the test procedure considered and used in AHAM's round robin testing program.

As discussed in the August 2016 TP SNOPR, multiple manufacturers that produce and sell products in both the United States and Europe supported the use of the water-heating test method in IEC 60350–2. BSH Home Appliances Corporation (BSH) specifically noted that this test procedure is applied in Europe for its Energy Conservation Program and that international test laboratories and manufacturers have successfully used this test method. 81 FR 57374, 57382 (Aug. 22, 2016). DOE agrees that manufacturers that also produce and sell conventional cooking tops in Europe are likely to already have experience with the water-heating test method adopted in this final rule. DOE further observes that because AHAM and other manufacturers also participate in the development of IEC 60350–2,[8] these interested parties are likely already familiar with the repeatability, reproducibility and test burden associated with the provisions from EN 60350–2:2013 adopted in this final rule. Accordingly, DOE does not find that a comment period extension for the test procedure is warranted.

With respect to the process of establishing test procedures and standards for a given product, DOE notes that, while not legally obligated to do so, it generally follows the approach laid out in guidance found in 10 CFR part 430, subpart C, appendix A (Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products). That guidance provides, among other things, that, when necessary, DOE will issue final, modified test procedures for a given product prior to publication of the NOPR proposing energy conservation standards for that product. While DOE strives to follow the procedural steps outlined in its guidance, there may be circumstances in which it may be necessary or appropriate to deviate from it. In such instances, the guidance indicates that DOE will provide notice and an explanation for the deviation. For this test procedure rulemaking, DOE issued a supplemental proposed rulemaking (the August 2016 TP SNOPR) conventional cooking products which is not contemplated by the process rule, but DOE believed was necessary due to the significant comments regarding the test procedures for both induction cooking tops and commercial-style cooking products. With this action, DOE is finalizing the test procedure as its next regulatory

[7] DOE notes that the test methods in EN 60350–2:2013 are based on the same test methods in the latest draft version of IEC 60350–2. Based on the few comments received during the development of the draft, DOE expects that the IEC procedure, once finalized, will retain the same basic test method as currently contained in EN 60350–2:2013.

[8] IEC committee members for IEC 60350–2 are listed online at: *http://www.iec.ch/dyn/www/f?p=103:14:0:::FSP_ORG_ID,FSP_LANG_ID:2420,25*, and *https://ansi.org/standards_activities/iec_programs/governance_committees/gen_info.aspx?menuid=3*.

action for cooking products, as commenters suggested.

DOE appreciates AHAM's willingness to conduct a round robin testing program to inform the rulemaking and other interested parties, as well as AHAM's comments that derive from the round robin testing that has been completed. DOE requested the test data from AHAM's round robin testing program so that it could further evaluate for this final rule the concerns raised by interested parties, but has not received any such data. However, DOE conducted its own additional testing on both electric and gas cooking tops after the August 2016 TP SNOPR to evaluate the variability in testing results using the proposed water-heating test methods and to address specific issues raised by interested parties regarding the water-heating test method, as discussed in section III.C of this document. The results from DOE's testing are presented and discussed in relevant sections of this final rule.

II. Synopsis of the Final Rule

In this final rule, DOE amends 10 CFR 430 Appendix I, ''Uniform Test Method for Measuring the Energy Consumption of Conventional Cooking Products,'' as follows:

- Repeals the provisions in the existing cooking products test procedure relating to conventional ovens;
- Incorporates by reference the relevant sections of EN 60350–2:2013, which uses a water-heating test method to measure the energy consumption of electric cooking tops;
- Extends the water-heating test method specified in EN 60350–2:2013 to gas cooking tops by correlating the burner input rate and test vessel diameters specified in EN 30–2–1:1998 *Domestic cooking appliances burning gas—Part 2–1: Rational use of energy—General* (EN 30–2–1) to the test vessel diameters and water loads already included in EN 60350–2:2013;
- Adopts a modified water quantity, different than the quantity specified in EN 60350–2:2013, used to normalize the total energy consumption of the cooking top to estimate a representative AEC for the U.S. market;
- Clarifies that for all cooking tops, specialty surface units such as bridge zones, warming plates, grills, and griddles are not covered by appendix I;
- Clarifies that the 20-minute simmering period starts when the water temperature first reaches 90 °C and does not drop below 90 °C for more than 20 seconds after initially reaching 90 °C;
- Adopts a calculation of the AEC and IAEC of conventional cooking tops;
- Defines the term ''combined cooking product'' as a cooking product that combines a conventional cooking product with other appliance functionality, which may or may not include another cooking product;
- Clarifies that the active mode test procedures in appendix I applies to the conventional cooking top component of a combined cooking product and includes a method to apportion the combined low-power mode energy consumption measured for the combined cooking product to the individual cooking top component of the combined cooking product;
- Clarifies that the measurement of the heating value of natural gas or propane specified in section 2.9.4 of appendix I be corrected to standard pressure and temperature conditions in accordance with the U.S. Bureau of Standards, circular C417, 1938; and
- Corrects grammatical errors in certain sections of appendix I that serve as clarifications and do not change the substance of the test method.

In this final rule, DOE is also modifying the requirements in 10 CFR 430.23 to align with the changes adopted for appendix I, clarifying test procedures for the measurement of energy consumption for cooking tops.

Finally, DOE amends the sampling plan requirements in 10 CFR 429.23 ''Conventional cooking tops, conventional ovens, microwave ovens'' to include AEC and IAEC for conventional cooking tops.

III. Discussion

In this test procedure final rule, DOE is amending the test procedures for conventional cooking products contained in the relevant sections of part 430 of Title 10 of the CFR. The test procedures established in this final rule provide a measure of conventional cooking top energy consumption under representative conditions, which are discussed further in sections III.C, III.D, III.E, and III.F of this final rule, and repeals provisions in the existing cooking products test procedure relating to conventional ovens.

A. Scope

As discussed in section I.A of this document, DOE has the authority to amend test procedures for covered products. EPCA identifies kitchen ranges and ovens as a covered product. (42 U.S.C. 6292(a)(10)) In a final rule published on September 8, 1998 (63 FR 48038), DOE amended its regulations in certain places to substitute the term ''kitchen ranges and ovens'' with ''cooking products.'' DOE regulations currently define ''cooking products'' as consumer products that are used as the major household cooking appliances. They are designed to cook or heat different types of food by one or more of the following sources of heat: Gas, electricity, or microwave energy. Each product may consist of a horizontal cooking top containing one or more surface units and/or one or more heating compartments, and must be one of the following classes: Conventional ranges, conventional cooking tops, conventional ovens, microwave ovens, microwave/conventional ranges and other cooking products. 10 CFR 430.2

In this final rule, DOE is addressing test procedures for conventional cooking tops and is repealing the test procedures for conventional ovens. In addition, because DOE regulations currently continue to use the term ''kitchen ranges and ovens'' and other terms in certain places to describe the products that are the subject of this rulemaking, DOE is amending its regulations codified at 10 CFR 430 to consistently refer to the products as ''cooking products.''

1. Induction Cooking Tops

As discussed in section I of this final rule, the test procedures currently specified in appendix I do not apply to induction cooking products. In the January 2013 TP NOPR, DOE proposed to amend the definition of ''conventional cooking top'' to include products that feature electric inductive heating surface units. 78 FR 6232, 6234–6235 (Jan. 30, 2013). DOE similarly proposed in the January 2013 TP NOPR to revise the definition of ''active mode'' included in appendix I to account for electric inductive heating, consistent with the proposed definition of ''conventional cooking top.'' *Id.* In comments on the January 2013 TP NOPR, manufacturers did not oppose amended definitions to include induction cooking. 79 FR 71894, 71897 (Dec. 3, 2014). Additionally, DOE did not receive any comments on its proposal to revise the definitions in the December 2014 TP SNOPR and August 2016 TP SNOPR. As a result, DOE is amending the definitions of ''conventional cooking top'' and ''active mode'' in this final rule to account for induction technology, as discussed above.

2. Combined Cooking Products

Certain residential household cooking appliances combine a conventional cooking product component with other appliance functionality, which may or may not perform a cooking-related function. Examples of such ''combined cooking products'' include a

conventional range, which combines a conventional cooking top and one or more conventional ovens; a microwave/conventional cooking top, which combines a microwave oven and a conventional cooking top; a microwave/conventional oven, which combines a microwave oven and a conventional oven; and a microwave/conventional range, which combines a microwave oven and a conventional oven in separate compartments and a conventional cooking top. Because combined cooking products may consist of multiple classes of cooking products, any potential conventional cooking top or oven energy conservation standard would apply to the individual components of the combined cooking product. Thus, DOE stated in the August 2016 TP SNOPR that the proposed cooking top test procedures would also apply to the individual conventional cooking top portion of a combined cooking product. 81 FR 57374, 57378 (Aug. 22, 2016). Because combined cooking products are a kind of cooking product that combines a conventional cooking product with other appliance functionality and not a distinct product class, DOE proposed in the August 2016 TP SNOPR to remove the definitions of the various kinds of combined cooking products currently included in 10 CFR 430.2, and then proposed to add a definition of ''combined cooking product'' to appendix I, as this definition would be related to the test of combined cooking products and is not a unique product class itself. *Id.* DOE also noted that the definitions of ''conventional cooking top,'' ''conventional oven,'' ''microwave oven,'' and ''other cooking products'' refer to these products as classes of cooking products. Because these are more general product categories and not specific product classes, DOE proposed in the August 2016 TP SNOPR to amend the definitions of conventional cooking top, conventional oven, microwave oven, and other cooking products in 10 CFR 430.2 to reflect this clarification. *Id.*

DOE did not receive any comments on its proposal to revise the definitions related to combined cooking products and cooking product categories. For the reasons discussed above, DOE is adopting these amended definitions in this final rule.

As discussed in the August 2016 TP SNOPR, DOE observed that for combined cooking products, the annual combined low-power mode energy consumption can only be measured for the combined cooking product and not the individual components. 81 FR 57374, 57378 (Aug. 22, 2016). As discussed in section III.D.2 of this document, DOE is adopting the methods proposed in the August 2016 TP SNOPR to calculate the IAEC of the conventional cooking top component separately by allocating a portion of the combined low-power mode energy consumption measured for the combined cooking product to the conventional cooking top component using the estimated annual cooking hours for the given components comprising the combined cooking product. Similarly for microwave ovens, DOE is adopting the methods proposed in the August 2016 TP SNOPR to allocate a portion of the combined low-power mode energy consumption measured for the combined cooking product to the microwave oven component, based on the estimated annual cooking hours for the given components comprising the combined cooking product.

3. Gas Cooking Tops With High Input Rates

In the December 2014 TP SNOPR, DOE proposed to amend the conventional cooking top test procedure in appendix I to measure the energy use of gas surface units with high input rates and noted that the current definition for ''conventional cooking top'' in 10 CFR 430.2 already covers conventional gas cooking products with higher input rates (including commercial-style gas cooking products), as these products are household cooking appliances with surface units or compartments intended for the cooking or heating of food by means of a gas flame. DOE considers a cooking top burner with a high input rate to be a burner rated greater than 14,000 Btu/h. 79 FR 71894, 71897 (Dec. 3, 2014). DOE did not receive any comments on this interpretation of the definition of ''conventional cooking top.'' In addition, as discussed in section III.C.3 of this document, DOE is adopting test methods to measure the energy consumption of conventional gas cooking tops that use a range of test vessel diameters and water loads that are selected based on the input rate of the burner, including those with burners having input rates greater than 14,000 Btu/h (including commercial-style gas cooking tops). As a result, DOE maintains the interpretation for this final rule that the definition for ''conventional cooking top'' in 10 CFR 430.2 covers conventional gas cooking products with higher input rates, including commercial-style cooking tops.

B. Repeal of the Conventional Oven Test Procedure

As discussed in the August 2016 TP SNOPR, DOE determined that commercial-style ovens typically incorporate design features (*e.g.,* heavier-gauge cavity construction, high input rate burners, extension racks) that result in inherently lower efficiencies than for residential-style ovens with comparable cavity sizes, due to the greater thermal mass of the cavity and racks when measured using the test procedure adopted in the July 2015 TP Final Rule. 81 FR 57374, 57379 (Aug. 22, 2016). Furthermore, DOE concluded that certain additional factors that are not currently addressed in the test procedure, such as the impact of door openings on thermal recovery, could, if included in the test procedure, alter the efficiencies of commercial-style ovens relative to the efficiencies of residential-style ovens. For these reasons, DOE proposed in the August 2016 TP SNOPR to repeal the provisions in appendix I for measuring conventional oven IAEC. In addition, because DOE proposed to repeal the provisions for measuring conventional oven IAEC, DOE also proposed to remove the reference to AHAM OV–1–2011 ''Procedures for the Determination and Expression of the Volume of Household Microwave and Conventional Ovens'' contained in 10 CFR 430.3. *Id.*

AHAM supported DOE's proposal to repeal the provisions in appendix I for measuring conventional oven IAEC. AHAM asserted that, in general, test procedures should be adopted and revised to accommodate products on the market. AHAM stated that products should not have to adapt to the test procedure, which could result in a loss of consumer utility, as would be the case with the existing test procedure for conventional ovens. (AHAM, No. 30 at p. 18) The Appliance Standards Awareness Project, Alliance to Save Energy, American Council for an Energy-Efficient Economy, Consumer Federation of America, Consumers Union, National Consumer Law Center, Natural Resources Defense Council, and Northwest Power and Conservation Council (collectively, the Joint Efficiency Advocates) and the SoCal IOUs encouraged DOE to initiate work to develop a test procedure for conventional ovens. The Joint Efficiency Advocates added that a test procedure for conventional ovens would allow DOE to set performance standards for ovens in the future that could achieve significant energy savings and provide information to consumers about the cooking efficiency of conventional

ovens. (Joint Efficiency Advocates, No. 32 at pp. 1–2; SoCal IOUs, No. 27 at p. 3)

Because DOE did not receive any objections to its proposal, and for the reasons stated, DOE is repealing the test procedures pertaining to conventional ovens in this final rule.

C. Water Heating Test Method

In this final rule, DOE is incorporating by reference the relevant sections from EN 60350–2:2013 for measuring electric cooking top energy consumption. DOE is also extending the testing methods in EN 60350–2:2013 to measure the energy consumption of gas cooking tops by correlating test equipment diameter to burner input rate. These amendments are discussed in the following sections.

1. Incorporation by Reference of EN 60350–2:2013

The test method to measure the energy consumption of each electric cooking top surface unit provided in EN 60350–2:2013 consists of two phases. The first phase of the EN 60350–2 test requires heating a water-filled test vessel on a surface unit to a calculated ''turndown temperature'' at the maximum energy input setting. During the second phase of the test, the power input is reduced to a setting that will maintain the water temperature above 90 °C (a simmering temperature) but as close to 90 °C as possible without additional adjustment of the low-power setting.[9] The test ends 20 minutes after the temperature first increases above 90 °C.

To determine the turndown temperature, T_c, EN 60350–2:2013 requires an initial test to determine the number of degrees that the temperature continues to rise after turning the unit off from the maximum energy input setting. This initial measurement involves heating the water-filled test vessel at the maximum energy input setting until the water temperature reaches 70 °C, T_{70}, at which point the power is switched off.[10] The water temperature is measured as it continues to rise after the power is switched off. The temperature overshoot, ΔT_0, is calculated as the highest measured water temperature minus T_{70}. T_c is then calculated as 93 °C minus ΔT_0.

For the test load, EN 60350–2:2013 specifies a quantity of water to be heated in a standardized test vessel. The test vessel consists of a thin-walled stainless steel cylinder attached to a flat, stainless steel 430 base plate. The test method also specifies an aluminum lid with vent holes and a small center hole to fix the thermocouple in the center of the pot. There are eight standardized cooking vessel diameters ranging from 4.7 inches to 13 inches and the amount of water varies with the test vessel diameter. One cooking vessel is chosen to test a given surface unit based on the diameter of the surface unit. Table III.1 lists the full range of test vessel diameters, water loads, and the corresponding surface unit diameters as specified in EN 60350–2:2013 for electric cooking tops. EN 60350–2:2013 also groups the specified test vessels into categories representing different cookware types.

TABLE III.1—EN 60350–2:2013 TEST VESSEL DIAMETER AND WATER LOAD

Test vessel diameter inches (mm)	Mass of the water load lbs (kg)	Corresponding surface unit diameter inches (mm)	Standard cookware category
4.72 (120)	1.43 (0.65)	3.93 ≤ × < 5.12 (100 ≤ × < 130)	A
5.91 (150)	2.27 (1.03)	5.12 ≤ × < 6.30 (130 ≤ × < 160)	
7.09 (180)	3.31 (1.50)	6.30 ≤ × < 7.48 (160 ≤ × < 190)	B
8.27 (210)	4.52 (2.05)	7.48 ≤ × < 8.66 (190 ≤ × < 220)	C
9.45 (240)	5.95 (2.70)	8.66 ≤ × < 9.84 (220 ≤ × < 250)	
10.63 (270)	7.54 (3.42)	9.84 ≤ × < 11.02 (250 ≤ × < 280)	D
11.81 (300)	9.35 (4.24)	11.02 ≤ × < 12.20 (280 ≤ × < 310)	
12.99 (330)	11.33 (5.14)	12.20 ≤ × < 12.99 (310 ≤ × ≤ 330)	

The number of test vessels needed to assess the energy consumption of the cooking top is based on the number of controls that can be independently but simultaneously operated on the cooking top. By assessing the number of independent controls and not just the marked surface units, the test procedure accounts for cooking tops with cooking zones that do not have limitative markings. Each independently controlled surface unit or area of a ''cooking zone'' is tested individually. The temperature of the water and the total input energy consumption is measured throughout the test. EN 60350–2:2013 specifies that the total cooking top energy consumption is determined as the average of the energy consumed during each independent test divided by the mass of the water load used for the test. This average energy consumption in Watt-hours (Wh) is then normalized to a standard water load size (1,000 grams (g)) to determine the average per-cycle energy consumption of the cooking top. Normalizing to a single load size ensures that manufacturers are not penalized for offering a variety of surface unit diameters to consumers.

For standard circular electric surface units, the test vessel with a diameter that most closely matches the surface unit diameter is selected. Different surface units on a cooking top can be tested with the same test vessel diameter. However, if the number of independent controls/surface units for the cooking top exceeds two, the selected test vessels must come from at least two cookware categories. This means that one or more of the surface units on the cooking top will be tested with the next best-matched test vessel in another cookware category. By adding this requirement, EN 603050–2:2013 accounts for the variety of cookware that would be used on the cooking top and prevents the test procedure from penalizing cooking tops that have a range of surface unit sizes with a range of surface unit input rates.

For cooking tops without defined surface units, such as cooking tops with full-surface induction cooking zones, EN 60350–2:2013 specifies a method to select the appropriate test position for each test vessel based on a pattern starting from the geometric center of the

[9] At first, the lowest power setting is selected. If the temperature of the water is less than 90 °C during the simmering time, the test has to be repeated with an increased power setting.

[10] To obtain a higher accuracy of the temperature measurement, T_{70} is determined by the average of the recorded temperature between the time to reach 70 °C, t_{70}, minus 10 seconds, and t_{70} plus 10 seconds. If the result is within the tolerance of 70 °C ± 0.5 °C, then this temperature is noted. If not, the test is repeated.

cooking zone. Instead of requiring that test vessels be selected based on best fit, the test vessel diameters are explicitly defined, and vary with the number of controls, to capture how different cookware types may be used on the unmarked cooking surface.

As part of the August 2016 TP SNOPR, DOE conducted a series of interviews with manufacturers, as well as analyzed test results from DOE's water-heating testing and results from round robin testing performed in 2011 by the European Committee of Domestic Equipment Manufacturers (CECED) [11] [12] to evaluate the repeatability and reproducibility of EN 60350–2:2013. Based on this evaluation, DOE determined that the test methods to measure surface unit energy consumption specified in EN 60350–2:2013 produce sufficiently repeatable and reproducible test results. DOE also noted that the test vessels specified in EN 60350–2:2013 are compatible with all cooking top types, and that the range of test vessel diameters cover the full range of surface unit diameters available on the U.S. market. 81 FR 57374, 57382–57384 (Aug. 22, 2016).

DOE proposed in the August 2016 TP SNOPR to incorporate by reference certain sections of EN 60350–2:2013.[13] Specifically, DOE proposed to incorporate Section 5, ''General conditions for the measurements,'' which outlines the test room and test equipment conditions; Section 6.2, ''Cooking zones per hob,'' which outlines how to determine the number of controls and the dimensions of the cooking zones; and Section 7.1, ''Energy consumption and heating up time,'' which outlines both the test methods and equipment required to measure cooking top energy consumption. DOE proposed to omit Section 7.1.Z5, ''Procedure for measuring the heating up time,'' as it is not required to calculate the overall energy consumption of the cooking top and would increase manufacturer test burden. Additionally, DOE proposed to omit Section 7.1.Z7, ''Evaluation and calculation,'' as DOE proposed an alternative method to normalize the measured cooking top energy consumption discussed further in section III.D.1 of this document. DOE also proposed to incorporate by reference Annex ZA through Annex ZF of EN 60350–2:2013, which provide further requirements for measuring the energy consumption, clarify test vessel construction, and provide examples for how to select the appropriate test vessels. DOE also proposed to include many of the definitions related to the measure of cooking top energy consumption specified in Section 3 of EN 60350–2:2013. However, due to differences in terminology between the United States and Europe, such as the use of the word hob for cooking top, DOE proposed to explicitly define relevant terms from Section 3 of EN 60350–2:2013 in appendix I. 81 FR 57374, 57384 (Aug. 22, 2016).

In response to the August 2016 TP SNOPR, DOE received a number of comments regarding the proposed water-heating test method. These comments are discussed in the following sections.

Repeatability, Reproducibility, and Representativeness of the Water-Heating Test Method

The SoCal IOUs and Joint Efficiency Advocates supported DOE's proposal to incorporate by reference EN 60350–2:2013. The SoCal IOUs added that this test method is more representative of actual cooking compared to the hybrid block test method. (SoCal IOUs, No. 27 at p. 2; Joint Efficiency Advocates, No. 32 at p. 2)

AHAM commented that it does not have consumer data on the representativeness of the water-heating test method and interested parties were not provided with enough time to collect this data. AHAM further commented that DOE should conduct consumer surveys to collect the data necessary to support the proposed test procedure. (AHAM, No. 30 at p. 8) Nonetheless, AHAM agreed that the best test method for cooking tops would be a water-heating test method even though it opposed DOE's proposed test procedure. AHAM believes that DOE must determine whether the test is repeatable and reproducible and address the significant issues raised by interested parties before finalizing the test procedure. (AHAM, No. 30 at pp. 2, 3, 4–5) AHAM objected to the use of CECED round robin testing conducted 5 years ago on European products, which have different designs (*e.g.,* different heating element/burner construction), to demonstrate the repeatability and reproducibility of DOE's proposed test procedure. AHAM noted that the CECED round robin testing included only testing of a single surface unit for each cooking top, and that DOE's proposed test procedure is not the same as the test procedure evaluated in the CECED round robin testing. (AHAM, No. 30 at pp. 3, 8)

AHAM commented that its round robin testing, which included four test units encompassing a different combination of controls and heating elements relevant to the U.S. market, showed a much higher variance in test results. AHAM's submitted its measured values for the coefficient of variance of test results from laboratory to laboratory of 7.1 percent, 9.2 percent, and 8.4 percent for electric coil, electric smooth–radiant, and electric smooth–induction cooking tops, respectively. Based on this round robin testing, AHAM stated that EN 60350–2:2013 does not produce reproducible test results and that more work is needed to reduce this variation. (AHAM, No. 30 at pp. 8–9)

GE commented that, based on the variation in test results shown in the AHAM round robin testing program, there will be significant risks of setting energy conservation standards at unachievable levels. GE commented that because cooking products have limited technology options to improve efficiency, setting a standard based on a test procedure with significant variation in test results could cause products to become obsolete and create significant issues with the enforcement of standards. (GE, No. 31 at p. 2)

With regards to the CECED round robin test results, DOE notes that, based on product teardowns conducted as part of the concurrent standards rulemaking, the heating elements and glass cooking surfaces used in electric smooth cooking tops are typically purchased parts that are manufactured by companies that produce and supply these parts to countries worldwide.[14] As discussed in the August 2016 TP SNOPR, DOE also notes that while the solid plate cooking top technology evaluated in the CECED round robin testing program is not available on the U.S. market, DOE anticipates that the results obtained for this technology type are most similar to those obtained for electric coil cooking tops because in both cases the electric resistance heating element is in direct contact with the cooking vessel. Additionally, based on its review of

[11] Italian National Agency for New Technologies, Energy and Sustainable Economic Development—Technical Unit Energy Efficiency (ENEA–UTEE), ''CECED Round Robin Tests for Hobs and Microwave Ovens—Final Report for Hobs,'' July 2011.

[12] The CECED round robin testing program included 3 cooking top technologies (electric solid plate, electric smooth—radiant, and electric smooth—induction) tested at 12 different test facilities (6 manufacturer test labs and 6 independent test labs).

[13] The test procedure also includes test methods to measure heat distribution and other forms of cooking performance not related to the energy consumption of the cooking top.

[14] DOE observed during product teardowns conducted for the concurrent energy conservation standards for conventional cooking products that many electric smooth cooking top heating elements are supplied by E.G.O. Worldwide (*http://www.egoproducts.com/en/home/*).

electric cooking tops, DOE observed that both U.S. and European models use similar controls (*i.e.,* both step and infinite). Because the electric cooking top controls and technologies available on the U.S. market are the same or similar to those available in Europe, the CECED round robin test results are appropriate for evaluating the repeatability and reproducibility of the water-heating test method proposed in the August 2016 TP SNOPR.

Furthermore, as discussed in section III.C.2, DOE is not requiring that each setting of the multi-ring surface unit be tested independently. Instead, DOE is aligning the test provisions for multi-ring surface units with those in EN 60350–2:2013. As a result, the test procedure used in the CECED round robin testing program does not contain any significant differences from the test procedure for electric cooking tops adopted in this final rule.

After the August 2016 TP SNOPR, DOE conducted additional testing to investigate concerns raised by interested parties regarding potential sources of variability in the water-heating test method. DOE conducted testing on five electric cooking tops incorporating different heating technologies and control types (*i.e.,* either controls that can adjust surface unit power input only in discrete increments or those that provide essentially infinite power input adjustment). Table III.2 includes a list of the heating and control characteristics for each of the cooking tops in the DOE test sample.

TABLE III.2—ELECTRIC COOKING TOPS EVALUATED FOR THE FINAL RULE

Cooking top unit	Heating technology	Control type
1	Coil	Discrete Step.
2	Smooth—Radiant	Discrete Step.
3	Smooth—Radiant	Infinite.
4	Smooth—Induction	Discrete Step.
5	Smooth—Induction	Discrete Step.

For each model, DOE conducted testing on surface units capturing a range of heating element sizes. To evaluate the variability in test results, DOE conducted 2–3 tests per surface unit. For each individual test, DOE performed the full surface unit test method, including the preliminary test required to determine the turndown temperature and simmering setting for a given surface unit. To further evaluate the repeatability and reproducibility of test results, DOE varied test operators for surface unit tests. In addition, in evaluating variation in tests results, DOE included test results from previous testing of these test units conducted in support of the August 2016 TP SNOPR.

Table III.3 lists the coefficient of variation of the measured energy consumption among all of DOE's tests for each surface unit. The average coefficient of variation observed for DOE's test sample was 1.2 percent, which was slightly lower than the average coefficient of variation of 1.6 percent determined as part of the CECED round robin testing program, and in no case did the coefficient of variation for any individual surface unit exceed 2.0 percent.

TABLE III.3—VARIATION IN ELECTRIC COOKING TOP SURFACE UNIT TOTAL TEST ENERGY CONSUMPTION

Cooking top unit	Surface unit location	Surface unit diameter (in.)	Cookware diameter (mm)	Average per-cycle energy consumption (Wh)	Coefficient of variation (%)
1	BR	6	150	202.1	1.0
	BL	6	180	275.1	1.4
2	FL	9	240	500.9	1.8
	BR	6	150	192.2	0.4
	FL	6	150	189.8	0.7
3	BR	6	150	184.4	1.0
4	FR	7	180	239.2	0.6
	BR	6	150	173.1	2.0
5	FL	7	180	266.8	1.1
	FL	6	150	185.9	2.0

Based on DOE's testing and the CECED round robin testing, and because DOE expects that the coefficient of variation of the results for an overall cooking top will not exceed the coefficient of variation of the results for an individual surface unit, DOE concludes that the water-heating test method in EN 60350–2:2013 produces repeatable and reproducible test results. To better understand the higher variation in test results observed as part of AHAM's round robin testing, DOE requested the test data from AHAM for comparison. At the time of this final rule analysis, DOE had not received this test data for direct evaluation. Therefore, as discussed in the following sections, DOE conducted further testing itself to evaluate specific water-heating test method conditions (*e.g.,* turndown temperature and setting) that could potentially have contributed to the variation in test results observed in AHAM's round robin testing.

Turndown Temperature

AHAM commented that there is variability in determining the turndown temperature because switching off power to a surface unit is not an automated process and cannot always be performed immediately after the water temperature reaches 70 °C during the preliminary turndown test. AHAM stated that this introduces variability in results depending on the accuracy, resolution, and response time of the temperature measuring device. AHAM

presented test data from its round robin test program for an electric coil surface unit for which the three testing laboratories determined turndown temperatures of 82.3 °C, 80 °C, and 81 °C, respectively. According to AHAM, this variation would result in testing laboratories selecting different simmering settings, which would create variability in the simmering phase of the test. AHAM further believes this variability would cause issues with demonstrating compliance with standards and prevent consumers from accurately comparing energy use of products. AHAM stated that, given the short comment period provided on the August 2016 TP SNOPR, DOE should conduct additional work to understand and reduce this variation. (AHAM, No. 30 at p. 11)

DOE notes that the provisions specified in section 7.1.Z6.2 of EN 60350–2:2013 already minimize the variability associated with determining the turndown temperature. For example, the preliminary test to determine the turndown temperature requires that the average recorded temperature must be within the tolerance of 70 °C ± 0.5 °C throughout the period of 10 seconds before to 10 seconds after power to the surface unit is shut off. This tolerance helps to improve the accuracy of the turndown temperature that is eventually identified for the energy test. Moreover, section 7.1.Z6.2.3 of EN 60350–2:2013 places a tolerance on the actual turndown temperature used in the energy test. The test is invalid unless the actual turndown temperature corresponding to the moment the surface unit setting is changed falls within +1.0 Kelvin (K) to −0.5 K of the turndown temperature, T_c, determined during the preliminary test.

In addition to evaluating overall repeatability of the surface unit energy consumption measurement, DOE conducted tests designed to investigate the impact of turndown temperature variations. Because DOE performed the full test method each time a surface unit was tested (*i.e.,* the test to determine the turndown temperature, the test to determine the simmering setting, and the energy test), DOE captured a range of turndown temperatures that satisfied the tolerances in EN 60350–2:2013. Table III.4 includes sample tests for a surface unit on an electric coil cooking top and on a smooth–radiant cooking top, demonstrating the effects of varying the actual turndown temperature for the same simmering setting. DOE observed that the total measured per-cycle energy consumption from test to test exhibited a coefficient of variation of less than 1 percent for variations in turndown temperature that were within allowable tolerances, and DOE expects that the impacts on IAEC for an entire cooktop would be even less significant. As a result, DOE is maintaining the methodology for determining the turndown temperature as specified in EN 60350–2:2013.

TABLE III.4—EFFECTS OF VARIED TURNDOWN TEMPERATURE ON TOTAL ENERGY CONSUMPTION

Cooking top unit	Heating element type	Test	Pre-determined turndown temp, T_c (°C)	Actual turndown temp (°C)	Final water temperature T_{final} (°C)	Total per-cycle energy consumption (Wh)	Coefficient of variation (%)
1	Coil	A	83.8	83.8	92.0	278.7	0.38
		B	85.9	86.3	91.6	276.6	
2	Smooth—Radiant	A	82.1	81.8	91.5	188.7	0.67
		B	83.1	82.8	92.0	191.7	
		C	81.5	81.3	92.7	189.1	
		D	82.7	84.3	91.7	188.1	
		E	83.6	83.4	91.5	190.3	

Determining the Simmering Setting

AHAM commented that there is variability in determining the simmering setting for the simmer phase of the test. AHAM stated that the proposed test procedure does not specify an exact setting for the turndown temperature and because of the way cooking tops are designed, it is impossible to define a single approach for determining the simmering setting. AHAM noted that the simmering setting plays an important role in the overshoot temperature and the ability to maintain a temperature as close as possible to 90 °C during the simmer phase of the test. AHAM stated that based on its testing, the results of which are shown in Table III.5 and Table III.6, the simmering setting determined for the simmer phase is not consistent from laboratory to laboratory. (AHAM, No. 30 at p. 11)

TABLE III.5—AHAM ROUND ROBIN TESTING—ELECTRIC SMOOTH RADIANT SURFACE UNIT (1500W) SIMMERING SETTING VARIABILITY

Test lab	Simmering setting	Final water temperature (°C)	Energy use coefficient of variation (%)
Lab 1	4	96	16.3
Lab 2	3	94	
Lab 3	5	100.1	

TABLE III.6—AHAM ROUND ROBIN TESTING—ELECTRIC SMOOTH INDUCTION SURFACE UNIT (1800W WITH BOOST) SIMMERING SETTING VARIABILITY

Test lab	Simmering setting	Final water temperature (°C)	Energy use coefficient of Variation (%)
Lab 1	4.5	94.7	10.1
Lab 2	4	93.9	
Lab 3	3	90.9	

AHAM commented that the proposed DOE test procedure does not define a tolerance for staying as close as possible to the required simmer temperature of 90 °C without going below this value. AHAM stated that this can give rise to significant test burden by requiring multiple test runs for each surface unit to determine the turndown control setting that provides a simmer temperature as close as possible to 90 °C. AHAM added that, as indicated in Table III.5 and Table III.6, the simmering setting and the maximum water temperature during the simmer phase of the test varied and had a significant effect on the overall measured energy consumption. AHAM stated that this will lead to issues with enforcement testing and prevent consumers from accurately comparing energy use of products. (AHAM, No. 30 at pp. 9–10)

However, AHAM also commented that it may be difficult to place a maximum temperature tolerance on the simmer phase of the test. According to AHAM, a surface unit may not be able to achieve a specified maximum tolerance depending on the unit's controls (*e.g.,* infinite switch or a step control). AHAM expressed concern that the uncertainty in these measurements using the proposed DOE test procedure could cause manufacturers to switch from step controls to more expensive infinite controls. AHAM stated that the test procedure must not dictate product design. (AHAM, No. 30 at p. 10)

AHAM further commented that due to the differences in resolution, sensitivity and accuracy of the temperature measuring device, testing laboratories cannot precisely determine when the temperature of the water has reached 90 °C. AHAM stated that its members have considered using a smoothing average when the temperature briefly reaches 90 °C but immediately falls below that level to account for temperature measurement noise caused by the convection of water and by the temperature measurement setup itself. As a result, AHAM stated that minor oscillations of the measured temperature occur and the actual threshold of 90 °C cannot be determined. AHAM urged DOE to address the oscillation issue before finalizing the test procedure. (AHAM, No. 30 at pp. 12–13)

AHAM commented that, as demonstrated by its round robin testing, these issues regarding the simmer phase of the test, result in a large variability in the overall measured energy consumption. AHAM urged DOE to further investigate these issues with the simmer phase and propose methods to reduce the variation in test results. (AHAM, No. 30 at pp. 10, 11)

GE asserted that the AEC results from the AHAM round robin testing program, presented in Table III.7, which included three different units tested at three manufacturer laboratories, indicate that the simmer phase of the test is the largest contributor to the variation in test results. GE commented that significant variation in the measured AEC would obscure any proposed efficiency gains that could be realized by many of the technology options DOE considered in its standards analysis. (GE, No. 31 at p. 3)

TABLE III.7—AHAM ROUND ROBIN TESTING—ELECTRIC COOKING TOPS COEFFICIENT OF VARIANCE

Cooking top technology	Coefficient of variance of measured energy consumption (%)		
	Heat up to 90 °C phase	20-Minute simmer phase	Total test
Coil	2.1	19.5	7.1
Smooth—Radiant	1.1	25.0	9.2
Smooth—Induction	3.5	21.3	8.4

GE commented that measuring only the energy required to reach 90 °C would provide repeatable results and reduce the burden of determining the turndown temperature and simmering setting. As a result, GE recommended eliminating the simmer phase of the test. (GE, No. 31 at p. 3)

Section 7.1.Z6.2.3 of EN 60350–2:2013 includes instructions for determining the correct setting for the simmering phase of the test with minimal uncertainty. For the first test of a surface unit, the lowest simmering setting is selected. If during the simmering phase of the test the temperature of the water falls below 90 °C, the test is repeated using the next highest setting until the setting that maintains the water temperature above, but as close as possible to, 90 °C is identified.

Based on DOE's testing, only a single setting for each surface unit achieved a water temperature that met the requirements of the simmering phase of the test as specified in section 7.1.Z6.2.3 of EN 60350–2:2013. To demonstrate the effect of improper selection of the simmering setting, as shown in Table III.8, DOE investigated settings that were both higher and lower simmering settings for several surface units in the test sample. Assuming all aspects of the test procedure are conducted appropriately, the final measured water temperature is consistently positively correlated with the simmering setting so that there is no ambiguity regarding

which simmering setting will repeatedly correspond to the setting that maintains the water temperature above but as close as possible to 90 °C. As part of this investigation, DOE also compared the selected settings from the testing effort conducted in support of the August 2016 TP SNOPR to the more recent testing effort conducted in support of this final rule and found that the correct simmering setting did not change when the surface unit was retested.

TABLE III.8—EFFECTS OF VARYING THE SIMMERING SETTING ON TOTAL PER-CYCLE ENERGY CONSUMPTION

Cooking top unit	Heating element type	Control type	Test	Simmering setting	Final water temp (°C)	Total per-cycle energy consumption (Wh)
1	Coil	Discrete Step	A	2	92.0	278.7
			C	2.5	95.2	297.3
2	Smooth-Radiant	Discrete Step	A	2	91.5	188.7
			F	3	99.6	228.4
3	Smooth-Radiant	Infinite	A	40° from minimum *	87.1	262.7
			B	50° from minimum	88.1	263.7
			C	60° from minimum	90.3	273.9
			D	70° from minimum	93.1	289.3
4	Smooth-Induction	Discrete Step	A	3	92.2	176.6
			B	3.5	94.3	191.6
5	Smooth-Induction	Discrete Step	A	1	83.9	167.0
			B	2	91.5	191.4
			C	3	96.7	228.7

* For infinite controls, the simmering setting is the degrees of angular control knob rotation from the lowest input power setting.

DOE's testing presented in Table III.8 shows that if a lab selects simmering that is too high, the measured surface unit energy consumption will be significantly higher than at the correct simmering setting. DOE notes that the variability in the measured energy consumption observed in the AHAM round robin test results, as presented in Table III.5, Table III.6, and Table III.7 appears to be due in large part to the selection of different simmering settings and the resulting variation in the energy consumption during the simmering phase of the test. As discussed, DOE expects that correctly following the methodology of starting with the lowest simmering setting and repeating the test as necessary with the next highest setting until the setting that maintains the water temperature above but as close as possible to 90 °C is identified, will result in only a single appropriate simmering setting for a given surface unit. As presented in Table III.3, DOE's testing showed that the total measured energy consumption did not vary significantly when consistently applying the methodology in section 7.1.Z6.2.3 of EN 60350–2:2013 for determining the simmering setting.

With regard to AHAM's comment concerning the difficulty of placing a maximum temperature tolerance on the simmering phase of the test, DOE concludes that the methodology in section 7.1.Z6.2.3 of EN 60350–2:2013 for determining the simmer setting eliminates the need to specify a maximum tolerance on the simmering temperature. By selecting the lowest simmering setting first and repeating the test as necessary with the next highest setting until the water temperature is as close to 90 °C as possible, an incremental increase in the final water temperature associated with each step increase in the power setting will become apparent. This information can then be used to determine the correct simmering setting without specifically limiting the final temperature. Given the impact that selecting the correct simmering setting has on overall energy consumption of a surface unit, DOE is amending appendix I in this final rule to require that the simmering setting selection for the energy test cycle of each cooking area or cooking zone be recorded.

As noted in Table III.2, DOE's test sample included products with both discrete step and infinite controls to investigate the effect different controls might have on variability during the simmering phase of the test. Based on DOE's testing with different power level settings, as presented in Table III.8, DOE did not observe any differences in the process of selecting the correct simmering setting between the models with discrete step and models with infinite controls. Assuming reasonable increments (on the order of 10 degrees of rotation) as the setting is adjusted to determine the correct simmering setting, infinite controls do not require a fine tolerance on the selected setting that would substantially impact the per-cycle energy consumption. Additionally, DOE did not find that it was easier to maintain the water temperature closer to 90 °C with one control type compared to the other. The test-to-test variation in total per-cycle energy consumption was also similar for cooking tops with infinite controls and cooking tops with discrete step controls. DOE also surveyed the cooking top models available in Europe, where EN 60350–2:2013 is already used to rate cooking tops. DOE observed that both products with step controls and with infinite controls were widely available on the European market.

For the reasons discussed, DOE determines that the water-heating test procedure adopted in this final rule would not result in the unavailability of certain control types. Furthermore, as noted in section I.A of this document, based on the provisions under 42 U.S.C. 6293(b)(3), DOE designs its test procedures to produce test results that measure energy use during a representative average use cycle and that are not unduly burdensome to conduct. Therefore, DOE focuses the development of its test procedure around the general use and operations performed by a consumer and not around specific product designs. DOE notes that a manufacturer may apply for a waiver from the test procedure if a basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures or cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). In such cases, a manufacturer may provide any alternate test procedures

known to the manufacturer to evaluate the performance of the product type in a manner representative of the energy consumption characteristics of the basic model. 10 CFR 430.27(b)(1)(iii).

Regarding AHAM's comment on the difficulty of determining when the water temperature first reaches 90 °C to start the 20-minute simmering phase of the test, DOE acknowledges that occasionally, when the temperature first reaches 90 °C, it may oscillate slightly above and below 90 °C due to noise in the temperature measurement. Based on DOE's testing, DOE observed temperature fluctuations around 90 °C at the start of the simmering phase primarily during tests of electric coil and smooth-radiant surface units. Figure III.1 shows an example of two separate tests conducted for the same surface unit on a smooth-radiant cooking top. After initially reaching 90 °C, the water temperature in each test drops below the 90 °C limit for no more than 20 seconds.

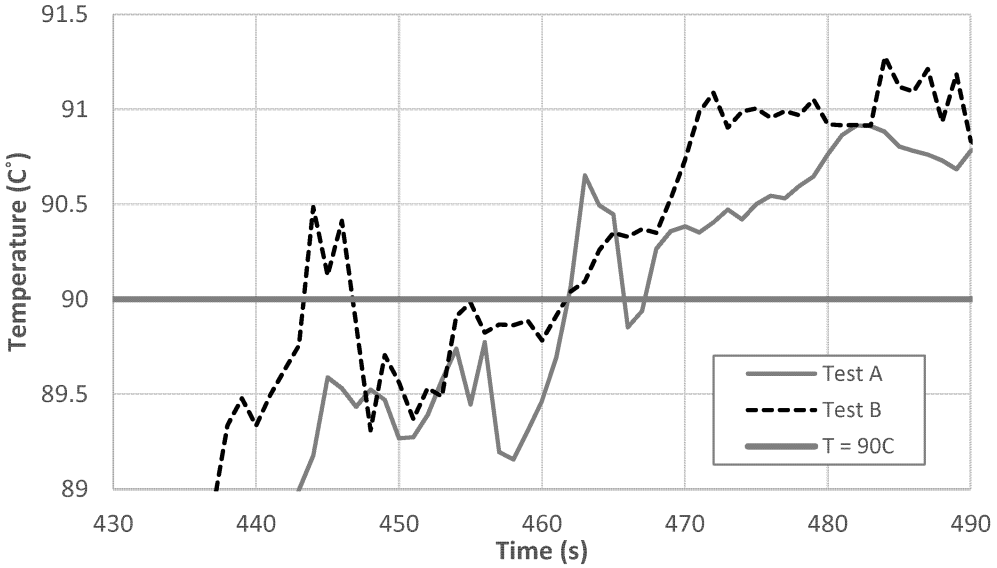

Figure III.1 Temperature Measurement Noise at the Start of the Simmer Phase for a Smooth – Radiant Cooking Top

Based on DOE's review of the temperature fluctuations observed for all electric and gas cooking tops in its test sample, DOE finds that a 20-second period would accurately account for any minor temperature fluctuations after the water temperature initially reaches 90 °C.

Allowing for temperature fluctuations around 90 °C during the first 20 seconds of the simmering phase is also consistent with the 20-second tolerance specified for determining the turndown temperature of a surface unit in section 7.1.Z6.2.2 of EN 60350–2:2013. DOE also notes that allowing for a 20 seconds of fluctuation about 90 °C at the start of the simmering phase does not significantly impact the total energy consumption measured for a surface unit. Table III.9 lists the final temperature and total per-cycle energy consumption for Test A and B that were also shown in Figure III.1.

TABLE III.9—EFFECT OF A 20-SECOND TOLERANCE AT THE START OF THE SIMMER PHASE

	Final water temperature T_{final} (°C)	Total per-cycle energy consumption (Wh)
Test A	92.0	191.7
Test B	91.5	190.3

Based on the comments from interested parties on the difficulty of determining when the water temperature first reaches 90 °C to start the 20-minute simmering phase of the test and DOE's analysis discussed, DOE is clarifying in this final rule that the 20-minute simmering period starts when the water temperature first reaches 90 °C and does not drop below 90 °C for more than 20 seconds after initially reaching 90 °C.

Heating Element Cycling

AHAM commented that cycling of power to the heating element is unpredictable and causes variation in test results. AHAM stated that it is unknown if the surface unit will cycle the heating element off during a critical phase of the test procedure (*i.e.,* at the start of the simmer phase or when determining the simmering setting). AHAM stated that the algorithm that governs the cycling of the heating element is important for cooking performance because it controls the temperature of the food being cooked. AHAM also noted that electric smooth cooking tops are equipped with a sensor that monitors the temperature of the glass surface and cycles the heating element as needed as a safety function to prevent the glass from breaking. AHAM commented that the uncertainty regarding how cycling of the heating element will impact test results, and test burden is a significant concern and could drive redesign of products. (AHAM, No. 30 at p. 12)

DOE recognizes that electric coil and smooth–radiant cooking tops typically control the heat input to the food load by cycling the heating element on and off at different rates based on the control setting rather than fully modulating the power to the heating element. DOE observed during its testing that during the heat-up phase of the test, when the

surface unit is set to the maximum setting, the heating element typically remains on the entire time. When the control setting is turned down to a lower level for the simmering phase of the test, the heater cycles on and off to achieve a lower level of heat. DOE observed only one electric smooth–radiant surface unit in its sample for which the heater cycled on and off during the heat-up phase of the test. However, after cycling off, the heating element cycled back on within a few seconds and, as a result, the water temperature continued to rise at a fairly steady rate. DOE concludes from the infrequency of heating element cycling during the heat-up phase that it observed among all electric cooking tops during testing that it is unlikely that other electric smooth-radiant cooking tops would require any substantive amount of heating element cycling to protect the glass surface. Therefore, given the short duration and infrequency of heating element cycling that may occur when the surface unit is set at the maximum setting during the heat-up phase of the test, DOE does not expect any measurable impacts of heating element cycling on the total measured per-cycle energy consumption.

Temperature Sensor Requirements

AHAM commented that the accuracy of the water temperature measurement is a critical part of the test procedure, but that EN 60350–2:2013 does not specify whether a resistance temperature detector (RTD) type probe or a thermocouple should be used. AHAM noted that RTDs are highly accurate, but can be sensitive, expensive, and may not be compatible with induction cooking tops. AHAM also noted that thermocouples offer durability but are not as accurate. According to AHAM, a laboratory using an RTD may obtain different turndown temperature and simmering settings than one using a thermocouple, resulting in variation in the total energy consumption measurement. AHAM commented that DOE should require a thermocouple in the test procedure and investigate the specific type of thermocouple that should be required to standardize the water temperature measurement. (AHAM, No. 30 at p. 12)

DOE conducted its testing using a thermocouple and infers, based on the various references to thermocouples in EN 60350–2:2013 (*e.g.,* use of thermocouples for other liquid heating measurements, reference to thermocouple standards in the bibliography), that the water-heating test method specified in EN 60350–2:2013 is intended to be conducted using a thermocouple to measure water temperature. DOE also notes that similar IEC water-heating test standards, such as IEC 60705 Amendment 1 to Edition 4.0, ''Household microwave ovens—Methods for measuring performance'', specify thermocouples for measuring water temperature. For these reasons, DOE agrees with AHAM that the test procedure should clarify that a thermocouple should be used for measuring water temperature.

Section 5.3 of EN 60350–2:2013 includes specifications for the water temperature measuring device, which includes requirements that the accuracy of the water temperature measuring device must be ±0.5 K of the temperature being measured. DOE notes that specific thermocouple types may have different accuracies. As a result, DOE concludes that specifying the thermocouple type is not necessary given that EN 60350–2:2013 already includes requirements for the accuracy of the water temperature measurement.

Surface Unit Diameter Measurement

AHAM commented that the proposed test procedure does not specify the equipment for measuring the surface unit cooking zone diameter, which is necessary for determining the size of the test cookware. According to AHAM, if the test procedure does not include requirements for the measuring equipment, the printed diameters of cooking tops may change to resemble standard sizes in the test procedure. To ensure consistency and accuracy in test measurements, AHAM stated that DOE should require a diameter measurement accurate to within ±1 mm and specify that the outer diameter of the cooking zone printed marking should be used for the measurement. (AHAM, No. 30 at p. 13)

DOE recognizes that measurements of surface unit cooking zone diameters will affect the test vessel diameters and load sizes selected for the test of electric cooking tops. DOE agrees that clarifying that the outer diameter of the cooking zone printed marking should be used for the measurement will provide more consistent measurements of surface unit cooking zone diameters. As a result, DOE is amending the test procedure in this final rule to clarify that the outer diameter of the cooking zone printed marking shall be used for the measurement. DOE does not find that specifying a tolerance on the accuracy of the surface unit diameter measurement in the test procedure is necessary. The provisions for measuring the dimensions of the cooking zone in section 6.2.Z2 of EN 60350–2:2013 and the cooking zone size categories in Table Z3 of EN 60350–2:2013 are provided in millimeters. DOE concludes that these values indicate that surface unit diameter measurements must be made to the nearest millimeter.

Availability of Test Vessels

AHAM commented that suppliers for test vessels are extremely limited and are located only in Europe, which adds time and cost for U.S. manufacturers. Furthermore, according to AHAM, if the test procedure is required to demonstrate compliance with standards, demand is expected to increase. AHAM stated that this may overburden existing suppliers, making it difficult for manufacturers and testing laboratories to procure test vessels in a timely manner and would make the test procedure unduly burdensome to conduct. (AHAM, No. 30 at pp. 6, 13)

AHAM stated that because testing has been limited and most manufacturers have only a single set of test vessels, AHAM has not yet been able to understand the durability of the test vessels. AHAM added that the quality of test vessels provided by suppliers in the United States has yet to be determined and may result in differences from test vessels procured from European suppliers. According to AHAM, DOE should identify acceptable suppliers in the United States and ensure that the test vessels are comparable from supplier to supplier. AHAM also stated that DOE should evaluate the durability of the test vessels to better quantify the test burden and how frequently test vessels need to be replaced. (AHAM, No. 30 at pp. 6, 13)

Section 7.1.Z2 of EN 60350–2:2013 includes detailed specifications for the materials and dimensions of the test vessels, such that any precision machine shop can construct the test vessels with the specified materials. DOE has also determined that test vessels meeting the requirements in EN 60350–2:2013 are available from multiple sources. DOE was able to source two full sets of test vessels, at two different points in time using different material stocks, from a small business precision machine shop. DOE also notes that the test methods and test vessels specified EN 60350–2:2013 are used in countries both within and outside of Europe, and that suppliers are not limited to those recommended in EN 60350–2:2013.[15]

To evaluate whether consistent test results can be produced using different

[15] European cookware supplier recommended in EN 60350–2:2013: RYBU GmbH (*http://www.rybu.de*)

sets of test vessels, DOE conducted testing after the August 2016 TP SNOPR using its two sets of test vessels. DOE conducted testing on four surface units on three cooking tops with both sets of test vessels. DOE's test results presented in Table III.10 show that the variance of test results was, on average, 1.6 percent, which is similar to the overall variation in test results using the water-heating test method presented in Table III.3. Based on this testing, DOE has determined that test vessels constructed using the detailed specifications provided in section 7.1.Z2 of EN 60350–2:2013 produce reproducible results.

TABLE III.10—VARIATION DUE TO DIFFERENT TEST VESSELS

Cooking top unit	Surface unit location	Surface unit diameter (in.)	Simmering setting	Cookware diameter (mm)	Average per-cycle energy consumption (Wh)	Coefficient of variation (%)
2	FL	6	2	150	189.8	0.7
4	BR	6	3	150	173.1	2.1
5	BR	6	2.5	150	172.8	2.6
	BR	6	3	150	187.0	1.2

Each set of test vessels used in DOE's testing also were subject to a different number of tests, but DOE's observation is that the test vessels met the specifications provided section 7.1.Z2 of EN 60350–2:2013 and remained within the allowable tolerances, such that the test procedure produces repeatable and reproducible results. The flatness of the test vessel bottoms have been observed to stay in tolerance for several years, but manufacturers may wish to examine the test vessels for compliance with the allowable tolerances more frequently. If the test vessels are no longer in tolerance, it may be possible to repair the equipment without replacing it. For the reasons discussed, DOE concludes that there are multiple sources that can supply the test vessels and that the specifications provided in section 7.1.Z2 of EN 60350–2:2013 for the test vessels are sufficient. As a result, DOE is not including any additional requirements for suppliers and durability of the test vessels.

Final Rule Test Procedure Amendments

Based on DOE's testing and investigations discussed, DOE concludes that the water-heating test method is both repeatable and reproducible for electric cooking tops. DOE posits that the variation in test results observed in AHAM's round robin testing may be related to the lack of familiarity with the test method rather than variability inherent to the test method itself. For these reasons, DOE is amending the test procedure in this final rule to incorporate by reference the testing provisions in EN 60350–2:2013 as proposed in the August 2016 TP SNOPR and presented, with the clarifications to the simmering temperature, temperature sensor requirements, and surface unit diameter measurement.

2. Multi-Ring and Non-Circular Surface Units

Many smooth–electric radiant cooking tops incorporate ''multi-ring'' elements that have multiple concentric heating elements for a single surface unit. When a single ring is selected for use, the smallest-diameter heating element is energized. Each setting which increases the number of rings sequentially energizes additional concentric heating elements, increasing the diameter of the surface unit accordingly. Multiple heating elements give the user flexibility to adjust the surface unit to fit a certain cookware size. Results from DOE testing presented in the December 2014 TP SNOPR showed a significant decrease in efficiency at the smaller-diameter settings as compared to the largest-diameter setting of a multi-ring surface unit. 81 FR 57374, 57384 (Aug. 22, 2016).

As discussed in the August 2016 TP SNOPR, EN 60350–2:2013 requires that the energy consumption of only the largest diameter of a multi-ring surface unit be measured, unless an additional test vessel category is needed to meet the test vessel selection requirements in section 7.1.Z3 of EN 60350–2:2013, as explained in section III.C.1 of this document. In that case, one of the smaller-diameter settings of the multi-ring surface unit that matches the next best-fitting test vessel diameter must be tested. However, DOE proposed in the August 2016 TP SNOPR to require each setting of the multi-ring surface unit be tested independently. 81 FR 57374, 57384–57385 (Aug. 22, 2016). DOE noted that because each setting could be used as an individual surface unit, each setting should factor into the AEC of the cooking top. Specifically DOE proposed that each diameter setting of the multi-ring surface unit would be tested and included as a unique surface unit in the average energy consumption calculation for the cooking top. *Id.*

The Joint Efficiency Advocates supported DOE's proposal to require each diameter setting of a multi-ring surface unit to be tested separately. The Joint Efficiency Advocates stated that testing each diameter setting separately will better capture the energy consumption of cooking tops with these elements and encourage manufacturers to develop ways to improve the efficiency of the smaller-diameter settings. (Joint Efficiency Advocates, No. 32 at p. 2)

AHAM and GE opposed DOE's proposal to require testing of each diameter setting of a multi-ring surface unit. AHAM stated that this proposal unduly increases the test burden, by up to 75 percent, depending on the number of heating elements. GE stated that because energy, in the form of radiation, escapes from the areas of the multi-ring element not covered by the test vessel when testing the inner ring heating elements, cooking tops with multi-ring surface units tested according to the proposed DOE test procedure will have a higher AEC than the same cooking top without multi-ring surface units. AHAM and GE also stated that requiring testing of each diameter setting of a multi-ring surface unit could drive manufacturers to eliminate this design, resulting in a loss of consumer utility of customizing element size to the size of their cookware. AHAM and GE noted that without these multi-ring surface units, consumers could use smaller pots on larger heating elements, which would result in 20-percent greater energy use [16]

[16] AHAM described two tests that were conducted on a multi-ring surface unit with a 210 mm test vessel. For the first test, the test vessel was placed on the inner ring as specified in the proposed test procedure with the small element activated. The second test was conducted with the test vessel placed in the center and the larger burner was

because the heating element is not completely covered by the cookware. (AHAM, No. 30 at pp. 5, 14; GE, No. 31 at pp. 3–4) AHAM and GE stated that based on the increased test burden, loss of consumer utility, and resulting inefficiency, DOE should remove the requirement to test each diameter setting of a multi-ring surface unit and instead follow EN 60350–2:2013 to only require testing of the largest measured diameter of multi-ring surface units. (AHAM, No. 30 at p. 14; GE, No. 31 at p. 4)

To better understand the utility provided by multi-ring surface units, DOE reviewed electric smooth–radiant cooking tops with multi-ring elements on the market in the United States. DOE estimates that multi-ring surface units add approximately 1.5 additional surface unit diameters per cooking top, providing consumers with the ability to better match cookware diameter to surface unit diameter. However, DOE is not aware of any data demonstrating how frequently consumers use the smaller diameter settings of multi-ring surface units.

DOE agrees with AHAM and GE that removing the multi-ring surface unit functionality from a cooking top could lead to increased energy consumption. As shown in Table III.11, DOE tested two multi-ring elements with the next best-fitting cookware from a different standardized cookware category (see Table Z3 of EN 60350–2:2013). By testing each surface unit with a smaller diameter cookware, DOE simulated the additional energy use that would result if the surface unit did not have the multi-ring functionality. DOE found that the normalized surface unit per-cycle energy consumption of the surface unit increases by greater than 25 percent if the cookware diameter is not matched to the surface unit diameter.

TABLE III.11—EFFECTS OF A SMALLER TEST VESSEL DIAMETER ON A MULTI-RING SURFACE UNIT

Cooking top unit	Surface unit location	Maximum surface unit diameter (mm)	Cookware diameter (mm)	Normalized surface unit energy consumption (Wh/g)	Increase in normalized energy consumption
2	FR	305	300	0.18	.....
			240	0.23	29.2
	BL	203	210	0.18	.....
			180	0.23	27.2

Based on the test results presented, DOE would expect an increase in actual cooking top energy consumption and loss of utility for consumers if the multi-ring feature were removed by manufacturers due to its negative impacts on the measured AEC. For these reasons, and in consideration of the uncertainty regarding the frequency of use of the smaller diameter settings of multi-ring surface units and the added testing burden associated with testing multi-ring surface units, DOE is not adopting a requirement that each diameter of a multi-ring surface unit be tested separately as part of the test method adopted in this final rule. Instead, DOE has determined that the provisions for testing multi-ring surface units in EN 60350–2:2013, which require that the energy consumption of only the largest diameter of a multi-ring surface unit be measured, unless an additional test vessel category is needed to meet the requirements of the test procedure, will produce an appropriate measurement of energy use for such surface units while minimizing testing burden and avoiding the unavailability of cooking tops with multi-ring surface units. DOE notes that the provisions in EN 60350–2:2013 ensure that if a cooking top with a multi-ring surface unit does not include other surface units with a variety of diameters, the smaller diameter settings of multi-ring surface units would be tested to fulfill the cookware category requirements in EN 60350–2:2013. Therefore, DOE is incorporating by reference the provisions for testing multi-ring surface units in EN 60350–2:2013 as discussed.

In the August 2016 TP SNOPR, DOE proposed to incorporate by reference section 7.Z1 in EN 60350–02:2013, which specifies that for cooking zones that include a circular and an elliptical or rectangular part, only the circular section be tested. Additionally, DOE proposed to incorporate by reference section 7.1.Z4 and Annex ZA of EN 60350–2:2013, which define the center of elliptical and rectangular surface units by their geometric centers and provide the required test positions of test vessels on these kinds of surface units. 81 FR 57374, 57384 (Aug. 22, 2016). DOE did not receive any comments on these proposed provisions regarding the testing of cooking zones that include a circular and an elliptical or rectangular part. DOE is adopting these provisions in this final rule.

In the August 2016 TP SNOPR, DOE also maintained its proposal to not require testing of certain types of non-circular cooking top elements, specifically, bridge zones, warming plates, grills, griddles, and roaster extensions. DOE clarified that it was not proposing to require testing of bridge modes that couple several surface units together for use as a warming plate or for use with a roasting pan. However, if the individual circular heating elements can be used independently of the bridge mode, DOE proposed that the individual circular heating elements should be tested and included in the calculation of cooking top AEC. 81 FR 57374, 57385 (Aug. 22, 2016).

AHAM agreed with DOE's proposal to not require testing of bridge zones, warming plates, grills and griddles. AHAM noted that these cooking top elements may not heat the test load to the temperature of 90 °C required under EN 60350–2:2013 and that the purpose of these cooking top elements is not to boil water. AHAM added that requiring testing of these elements would increase test burden and require the development of unique test vessels/loads as well as further evaluation of repeatability and reproducibility. (AHAM, No. 30 at p. 14) The SoCal IOUs stated that because DOE's proposed test procedure already includes provisions for testing non-circular cooking top elements, no additional testing burden would be introduced by requiring testing of bridge zones, warming plates, grills and griddles. The SoCal IOUs recommended that DOE extend the water-heating test method to include these non-circular cooking top elements to ensure that sufficient data is collected to develop

activated (as a consumer would, if this utility is removed).

standards that maximize energy savings. (SoCal IOUs, No. 27 at p. 3)

As noted in the December 2014 TP SNOPR, bridge zones, warming plates, grills, and griddles are not intended for use with a typical circular piece of cookware. DOE also noted that appropriate test loads for these non-circular cooking top elements would depend on the intended function of each cooking top element. 79 FR 71894, 71906 (Dec. 3, 2014). Because DOE has not developed test loads for bridge zones, warming plates, grills, and griddles, which are not intended for use with typical circular piece of cookware, the test procedure proposed in the August 2016 TP SNOPR did not address these cooking top elements. DOE is only requiring testing of non-circular cooking top elements in cases where those elements are designed for circular pieces of cookware (*e.g.,* bridge zone individual circular heating elements that can be used independently of the bridge mode). Because the additional equipment necessary for the test method to be representative would place an unreasonable burden on test laboratories and manufacturers, and for the reasons discussed, DOE is not requiring testing of bridge zones, warming plates, grills, and griddles.

In the August 2016 TP SNOPR, DOE clarified that a flexible cooking area (*i.e.,* a full-surface induction cooking zone, able to heat multiple items of cookware simultaneously, with independent control options for each piece of cookware) does not constitute a bridge mode. 81 FR 57374, 57385 (Aug. 22, 2016). As discussed in section III.C.1 of this document, DOE is incorporating by reference Annex ZA of EN 60350–2:2013 for testing flexible cooking areas, which specifies that for a cooking area without limitative marking, *e.g.,* a full-surface induction zone, the number of controls is defined by the number of cookware items that can be used independently and simultaneously, and the number of controls determines the number of tests.

3. Gas Cooking Tops

The test methods specified in the relevant sections of EN 60350–2:2013 were intended for use with only electric cooking tops. In the August 2016 TP SNOPR, DOE proposed to extend this water-heating test method to gas cooking tops based on the test provisions in another European water-heating test standard, EN 30–2–1:1998 *Domestic cooking appliances burning gas—Part 2–1: Rational use of energy—General.* EN 30–2–1 is similar to the electric cooking top water-heating test method in that it specifies a series of test vessels and water loads that are dependent on a nominal characteristic of the surface unit. EN 30–2–1 specifies the diameter of the test vessel and the mass of the water load based on the heat input of the gas burner being tested. 81 FR 57374, 57385–57386 (Aug. 22, 2016).

However, DOE noted in the August 2016 TP SNOPR that because the two test methods differ slightly (*e.g.,* differences in the test vessels, water load sizes, and heating phases measured during the test), the resulting measured energy consumption would not be comparable between gas and electric cooking tops. As a result, DOE did not propose to incorporate both test methods by reference. DOE noted that it was not aware of data showing that consumers cook food differently with gas cooking tops than with electric cooking tops. Thus, DOE proposed to extend the test methods specified for electric cooking tops in EN 60350–2:2013 to gas cooking tops, but using the test vessel diameters and the corresponding water loads from EN 60350–2:2013 that most closely match the test vessel diameters specified in EN 30–2–1. DOE determined that using the same test vessels and water loads as specified for electric cooking tops, as well as the same general test method, would reduce the burden on manufacturers by minimizing the amount of new test equipment required to be purchased. 81 FR 57374, 57386 (Aug. 22, 2016). In addition, unlike for electric cooking tops, DOE did not propose to require a minimum number of cookware categories for the test of a gas cooking top. Given that the diameter of the gas flame cannot be adjusted when the burner is at its maximum setting, DOE determined that only the best fitting test vessel would be used for the surface unit test. *Id.*

The SoCal IOUs supported the extension of the water-heating test method to gas cooking tops, but stated that DOE should conduct a sensitivity analysis of the impact of ambient temperature and pressure conditions on the test results for gas and electric cooking products. The SoCal IOUs stated that this will ensure consistent test results across various regions, climates, and altitudes. The SoCal IOUs also commented that validating the ambient condition requirements would address the impact of the proposed correction to the gas heating value to standard temperature and pressure conditions. (SoCal IOUs, No. 27 at pp. 2–3) As discussed in section III.C.1 of this final rule, DOE is incorporating the ambient air pressure and temperature conditions specified in section 5.1 of EN 60350–2:2013. As a result, these test conditions will be standardized such that test results should not be impacted by tests being conducted in different locations.

AHAM commented that it does not have any consumer data on the representativeness of the proposed water heating method for gas cooking tops, and DOE did not provide AHAM and manufacturers with enough time to collect such data and to understand whether the proposed test method provides representative results for gas cooking tops. AHAM further commented that DOE should conduct consumer surveys to collect the data necessary to support the proposed test method for gas cooking tops. (AHAM, No. 30 at pp. 15, 17)

AHAM commented that DOE needs to assess the impact of using the electric cooking top test procedure for gas cooking tops. AHAM noted that Europe uses different test procedures for each technology because gas cooking tops use more of a system approach when compared to electric cooking tops. AHAM added that the heat transferred to the test load depends on the design of the burner, flow of gas, mass of the grate, and height of the grate from the burner. (AHAM, No. 30 at p. 15) AHAM commented that because of the short comment period, it was not been able to run its proposed round robin testing program for gas cooking tops to evaluate the proposed test method. AHAM also noted that it was conducting investigative testing to compare DOE's proposal to EN 30–2–1, as well as a combination of DOE's proposed test procedure and the test vessels specified in EN 30–2–1. AHAM commented that it does not have the data to determine, nor has DOE demonstrated, that the proposed test procedure for gas cooking tops produces repeatable and reproducible test results. AHAM stated that DOE cannot rely on the CECED round robin testing to demonstrate repeatability and reproducibility because the CECED round robin did not test according to DOE's proposed test procedure for gas cooking tops. (AHAM, No. 30 at pp. 3, 15)

Because DOE has proposed to establish the same test procedure for electric cooking tops to gas, AHAM noted that the same testing issues it identified for electric cooking tops also apply for gas cooking tops. (AHAM, No. 30 at p. 15)

AHAM additionally commented that several manufacturers observed during testing that, in some instances, the overshoot temperature went beyond the simmer temperature of 90 °C, such that the turndown calculation showed a negative temperature value. According

to AHAM, this means that some products may not be able to complete a valid test. (AHAM, No. 30 at pp. 16–17)

AHAM also noted that, based on its limited investigative testing, testing laboratories did not always center the test vessel because some grate designs cannot support the test vessels specified in DOE's proposed test procedure. AHAM indicated that the test vessel was either unbalanced on the grates, or was too big for the design of the grates. As a result, laboratories selected either a larger or smaller test vessel to conduct a test. AHAM stated that DOE should investigate and address this issue before finalizing the test procedure. (AHAM, No. 30 at p. 16)

As noted for electric cooking tops, DOE requested test data and information from AHAM's testing of gas cooking tops to better understand the issues raised on their comments. DOE has not received this test data or information which would allow for a direct evaluation of the issues identified. As described in section III.C.1 of this document, DOE conducted testing after the August 2016 TP SNOPR to investigate the concerns raised by interested parties regarding potential sources of variability in the water-heating test method. In addition to the electric cooking top testing, DOE also conducted testing on five gas cooking tops that covered a range of manufacturers, burner input rates, installation widths, burner quantities, and grate weights. DOE's test sample also included cooking tops marketed as either residential-style or commercial-style. Table III.12 lists the characteristics for each of the gas cooking tops in the DOE test sample.

TABLE III.12—DOE GAS COOKING TOPS TEST SAMPLE

Cooking top unit	Width (in.)	Number of burners	Minimum input rate (Btu/h)	Maximum input rate (Btu/h)	Burner configuration	Grate type	Grate weight per burner (lbs)
1	30	4	9,000	9,000	Open	Steel-wire	0.5
2	30	4	5,000	15,000	Sealed	Cast Iron	3.7
3	36	6	18,000	18,000	Sealed—Stacked	Cast Iron	4.2
4	36	6	9,200	15,000	Sealed—Stacked	Cast Iron (continuous)	5.8
5	36	6	15,000	18,500	Sealed	Cast Iron (continuous)	7.0

To evaluate the variability in test results, DOE conducted two to three tests on each burner. For each individual test, DOE performed the full test method, including the preliminary test required to determine the turndown temperature and simmering setting for a given burner. In addition, in evaluating the test-to-test variation, DOE included test results from previous testing conducted in support of the August 2016 TP SNOPR. The coefficient of variation for the measured AEC observed for DOE's gas cooking top test sample was, on average, 1.0 percent. DOE also noted that the average per-cycle energy consumption coefficient of variation for each burner was 1.7 percent, which is similar to the variation observed for electric cooking tops presented in section III.C.1 of this document. Based on this testing, DOE concludes that the water-heating test method in EN 60350–2:2013, extended to gas cooking tops based on EN 30–2–1, produces repeatable and reproducible test results.

TABLE III.13—COEFFICIENT OF VARIATION IN ANNUAL ENERGY CONSUMPTION FOR GAS COOKING TOPS

Cooking top unit	Average annual energy consumption (kBtu/yr)	Coefficient of variation
1	640.4	2.4%
2	854.4	1.4%
3	974.6	0.4%

TABLE III.13—COEFFICIENT OF VARIATION IN ANNUAL ENERGY CONSUMPTION FOR GAS COOKING TOPS—Continued

Cooking top unit	Average annual energy consumption (kBtu/yr)	Coefficient of variation
4	963.5	0.3%
5	893.1	0.3%

DOE observed similar variation in the turndown temperature for gas cooking tops as for electric cooking tops, and noted that the observed variation in the turndown temperature did not measurably affect the variability in the per-cycle energy consumption. As noted in III.C.1 of this document, the provisions specified in section 7.1.Z6.2 of EN 60350–2:2013 reduce the variability associated with determining the turndown temperature by including tolerances on the temperature at which gas flow to the burner is shut off.

As discussed in section III.C.1 of this document, the preliminary test to determine the turndown temperature specifies that the test load be heated at the maximum input rate until the water temperature reaches 70 °C (T_{70}), at which point the burner is immediately shut off. After the burner is shut off, the water temperature is recorded until it has reached its maximum value above T_{70}. In this final rule, DOE is clarifying that the temperature overshoot (ΔT_o), as shown in figure Z2 in section 7.1.Z6.2.2 of EN 60350–2:2013 is the difference between the maximum recorded water temperature and T_{70}. DOE notes that the while the figure correctly shows that $\Delta T_o = T_{max} - ;T_{70}$, the text in section 7.1.Z6.2.2 of EN 60350–2:2013 incorrectly defines ΔT_o as the highest recorded temperature. The turndown temperature for the energy test (T_c) is then calculated as $T_c = 93\ °C - \Delta T_o$. With regards to concerns that the overshoot temperature can be large enough such that the turndown calculation results in a negative temperature value, DOE did not observe any cases during its testing where the turndown temperature would approach a negative value. DOE notes that a negative turndown temperature would require a temperature overshoot during the preliminary turndown test of greater than 93 °C, and a final water temperature higher than the boiling point of water, whereas DOE typically observed temperature overshoots of 10 °C or less. In addition, EN 60350–2:2013 specifies that if T_c is less than or equal to 80 °C, then 80 °C is used as T_c.

Similarly, DOE evaluated the variation in the simmering setting for gas cooking tops, using the same test methodology as for electric cooking tops. As part of its testing effort, DOE first selected the lowest setting and then incrementally increased the setting in each consecutive test until the simmering temperature was above, but as close to, 90 °C as possible. DOE did not observe any differences between gas and electric cooking tops regarding the

process of selecting the correct simmering setting. Based on DOE's test results, as presented in Table III.13, the water-heating test method, including the process for selecting the simmering setting, did not result in significant variability in test results.

Furthermore, throughout its testing of gas cooking tops, which covered a range of burner/grate designs, DOE did not observe any difficulty or issues with positioning the test load on the grates. The maximum test vessel diameter specified in the test method for gas cooking tops is approximately 12 inches, which is a common pan diameter in the United States. For all of the cooking tops in DOE's test sample, the grates were able to support the test vessel and water loads specified in the test method for the full duration of the test. None of the grates in DOE's test sample exhibited signs that the test vessels and water loads were too big or heavy for the design of the grates.

In the August 2016 TP SNOPR, DOE proposed to use the same test vessels and water loads as specified for electric cooking tops in EN 60350–2:2013, correlating those test vessel sizes to nominal burner input rate. Specifically, DOE proposed to include a table of burner input rates and test vessel sizes in section 2.7.2 of appendix I, along with the mass of the water load to be used in both English and Metric units. However, DOE incorrectly specified the mass of the water load in pounds for the 300 mm test vessel diameter, although the mass listed in kilograms (kg), 4.24 kg, was correct. As part of this final rule, DOE is correcting the conversion to English units for the 300 mm test vessel so that it correctly corresponds to the test vessel diameter and water load listed in EN 60350–2:2013. Table III.14 lists the correct test vessel diameters adopted for the test of conventional gas cooking tops.

TABLE III.14—TEST VESSEL DIAMETERS AND WATER LOADS FOR THE TEST OF CONVENTIONAL GAS COOKING TOPS

Nominal gas burner input rate		Test vessel diameter inches (mm)	Water load mass lbs (kg)
Minimum Btu/h (kW)	Maximum Btu/h (kW)		
3,958 (1.16)	5,596 (1.64)	8.27 (210)	4.52 (2.05)
5,630 (1.65)	6,756 (1.98)	9.45 (240)	5.95 (2.70)
6,790 (1.99)	8,053 (2.36)	10.63 (270)	7.54 (3.42)
8,087 (2.37)	14,331 (4.2)	10.63 (270)	7.54 (3.42)
>14,331 (4.2)	.....	11.81 (300)	9.35 (4.24)

AHAM commented that the design of gas cooking top burners (*i.e.,* shape, whether it is open versus sealed, or stacked) and grates (*i.e.,* size, weight, material, distance from burner to grate, and whether the grates are continuous to allow a pot to be moved from one burner to another without lifting it) vary from one product to another and offer different consumer utility. AHAM also commented that each burner or grate design element affects how the test load is heated and the measured energy consumption. AHAM urged DOE to evaluate these design differences and their effect on the test procedure, including the resulting effect on repeatability and reproducibility, so that the test procedure does not dictate future design of burners and grates and result in a loss of consumer utility. (AHAM, No. 30 at pp. 15–16)

The test procedure is designed to measure energy consumption that is representative of consumer use. As noted in Table III.12, DOE's test sample included products with a range of burner types (stacked, sealed, and open), burner input rates, grate materials (steel wire and cast iron), and continuous and non-continuous grates. As shown in Table III.13, DOE's testing demonstrated that the water-heating test method produces repeatable and reproducible results for gas cooking tops. DOE did not observe that any single design feature produced significant variation in test results. DOE recognizes that certain design features relating to the burner and grate design may impact the measured energy use. DOE considers any consumer utility provided by different design features that may impact energy use as part of the energy conservation standards rulemaking when evaluating product classes and proposed standards.

Sub-Zero expressed concern that limitations of the test procedure would unfairly impact the consumer utility offered by high performance commercial-style cooking products in a rulemaking to establish standards for these products. (Sub-Zero, No. 25 at p. 1) Sub-Zero commented that the commercial-style cooking top market segment appeals to consumers that demand performance similar to that found in restaurant equipment at a safety and convenience level that are necessary for residential use. Sub-Zero stated that these consumers use their products in a way that is often different from the typical household user. For example, Sub-Zero noted that users of commercial-style gas cooking tops often sauté at very high burner outputs, manipulate the pans to mix the ingredients like professional chefs, flame the contents, and operate most of the cooking top burners simultaneously. (Sub-Zero, No. 25 at pp. 1–2)

Sub-Zero opposed DOE's proposal to test all gas cooking tops in the same manner despite commercial-style products differing markedly in construction and usage. Sub-Zero commented that gas burner design attributes such as safety, performance, efficiency are systematic, and that a change to one attribute significantly affects the others. Sub-Zero noted that specific design features associated with commercial-style gas cooking tops that impact efficiency include:

- High input rate burners with large diameters and high controllability of the flame, for quicker heat-up times as well as the ability to simmer foods such as chocolates and sauces;
- Heavy cast iron grates for better heat distribution and strength to support large loads;
- Greater distance from the burner to the grate for heat distribution and reduction of carbon monoxide; and
- Larger open area for primary and secondary air for combustion and exhaust of combustion byproducts.

(Sub-Zero, No. 25 at pp. 2–3)

Sub-Zero requested that DOE reconsider the impact that the proposed test procedure will have on small, niche market, commercial-style cooking product manufacturers. Sub-Zero expressed concern that a single regulatory approach would not allow companies like Sub-Zero to adequately serve their customer base and would negatively impact consumer utility. (Sub-Zero, No. 25 at p. 3)

In its testing of commercial-style gas cooking products, DOE did not identify any provisions of the test method that

would be more difficult for commercial-style products to meet than residential-style products. Because the test procedure adopted in this final rule specifies a water-heating test method, DOE determined that the test procedure is representative of how consumers would use any gas cooking top, regardless of whether the cooking top is marketed as commercial-style. By correlating burner input rate to test vessel and water load size, the test method properly accounts for the grates' ability to support large loads. Furthermore, DOE expects that benefits resulting from the improved controllability of the flame, high input rates for quicker heat-up times, and the design of the burner for low simmering settings, features cited by Sub-Zero as factors differentiating commercial-style cooking tops on the market, would be captured by the test method. Specifically, if the higher input rates result in faster heat-up times and the burner design allow for more precise simmering control, DOE expects that the cooking top may use less energy consumption during both the heat-up and simmering phase of the test as compared to other commercial-style cooking tops not equipped with these features.

For the reasons discussed above, DOE is adopting its proposal from the August 2016 TP SNOPR for the test of gas cooking tops. The adopted test procedure for gas cooking tops uses the same test vessels and water loads as specified for electric cooking tops, but correlates them to the nominal burner input rate. The adopted test procedure follows the same general test methods proposed in EN 60350–2:2103 and incorporates the minor modifications originally proposed in the August 2016 TP SNOPR, as clarified above, that are necessary to adapt the electric cooking top test procedure to the gas fuel type.

D. Annual Energy Consumption

In this final rule, DOE amends the cooking top test procedure to include a method to calculate both AEC and IAEC using the average of the test energy consumption measured for each surface unit of the cooking top, normalized to a representative water load size. DOE is also including a method to allocate a portion of the combined low-power mode energy consumption for combined cooking products to the conventional cooking top component. These amendments are discussed in the following sections.

1. Conventional Cooking Top Annual Energy Consumption

In section 4.2.2 of the existing test procedure in appendix I, the AEC for electric and gas cooking tops and ovens is specified as the ratio of the annual useful cooking energy output to the cooking efficiency measured with an aluminum test block. The cooking efficiency is the average of the surface unit efficiencies measured for the cooking top. The annual useful cooking energy output was determined during the initial development of the cooking products test procedure. It correlated cooking field data to results obtained using the aluminum test block method and the DOE test procedure. In subsequent analyses for cooking products energy conservation standards and updates to the test procedure, the annual useful cooking energy output was scaled to adjust for changes in consumer cooking habits.

In the August 2016 TP SNOPR, DOE pointed out that, unlike the existing test procedure in appendix I, EN 60350–2:2013 does not include a method to determine surface unit efficiency and the total cooking top efficiency. DOE also identified several issues associated with specifying an efficiency metric for a water-heating test method. As a result, DOE proposed to include a method to calculate both AEC and IAEC. 81 FR 57374, 57387 (Aug. 22, 2016).

Section 7.1.Z7.2 of EN 60350–2:2013 specifies that the energy consumption of the cooking top be normalized to 1,000 g of water. In the August 2016 TP SNOPR, DOE noted that 1,000 g of water, which is associated with a test vessel diameter of approximately 6 inches, may not be representative of the average load used with cooking tops found in the U.S. market. To determine the representative load size for both electric and gas cooking tops, DOE reviewed the surface unit diameters and input rates for cooking tops (including those incorporated into combined cooking products) available on the market. Using the methodology in 7.1.Z2 of EN 60350–2 for selecting test vessel diameters, DOE determined that the average water load size for both electric and gas cooking top models available on the U.S. market was 2,853 g. 81 FR 57374, 57387 (Aug. 22, 2016).

In the August 2016 TP SNOPR, DOE proposed to calculate the normalized cooking top energy consumption for electric products as

$$E_{CTE} = \frac{2{,}853g}{n_{tv}} \times \sum_{tv=1}^{n_{tv}} \frac{E_{tv}}{m_{tv}}$$

and the normalized cooking top energy consumption for gas product as

$$E_{CTG} = \frac{2{,}853g}{n_{tv}} \times \sum_{tv=1}^{n_{tv}} \frac{E_{tv}}{m_{tv}}$$

Where:

E_{CTE} is the energy consumption of an electric cooking top calculated per 2,853 g of water, in Wh;

E_{CTG} is the energy consumption of a gas cooking top calculated per 2,853 g of water, in Wh;

E_{tv} is the energy consumption measured for a given test vessel, tv, in Wh;

m_{tv} is the mass of water in the test vessel, in g; and,

n_{tv} is the number of test vessels used to test the complete cooking top.

Id.

To extrapolate the cooking top's normalized test energy consumption to an annual energy consumption, DOE considered the cooking top usage data regarding the frequency of cooking events from the 2009 DOE Energy Information Administration (EIA) *Residential Energy Consumption Survey* (*RECS*),[17] presented in Table III.15.

TABLE III.15—*RECS* 2009 USAGE DATA FOR CONVENTIONAL COOKING TOPS

Cooking top type	RECS average cooking frequency (meals per day)	Annual cooking frequency (meals per year)
Electric	1.21	441.5
Smooth Electric[a]	1.21	441.5
Gas	1.25	456.3

[a] Smooth Electric as listed here includes both smooth electric radiant and induction cooking tops.

[17] Available online at: *http://www.eia.gov/consumption/residential/data/2009/*.

However, because *RECS* does not provide details about the cooking load (*e.g.,* load size or composition) nor the duration of the cooking event, DOE proposed in the August 2016 TP SNOPR to normalize the number of cooking cycles to account for differences between the duration of a cooking event represented in the *RECS* data and DOE's proposed test load for measuring the energy consumption of the cooking top to calculate the AEC. 81 FR 57374, 57387 (Aug. 22, 2016). Based on DOE's review of recent field energy consumption survey data of residential cooking [18] [19] and analysis of energy consumption using test data from the DOE test sample and the *RECS* data presented above, DOE observed a significant difference between the AEC determined using the proposed test procedure and the *RECS* cooking frequency compared to the field energy consumption data. As a result, DOE determined that the number of cooking cycles per year used in the AEC calculation needs to be adjusted. 81 FR 57374, 57387–57388 (Aug. 22, 2016). DOE used the average ratio between the maximum AEC measured in the DOE test sample and the estimated field energy use of both gas and electric cooking tops to determine a normalization factor of 0.47, which DOE proposed to apply to the number of cycles per year such that,

N_{CE}= 441.5 × 0.47 = 207.5 cooking cycles per year, the average number of cooking cycles per year normalized for duration of a cooking event estimated for electric cooking tops.

N_{CG} = 456.3 × 0.47 = 214.5 cooking cycles per year, the average number of cooking cycles per year normalized for duration of a cooking event estimated for gas cooking tops.

81 FR 57374, 57388 (Aug. 22, 2016).

The Joint Efficiency Advocates commented that DOE's proposal for calculating AEC for cooking tops appears to be reasonable. (Joint Efficiency Advocates, No. 32 at p. 2) AHAM did not support DOE's proposal to normalize the test energy consumption using a water load size of 2,853 g. AHAM stated that DOE did not provide its review of the cooking tops available on the market for interested parties to evaluate, and that it was unclear whether DOE considered only cooking tops in its test sample or all cooking tops available on the market. (AHAM, No. 30 at p. 18)

In determining the water load size used to normalize the test energy consumption, DOE surveyed 335 electric cooking tops and 283 gas cooking tops available on the market in the United States.[20] Using the rated electric surface unit diameter or gas burner input rate for each model, DOE determined the test vessel diameters and water load sizes that would be required to test each cooking top model. Based on this extensive review of cooking top models available on the market, DOE concludes that the water load size of 2,853 g used to normalize the test energy consumption is appropriate. For these reasons, and for the reasons discussed above, DOE is adopting in this final rule its proposal to calculate the AEC of a conventional cooking top by multiplying the normalized test energy consumption of the cooking top by the normalized cooking frequency and the number of days in a year (365). IAEC for the cooking top is in turn calculated by adding the annual conventional cooking top combined low-power mode energy consumption.

2. Combined Cooking Products

As noted in section III.A.1 of this document, DOE's test procedures apply to conventional cooking tops, including the individual cooking top component of a combined cooking product. However, in the August 2016 TP SNOPR, DOE noted that the annual combined low-power mode energy consumption can only be measured for the combined cooking product as a whole and not for the individual components. To determine the IAEC of only the conventional cooking top component of a combined cooking product, DOE proposed to allocate a portion of the measured combined low-power mode energy consumption for the combined cooking product to the conventional cooking top component based on the ratio of the annual cooking hours for the cooking top to the sum of the annual cooking hours for all components making up the combined cooking product. DOE also proposed to use the same apportioning method to determine the annual combined low-power mode energy consumption for any microwave oven component of a combined cooking product. 81 FR 57374, 57388 (Aug. 22, 2016).

As part of the August 2016 TP SNOPR, DOE proposed to use the following annual cooking hours to apportion the measured combined low-power mode energy consumption for combined cooking products. For conventional cooking tops, DOE determined the annual cooking hours to be 213.1 hours based on the total inactive mode and off mode hours specified in the current version of appendix I, sections 4.2.2.1.2 and 4.2.2.2.2. For conventional ovens, DOE similarly determined the annual cooking hours to be 219.9, based on the total inactive mode and off mode hours specified in the current version of appendix I, section 4.1.2.3, and using the annual hours already established for a conventional oven. For microwave ovens, DOE determined the number of annual cooking hours to be 44.9 hours, based on consumer usage data presented in a February 4, 2013 NOPR proposing active mode test procedures for microwave ovens. 81 FR 57374, 57388 (Aug. 22, 2016).

In the August 2016 TP SNOPR, DOE proposed to calculate the IAEC for the conventional cooking top component of a combined cooking product as the sum of the AEC and the portion of the combined cooking product's annual combined low-power mode energy consumption allocated to the cooking top component. Because appendix I currently contains test procedures for microwave ovens that measure only standby mode and off mode test energy consumption, DOE also proposed to include an annual combined low-power mode energy consumption calculation for the microwave oven component of a combined cooking product. *Id.*

The Joint Efficiency Advocates commented that DOE's proposal to apportion the combined low-power mode energy consumption of combined cooking products appears to be reasonable. (Joint Efficiency Advocates, No. 32 at pp. 2–3)

AHAM opposed the proposed apportionment approach, claiming that it would effectively set new standby power standards for conventional cooking tops, conventional ovens, and microwave ovens. (AHAM, No. 30 at p. 19) AHAM commented that if the combined cooking product under test was a microwave/conventional range with two cavities consuming a total measured standby power of 4 Watts, standby mode energy use would be apportioned to both the microwave oven and conventional range components. AHAM and GE commented that third-

[18] California Energy Commission. 2009 *California Residential Appliance Saturation Study,* October 2010. Prepared for the California Energy Commission by KEMA, Inc. Contract No. 200–2010–004. <*http://www.energy.ca.gov/2010publications/CEC-200-2010-004/CEC-200-2010-004-V2.PDF*>

[19] FSEC 2010. Updated Miscellaneous Electricity Loads and Appliance Energy Usage Profiles for Use in Home Energy Ratings, the Building America Benchmark and Related Calculations. Published as FSEC–CR–1837–10, Florida Solar Energy Center, Cocoa, FL.

[20] DOE's survey of cooking top surface units and corresponding test vessel sizes is available at: *https://www.regulations.gov/document?D=EERE-2012-BT-TP-0013-0033.*

party laboratories would not know the inner workings of the appliance, and could not measure the standby power of only one portion of the product because many products have only one power cord and control panel. AHAM stated, therefore, that this approach would make it impossible for third-party laboratories to perform verification testing. (AHAM, No. 30 at p. 19; GE, No. 31 at p. 4)

GE expressed concern that the DOE's proposed amendments for combined cooking product standby power would inappropriately compare energy usage between products in a manner that would not represent actual consumer use. GE noted that apportioning standby power to the cooking top on a combined cooking product negatively impacts the cooking top IAEC. However, GE noted that on a majority of combined cooking products, the cooking tops controls consist of electromechanical switches that have no standby power. GE stated that, as a result, when comparing the IAEC between an electromechanically controlled stand-alone cooking top and a similarly controlled combined cooking product that has a cooking top, the combined product's cooking top will appear to use more energy. (GE, No. 31 at p. 4)

GE commented that rather than apportioning energy consumption, DOE should instead adopt the same prescriptive approach for cooking tops and combined cooking products that it has proposed for conventional oven energy conservation standards, to require that electronically controlled products be equipped with a switch-mode power supply to manage the unit's standby power. GE noted that this would enable consumers to accurately compare the energy use of cooking tops across combined and stand-alone cooking tops. In addition, GE stated that this approach would avoid effectively setting a new standard for conventional ovens through a test procedure change, and preclude any verification issues. (GE, No. 31 at p. 4)

The proposed methodology to calculate the IAEC for the conventional cooking top component of a combined cooking product does not require a testing laboratory to understand the inner design or functionality of the product to conduct verification testing. As discussed above, the total measured standby energy consumption of the combined cooking product would be apportioned based on the ratio of the annual cooking hours for the cooking top to the sum of the annual cooking hours for all components making up the combined cooking product.

As part of the concurrent standards rulemaking for conventional cooking products, DOE proposed standards for conventional cooking tops based on the IAEC metric. 81 FR 60784, 60785 (September 30, 2016). DOE is not proposing standards to include prescriptive standby power design requirements for the individual components of a combined cooking product. DOE also notes that the current standby power standard levels for microwave ovens apply only to standalone microwave ovens and did not include combined cooking products. 78 FR 36316, 36328 (June 17, 2013). DOE may consider the effects of setting prescriptive standby power design requirements for microwave ovens that are a part of a combined cooking product as part of a future rulemaking to consider standards for these products.

DOE will consider how the methods for calculating the IAEC that are adopted in this final rule will impact stand-alone cooking tops and combined cooking products that include a cooking top as part of the concurrent energy conservation standards rulemaking for conventional cooking products. DOE will also consider as part of the standards rulemaking the merits of the approach of adopting a prescriptive standard for the power supply for conventional cooking tops.

As discussed in section III.B of this document, DOE is repealing the test procedures for conventional ovens in this final rule. As a result, DOE is not incorporating methods to calculate the IEAC for the conventional oven component of a combined cooking product.

DOE is also modifying the test procedures codified at 10 CFR 430.23 that measure the energy consumption of combined cooking products to reflect the amendments adopted for appendix I in this final rule.

3. Full Fuel Cycle Metric

In response to the August 2016 TP SNOPR, AGA and APGA commented that DOE should consider a full fuel cycle (FFC) energy use metric for measuring the total energy consumption of fuel gas and electricity for cooking products. AGA and APGA stated that, compared to a site energy use metric, an FFC metric that uses a correction factor provides a more comprehensive measurement that complies with the DOE policy to incorporate FFC in its appliance efficiency programs. AGA and APGA commented that direct comparisons of baseline and proposed efficiency standard levels are needed to inform all interested parties of the FFC implications of standards proposals, which can only be accomplished where energy savings opportunities are expressed in both site energy and FFC energy. (AGA and APGA, No. 28 at p. 3)

As DOE has noted for other products, such as residential furnaces and boilers (81 FR 2628, 2638–2639 (Jan. 15, 2016)), DOE does not believe the test procedure is the appropriate vehicle for deriving an FFC energy use metric for cooking products. As discussed in the Notice of Policy Amendment Regarding Full-Fuel Cycle Analyses, DOE intends to use the *National Energy Modeling System* (*NEMS*) as the basis for deriving the energy and emission multipliers used to conduct FFC analyses in support of energy conservation standards rulemakings. 77 FR 49701 (Aug. 17, 2012). DOE also uses *NEMS* to derive factors to convert site electricity use or savings to primary energy consumption by the electric power sector. *NEMS* is updated annually in association with the preparation of the EIA's *Annual Energy Outlook.* Based on its experience to date, DOE expects that the energy and emission multipliers used to conduct FFC analyses will change each year. If DOE were to include a secondary FFC energy descriptor as part of the cooking products test procedure, DOE would need to update the test procedure annually. As part of the concurrent energy conservation standard rulemaking for conventional cooking products, DOE estimated the FFC energy savings and took those savings into account in proposing amended standards. 81 FR 60784, 60798, 60831–60832 (Sept. 2, 2016).

E. Installation Test Conditions

In the August 2016 TP SNOPR, DOE proposed to amend section 2.1 of the current appendix I, which defines installation test conditions for cooking products, to incorporate by reference the following test structures specified in ANSI Z21.1–2016 sections 5.1 and 5.19 for both gas and electric conventional cooking products:

- Figure 7, ''Test structure for built-in top surface cooking units and open top broiler units;''
- Figure 5, ''Test structure for floor-supported units not having elevated cooking sections;'' and
- Figure 6, ''Test structure for floor-supported units having elevated cooking sections.''

81 FR 57374, 57388 (Aug. 22, 2016).

AGA and APGA supported incorporating by reference the test structure requirements in ANSI Z21.1. (AGA and AGPA, No. 28 at p. 3) AHAM opposed DOE's proposal to require ANSI Z21.1 test structures for both gas

and electric cooking products. AHAM asserted that this would increase testing burden for laboratories, requiring them to procure additional test structures if the products are not ANSI-listed. AHAM stated that if the cooking top is a UL-listed product, the UL specified test structure should be used, and that if the cooking top is covered by ANSI Z21.1, the ANSI specified test structure should be used. (AHAM, No. 30 at p. 19)

DOE recognizes that requiring the test structures in ANSI Z21.1 for all conventional cooking products may increase testing burden. DOE notes that ANSI Z21.1 and UL 858 ''Standard for Household Electric Ranges'' include specific safety requirements for gas and electric cooking products, respectively. Because these standards include specific test structures for safety testing, which may be intended to represent worst-case installation configurations and operating conditions, DOE is not aware of data demonstrating that these test structures are representative of typical consumer use. For example, section 59.4 and 59.5 in UL 858 specify that the side walls of the test enclosures, including the walls that extend above the cooking surface, be installed as closely as possible to the side of the appliance. However, DOE notes that manufacturer's installation instructions typically specify minimum clearances of walls and other structures surrounding the product when installing products in homes. DOE is also not aware of data showing how these test structures affect measured energy use. For these reasons, in this final rule, DOE is not including a requirement to install gas and electric conventional cooking products in accordance with the test structures specified in ANSI Z21.1. Instead, DOE is maintaining the existing installation requirements in appendix I. DOE notes these requirements do not preclude the use of any testing structures, as long as those structures comply with the installation requirements in appendix I.

In the August 2016 TP SNOPR, DOE proposed to clarify its definition of ''built-in'' and ''freestanding'' cooking products based on the definitions of installation configurations included in ANSI Z21.1. DOE proposed to clarify that ''built-in'' means a product that is enclosed in surrounding cabinetry, walls, or other similar structures on at least three sides, and that can be supported by surrounding cabinetry (*e.g.,* drop-in cooking tops) or the floor (*e.g.,* slide-in conventional ranges). DOE also proposed to clarify that ''freestanding'' means a product that is supported by the floor and is not designed to be enclosed by surrounding cabinetry, walls, or other similar structures. 81 FR 57374, 57388–57389. DOE did not receive any comments on the proposed clarifications to the definitions of ''built-in'' and ''freestanding.'' DOE is adopting these clarified definitions in this final rule.

In the August 2016 TP SNOPR, DOE noted that in general, where the test procedure references manufacturer instructions used to determine the installation conditions for the unit under test, those instructions must be those normally shipped with the product, or if only available online, the version of the instructions available online at the time of test. 81 FR 57374, 57389 (Aug. 22, 2016). DOE also noted that some manufacturer's instructions may specify that the cooking product may be used in multiple installation conditions, such as built-in and freestanding. DOE stated that because built-in products are installed in configurations with more surrounding cabinetry that may limit airflow and venting compared to freestanding products, products capable of built-in installation configurations may require additional features such as exhaust fans or added insulation to meet the same safety requirements (*e.g.,* surface temperature requirements specified in Table 12 of ANSI Z21.1) that impact energy use of the unit. As a result, DOE proposed in the August 2016 TP SNOPR that if the manufacturer's instructions specify that the cooking product may be used in multiple installation conditions, it should be installed according to the built-in configuration. *Id.* DOE did not receive any comments on these proposed clarifications. As a result, and for the reasons discussed above, DOE is adopting these clarifications regarding manufacturer's instructions and installation requirements in this final rule.

DOE also notes that some manufacturer instructions may specify multiple installation conditions for cooking tops (*i.e.,* installed in a countertop up against a rear wall or in an island countertop with no rear wall.) Because the countertop with a rear wall may limit airflow and venting compared to an island installation, and as a result impact the energy use of the unit, DOE is clarifying in this final rule that if the manufacturer's instructions specify that the cooking top may be used in multiple installation conditions, it shall be tested against, or as near as possible to, a rear wall.

F. Technical Clarification to the Correction of the Gas Heating Value

As discussed in the August 2016 TP SNOPR, DOE proposed to clarify in section 2.9.4 in the existing test procedure in appendix I that the measurement of the heating value of natural gas or propane specified in appendix I be corrected to standard pressure and temperature conditions in accordance with the U.S. Bureau of Standards, circular C417, 1938. DOE noted that this clarification would ensure that the same correction methods are used by all operators of the test. 81 FR 57374, 57389 (Aug. 22, 2016).

AGA and APGA supported the technical clarification to require that the gas heating value be corrected to standard and temperature conditions in accordance with the U.S. Bureau of Standards, circular C417. AGA and APGA stated that this would help ensure consistent test results in various testing laboratories. (AGA and APGA, No. 28 at p. 3) Because DOE did not receive any objections to its proposal, and for the reasons stated above, DOE is adopting the clarification that the measurement of the heating value of natural gas or propane specified in appendix I be corrected to standard pressure and temperature conditions in accordance with the U.S. Bureau of Standards, circular C417, 1938.

G. Grammatical Changes to Certain Sections of Appendix I

In the August 2016 TP SNOPR, DOE proposed minor grammatical corrections or modifications to clarify the text in certain sections of appendix I and proposed to remove the watt meter requirements specified in section 2.9.1.2 of appendix I, which are no longer used in the test procedure. 81 FR 57374, 57389 (Aug. 22, 2016). DOE did not receive comment on these proposals, and as a result, adopts these grammatical changes as part of this final rule. DOE notes that these minor modifications do not change the substance of the test methods or descriptions provided in these sections.

H. Compliance With Other EPCA Requirements

EPCA requires that any new or amended test procedures for consumer products must 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 must not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In the August 2016 TP SNOPR, DOE determined that the proposed amendments to the test procedure would produce test results that measure the energy consumption of conventional cooking tops during representative use, and that the test procedures would not

be unduly burdensome to conduct. 81 FR 57374, 57389 (Aug. 22, 2016).

DOE stated in the August 2016 TP SNOPR that, although the proposed test procedures differ from the method currently included in appendix I for testing cooking tops, the essential method of test which includes an initial temperature rise of the test load and a simmering phase, is performed in approximately the same amount of time as the existing test procedure in appendix I. DOE noted that the existing test equipment in appendix I would be replaced with the eight test vessels described in section 7.1.Z2 of EN 60350–2:2013. DOE estimated that current testing represents a cost of roughly $700 per test for labor, with a one-time investment of $2,000 for test equipment ($1,000 for test blocks and $1,000 for instrumentation). DOE also noted that the proposed reusable test vessels would represent an additional one-time expense of $5,000 for the test vessels. DOE also noted in the August 2016 TP SNOPR that the only additional instrumentation required would be an absolute pressure transducer to measure the ambient air pressure of the test room. DOE estimated the cost of this transducer to be $100 or less for a model compatible with typical existing data collection systems used by the manufacturer. DOE noted that the allowable range of room air pressure specified in EN 60350–2:2013 is wide enough that a pressurized test chamber would not be required. Air pressure at elevations less than 3,000 feet above sea level falls within the range. DOE stated that it does not believe this additional cost represents an excessive burden for test laboratories or manufacturers given the significant investments necessary to manufacture, test and market consumer appliances. Given the similarities (in terms of the test equipment, test method, the time needed to perform the test, and the calculations necessary to determine IAEC), DOE stated in the August 2016 TP SNOPR that the proposed amendments to test procedure for cooking tops would not be unreasonably burdensome to conduct as compared to the existing test procedure in appendix I. 81 FR 57374, 57389 (Aug. 22, 2016).

AHAM commented that it has not been able to fully evaluate the proposed test procedure to determine whether it is unduly burdensome to conduct. However, AHAM stated that based on its testing conducted at the time of its comments, the overall test is burdensome and there may be ways that DOE can reduce the test burden. AHAM stated that determining the appropriate simmering setting requires trial and error to meet the tolerances of the test procedure, which may require multiple test runs. Because of this, and because only one surface unit can be tested at a time and then must be cooled to ambient room temperature, testing time is variable and may increase substantially for a test laboratory that is unfamiliar with a unit or if a unit has more than the typical four surface units to test. AHAM added that DOE's proposal to require testing of each individual each diameter setting of a multi-ring surface unit is overly burdensome, noting that a cooking top with dual- and tri-ring surface units would require seven tests, instead of four. (AHAM, No. 30 at p. 5)

GE commented that DOE's proposed additional test procedure requirements beyond those in the Canadian and European test procedures make testing more burdensome while introducing more variability into test results. GE commented that DOE's proposed test procedure would require approximately 25 separate tests and approximately 3 weeks for a standard unit, compared to four tests and approximately 2 days to test a standard unit for Canada. (GE, No. 31 at p. 2)

DOE recognizes that the water-heating test procedure will typically require several repetitions of the test cycle to determine the appropriate setting for the simmering phase of the test. However, based on DOE's testing, in cases where the water temperature falls below the minimum allowable simmering temperature of 90 °C, this typically occurs near the beginning of the simmering phase of the test. As a result, the test can be immediately stopped to conserve testing time. Additionally, by providing guidance on the acceptable oscillation of the water temperature about 90 °C during the first 20 seconds of the simmering phase of the test, as discussed in section III.C.1 of this document, the uncertainty regarding whether a test will pass or fail is reasonably reduced. DOE also observed from its testing that after conducting a few tests on a model, a test laboratory is able to better predict the appropriate simmering setting for other surface units on that cooking top, based on the ratio of simmer energy consumption to total energy consumption. As a result, DOE expects that as manufacturers and test laboratories conduct tests and become familiar with models, the time required for subsequent tests on a given model should decrease. Furthermore, DOE notes that the preliminary test to determine the turndown temperature does not need to be rerun prior to the next energy consumption test cycle on the same surface unit.

With regard to the time required to cool the appliance in between tests to achieve the normal non-operating temperature, section 5.5 of EN 60350–2:2013 specifies that forced cooling may be used to assist in reducing the temperature of the appliance. DOE notes that this reduces the time to cool the appliance in between tests. In this final rule, DOE is clarifying that forced cooling may be used to reduce the temperature of the appliance to achieve the normal non-operating temperature as specified in section 5.5 of EN 60350–2:2013. During its investigative testing conducted in support of this final rule, DOE observed that forced air cooling can reduce the time between tests by almost half for electric smooth–radiant cooking tops, electric coil cooking tops, and gas cooking tops. Because induction cooking tops directly heat the test vessel, minimizing heat transfer to the glass ceramic surface of the cooking top, the time to cool an induction cooking top is typically much shorter than for other cooking top types.

In addition, as discussed in section III.C.2 of this final rule, DOE is not requiring that each setting of the multi-ring surface unit be tested independently and is instead aligning the test provisions with EN 60350–2:2013 and the draft IEC 60350–2 to require testing of the largest measured diameter of multi-ring surface units only, unless an additional test vessel category is needed to meet the requirements of the test procedure. In that case, one of the smaller-diameter settings of the multi-ring surface that matches the next best-fitting test vessel diameter must be tested. As a result, DOE's amended test procedure will in most cases require only one full test cycle (including the preliminary turndown test and energy cycle test) per surface unit or burner, and is equivalent to the number of tests required under EN 60350–2:2013. Using the example provided by AHAM of a cooking top with dual- and tri-ring surface units, DOE's amended test procedure will require only four full test cycles, instead of seven.

Based on the discussion above and DOE's experience conducting tests using the amended test procedure, DOE estimates that testing of a cooking top model would require on average 2 to 3 days depending on the number of surface units or burners. As a result, DOE does not consider the amended test procedure to be unduly burdensome to conduct.

DOE also notes that the test procedure used in Canada is equivalent to the existing DOE test procedure in appendix I, which involves heating a solid

aluminum test block on each surface unit of the cooking top. That test procedure includes only one test block size for gas cooking tops and two test block sizes for electric cooking tops. DOE also notes that the aluminum test block is not compatible with induction cooking tops. The test method involves heating the test block at the maximum energy input setting. After the test block temperature increases by 144 degrees Fahrenheit (°F), the surface unit is immediately reduced to 25 percent ± 5 percent of the maximum power input for 15 ± 0.1 minutes. Based on DOE's experience conducting tests using this test procedure, the second phase of the test requires trial and error to determine the appropriate simmering setting to achieve 25 percent ± 5 percent of the maximum power input because most electric cooking tops cycle the heating element on and off rather than fully modulating the input power. Therefore, the setting that achieves, on average, 25 percent ± 5 percent of the maximum power input will not be clear to a test technician at the start of the test and the setting selected must be evaluated after the test is complete test to determine if it meets the requirements. As a result, testing under the Canadian test procedure imposes a similar test burden as the water-heating test method adopted in this final rule.

DOE previously noted that the reusable test vessels would represent a one-time expense of $5,000. As the test vessels are heated and cooled over time, it is possible that the test vessels bottoms will no longer meet the allowable tolerances for flatness. Based on discussions with test vessel suppliers, DOE notes that test vessels may need to be repaired or replaced after a few years of use, depending on their frequency of use. Certain test vessel diameters will be used more frequently than others, as certain surface unit diameters are more common in cooking tops on the U.S. market than others. Thus, DOE anticipates that the entire set of cookware would not need to be replaced or repaired at the same frequency.

For the reasons discussed above, DOE has determined that the amended test procedure adopted in this final rule produces test results that measure the energy consumption of conventional cooking tops during representative use, and that the test procedures are not unduly burdensome to conduct.

In the concurrent rulemaking to establish energy conservation standards for conventional cooking products, DOE proposed in an SNOPR published on September 2, 2016 to update the sampling plan requirements for cooking products in 10 CFR 429.23(a) to include the AEC and IAEC metrics for conventional gas and electric cooking tops. 81 FR 60784, 60799. DOE did not receive any comments on this proposal in response to the September 2016 SNOPR. In this final rule, DOE is adopting these amendments to the sampling plan requirements for the selection of units for testing, as well as calculation procedures for determining a basic model's represented rating in 10 CFR 429.23(a) for cooking products to include the AEC and IAEC metrics for conventional gas and electric cooking tops.[21] Changes to the certification requirements in 10 CFR 429.23(b) will be addressed in the concurrent standards rulemaking.

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 that when an agency promulgates a final rule under 5 U.S.C. 553, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis (FRFA). 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 this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This final rule would amend the test method for measuring the energy efficiency of conventional cooking tops, including methods applicable to induction cooking products and gas cooking tops with higher input rates. DOE has concluded that the rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

The Small Business Administration (SBA) considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts 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/files/Size_Standards_Table.pdf.* The threshold number for NAICS classification code 335221, titled ''Household Cooking Appliance Manufacturing,'' is 1,500 employees or fewer; this classification includes manufacturers of residential conventional cooking products.

As discussed in the August 2016 TP SNOPR, DOE surveyed the AHAM member directory to identify manufacturers of residential conventional cooking tops. 81 FR 57374, 57390 (Aug. 22, 2016). DOE also consulted publicly-available data, purchased company reports from vendors such as Dun and Bradstreet, and contacted manufacturers, where needed, to determine if they meet the SBA's definition of a ''small business manufacturing facility'' and have their manufacturing facilities located within the United States. Based on the 2016 threshold number of workers for small business, DOE estimates that there are ten small businesses that manufacture conventional cooking products covered by the test procedure amendments. This number represents an increase from nine small businesses analyzed as part of the August 2016 TP SNOPR due to a change in the SBA's threshold number of workers for NAICS classification code 335221 since the time of the SNOPR analysis.[22] DOE further estimates that eight of these ten small businesses actually manufacture the products they sell. The other two are rebranders and

[21] In the September 2016 SNOPR for the concurrent standards rulemaking for conventional cooking products, the first sentence of 10 CFR 429.23(a)(2)(i), ''(i) The mean of the sample, where:'', was unintentionally left out of the **Federal Register** publication. DOE is including this language in the amendments adopted in this final rule.

[22] The SBA's threshold number of workers for NAICS classification code 335221 changed from 750 at the time of the August 2016 TP SNOPR to 1,500 for this final rule.

do not manufacture the products they sell.

In August 2016 TP SNOPR, DOE concluded that the proposed test procedures for cooking tops that incorporate provisions from EN 60350–2:2013 to address active mode energy consumption for all conventional cooking top technology types, including induction surface units and surface units with higher input rates, would not have a significant economic impact on a substantial number of small entities. 81 FR 57374, 57390 (Aug. 22, 2016). DOE's estimates for the cost of testing and of new test equipment, have not changed from the August 2016 TP SNOPR. The amended test procedure would be used to develop and test compliance with any future energy conservation standards for cooking tops that may be established by DOE. The test procedure amendments involve the measurement of active mode energy consumption through the use of a water-heating test method that requires different test equipment than previously specified for conventional cooking tops. The test equipment consists of a set of eight stainless steel test vessels. DOE estimates the cost for this new equipment to be approximately $5,000–$10,000, depending on the number of sets the manufacturer wishes to procure.

DOE estimates a cost of approximately $46,288 for an average small manufacturer to test a full product line of induction surface units and surface units with high input rates not currently covered by the existing test procedure in appendix I. DOE updated this estimate to reflect the most recent changes to the small business classification, which includes the identification of an additional small manufacturer and the determination that two of the small businesses are rebranders and do not manufacture the products they sell. This updated estimate assumes $700 per test for labor with up to 66 total tests per manufacturer needed, assuming 21 models [23] with either four or six individual surface unit tests per cooking top model. This cost is small (0.07 percent) compared to the average annual revenue of the eight identified small businesses that manufacture cooking products in the United States, which DOE estimates to be over $162 million.[24]

In the August 2016 TP SNOPR, DOE determined that the proposed modification to the calculation of the IEAC of the cooking top portion of a combined cooking product requires the same methodology, test equipment, and test facilities used to measure the combined low-power mode energy consumption of stand-alone cooking products and would not result in any additional facility or testing costs. Additionally, DOE determined that its proposal to incorporate test structures from ANSI Z21.1 by reference to standardize the installation conditions used during the test of conventional cooking tops would not significantly impact small manufacturers under the applicable provisions of the Regulatory Flexibility Act.[25] 81 FR 57374, 57390 (Aug. 22, 2016).

As discussed in section III.E of this document, in this final rule, DOE is no longer including a requirement to install gas and electric conventional cooking products in accordance with the test structures specified in ANSI Z21.1. Instead, DOE is maintaining the existing installation requirements in appendix I. DOE notes these requirements would not preclude the use of any testing structures, as long as those structures comply with the installation requirements in appendix I. Because DOE is not changing the existing installation requirements, DOE concludes that these requirements will not significantly impact small manufacturers.

After estimating the potential impacts to the updated list of small business and considering feedback from interested parties regarding test burdens, DOE concludes that the cost effects accruing from the final rule would not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of a FRFA is not warranted. DOE has submitted a certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of conventional cooking products must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including conventional cooking products. (See generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 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.

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 amends its test procedure for conventional cooking products. 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

[23] DOE considered different configurations of the same basic model (where surface units were placed in different positions on the cooking top) as unique models.

[24] Based on publicly available information from online sources such as Hoovers, Cortera, and Glassdoor.

[25] DOE estimated a cost of $500 for an average small manufacturer to fabricate the test structures for the test of cooking tops and combined cooking products, which is negligible when compared to the average annual revenue of the eight identified small manufacturers.

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 this 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 this 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. This 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 this 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.

This 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 amendments to the test procedure for conventional cooking products adopted in this final rule incorporate testing methods contained in certain sections of the commercial standard, EN 60350–2:2013 ''Household electric cooking appliances Part 2: Hobs—Methods for measuring performance.'' While the amended test procedure is not exclusively based on the provisions in this industry standard, many components of the test procedure have been adopted without amendment. DOE has evaluated 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 this 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. Description of Materials Incorporated by Reference

In this final rule, DOE incorporates by reference certain sections of the test standard published by CENELEC, titled ''Household electric cooking appliances Part 2: Hobs—Methods for measuring performance,'' EN 60350–2:2013. EN 60350–2:2013 is an industry accepted European test procedure that measures cooking top energy consumption and performance. DOE has determined that EN 60350–2:2013, with the clarifications discussed in sections III.C.2, III.C.3 and III.D of this document, provides test methods for determining the annual energy use metrics and are applicable to all residential conventional cooking tops sold in the United States. The test procedure adopted in this final rule references various sections of EN 60350–2:2013 that address test setup, instrumentation, test conduct, and measurement procedure. EN 60350–2:2013 is readily available on the British Standards Institute's Web site at *http://shop.bsigroup.com/.*

V. 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 November 22, 2016.

Kathleen B. Hogan,

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

For the reasons set forth 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; 28 U.S.C. 2461 note.

■ 2. Section 429.23 is amended by revising the section heading and paragraph (a) to read as follows:

§ 429.23 Cooking products.

(a) *Sampling plan for selection of units for testing.* (1) The requirements of § 429.11 are applicable to cooking products; and

(2) For each basic model of cooking products a sample of sufficient size shall be randomly selected and tested to ensure that any represented value of estimated annual operating cost, standby mode power consumption, off mode power consumption, annual energy consumption, integrated annual energy consumption, or other measure of energy consumption of a basic model for which consumers would favor lower values 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 ith sample;

Or,

(ii) The upper 97½ percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{.975}\left(\frac{s}{\sqrt{n}}\right)$$

And $\bar{x}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.975}$ is the t statistic for a 97.5% one-tailed confidence interval with n–1 degrees of freedom (from appendix A).

* * * * *

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. Revising the definitions for ''Conventional cooking top'' and ''Conventional oven'';

■ b. Removing the definition of ''Conventional range'';

■ c. Revising the definition of ''Cooking products'';

■ d. Removing the definitions of ''Microwave/conventional cooking top'', ''Microwave/conventional oven'', and ''Microwave/conventional range''; and

■ e. Revising the definitions of ''Microwave oven'' and ''Other cooking products''.

The revisions read as follows:

§ 430.2 Definitions.

* * * * *

Conventional cooking top means a category of cooking products which is a household cooking appliance consisting of a horizontal surface containing one or more surface units that utilize a gas flame, electric resistance heating, or electric inductive heating. This includes any conventional cooking top

component of a combined cooking product.

* * * * *

Conventional oven means a category of cooking products which is a household cooking appliance consisting of one or more compartments intended for the cooking or heating of food by means of either a gas flame or electric resistance heating. It does not include portable or countertop ovens which use electric resistance heating for the cooking or heating of food and are designed for an electrical supply of approximately 120 volts. This includes any conventional oven(s) component of a combined cooking product.

Cooking products means consumer products that are used as the major household cooking appliances. They are designed to cook or heat different types of food by one or more of the following sources of heat: Gas, electricity, or microwave energy. Each product may consist of a horizontal cooking top containing one or more surface units and/or one or more heating compartments.

* * * * *

Microwave oven means a category of cooking products which is a household cooking appliance consisting of a compartment designed to cook or heat food by means of microwave energy, including microwave ovens with or without thermal elements designed for surface browning of food and convection microwave ovens. This includes any microwave oven(s) component of a combined cooking product.

* * * * *

Other cooking products means any category of cooking products other than conventional cooking tops, conventional ovens, and microwave ovens.

* * * * *

■ 5. Section 430.3 is amended by:

■ a. Removing paragraphs (i)(6) and (i)(8);

■ b. Redesignating paragraphs (i)(7) and (i)(9) as (i)(6) and (i)(7);

■ c. Redesignating paragraphs (l) through (u) as paragraphs (m) through (v), respectively; and

■ d. Adding new paragraph (l).

The revisions and additions read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(l) *CENELEC.* European Committee for Electrotechnical Standardization, 17, Avenue Marnix, B–1000 Brussels, phone: +32 2 519 68 71, available from the HIS Standards Store, *https://www.ihs.com/products/cenelec-standards.html*

(1) EN 60350–2:2013, (''EN 60350–2:2013''), *Household electric cooking appliances Part 2: Hobs—Methods for measuring performance,* (June 3, 2013), IBR approved for appendix I to subpart B, as follows:

(i) Section 5—General conditions for the measurements, (excluding 5.4);

(ii) Section 6—Dimensions and mass, Section 6.2—Cooking zones per hob;

(iii) Section 7—Cooking zones and cooking areas, Section 7.1—Energy consumption and heating up time, (excluding 7.1.Z1, 7.1.Z5, 7.1.Z7);

(iv)Annex ZA—Further requirements for measuring the energy consumption and heating up time for cooking areas;

(v) Annex ZB—Aids for measuring the energy consumption;

(vi)Annex ZC—Examples how to select and position a cookware set for measuring the heating up time (7.1.Z5) and energy consumption (7.1.Z6);

(vii) Annex ZD—Example—Multiple zones; and

(viii) Annex ZF—Normative references to international publications with their corresponding European publications.

(2) [Reserved]

* * * * *

■ 6. Section 430.23 is amended by revising paragraph (i) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(i) *Cooking products.* (1) Determine the integrated annual electrical energy consumption for conventional electric cooking tops, including any integrated annual electrical energy consumption for combined cooking products according to sections 4.1.2.1.2 and 4.2.2.1 of appendix I to this subpart. For conventional gas cooking tops, the integrated annual electrical energy consumption shall be equal to the sum of the conventional cooking top annual electrical energy consumption, $E_{CCE,}$ as defined in section 4.1.2.2.2 or 4.2.2.2 of appendix I to this subpart, and the conventional cooking top annual combined low-power mode energy consumption, E_{CTSO}, as defined in section 4.1.2.2.3 appendix I to this subpart, or the annual combined low-power mode energy consumption for the conventional cooking top component of a combined cooking product, E_{CCTLP}, as defined in section 4.2.2.2 of appendix I to this subpart.

(2) Determine the annual gas energy consumption for conventional gas cooking tops according to section 4.1.2.2.1 of appendix I to this subpart.

(3) Determine the integrated annual energy consumption for conventional cooking tops according to sections 4.1.2.1.2, 4.1.2.2.2, 4.2.2.1, and 4.2.2.2, respectively, of appendix I to this subpart. Round the integrated annual energy consumption to one significant digit.

(4) The estimated annual operating cost corresponding to the energy consumption of a conventional cooking top, shall be the sum of the following products:

(i) The integrated annual electrical energy consumption for any electric energy usage, in kilowatt-hours (kWh) per year, as determined in accordance with paragraph (i)(1) of this section, times the representative average unit cost for electricity, in dollars per kWh, as provided pursuant to section 323(b)(2) of the Act; plus

(ii) The total annual gas energy consumption for any natural gas usage, in British thermal units (Btu) per year, as determined in accordance with paragraph (i)(2) of this section, times the representative average unit cost for natural gas, in dollars per Btu, as provided pursuant to section 323(b)(2) of the Act; plus

(iii) The total annual gas energy consumption for any propane usage, in Btu per year, as determined in accordance with paragraph (i)(2) of this section, times the representative average unit cost for propane, in dollars per Btu, as provided pursuant to section 323(b)(2) of the Act.

(5) Determine the standby power for microwave ovens, excluding any microwave oven component of a combined cooking product, according to section 3.2.3 of appendix I to this subpart. Round standby power to the nearest 0.1 watt.

(6) For convertible cooking appliances, there shall be—

(i) An estimated annual operating cost and an integrated annual energy consumption which represent values for the operation of the appliance with natural gas; and

(ii) An estimated annual operating cost and an integrated annual energy consumption which represent values for the operation of the appliance with LP-gas.

(7) Determine the estimated annual operating cost for convertible cooking appliances that represents natural gas usage, as described in paragraph (i)(6)(i) of this section, according to paragraph (i)(4) of this section, using the total annual gas energy consumption for natural gas times the representative average unit cost for natural gas.

(8) Determine the estimated annual operating cost for convertible cooking appliances that represents LP-gas usage, as described in paragraph (i)(6)(ii) of

this section, according to paragraph (i)(4) of this section, using the representative average unit cost for propane times the total annual energy consumption of the test gas, either propane or natural gas.

(9) Determine the integrated annual energy consumption for convertible cooking appliances that represents natural gas usage, as described in paragraph (i)(6)(i) of this section, according to paragraph (i)(3) of this section, when the appliance is tested with natural gas.

(10) Determine the integrated annual energy consumption for convertible cooking appliances that represents LP-gas usage, as described in paragraph (i)(6)(ii) of this section, according to paragraph (i)(3) of this section, when the appliance is tested with either natural gas or propane.

(11) Other useful measures of energy consumption for conventional cooking tops shall be the measures of energy consumption that the Secretary determines are likely to assist consumers in making purchasing decisions and that are derived from the application of appendix I to this subpart.

* * * * *

■ 7. Appendix I to subpart B of part 430 is revised to read as follows:

Appendix I to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Cooking Products

Note: Any representation related to energy or power consumption of cooking products made after June 14, 2017 must be based upon results generated under this test procedure. Upon the compliance date(s) of any energy conservation standard(s) for cooking products, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required.

1. Definitions

The following definitions apply to the test procedures in this appendix, including the test procedures incorporated by reference:

1.1 *Active mode* means a mode in which the product is connected to a mains power source, has been activated, and is performing the main function of producing heat by means of a gas flame, electric resistance heating, electric inductive heating, or microwave energy.

1.2 *Built-in* means the product is enclosed in surrounding cabinetry, walls, or other similar structures on at least three sides, and can be supported by surrounding cabinetry or the floor.

1.3 *Combined cooking product* means a household cooking appliance that combines a cooking product with other appliance functionality, which may or may not include another cooking product. Combined cooking products include the following products: Conventional range, microwave/conventional cooking top, microwave/conventional oven, and microwave/conventional range.

1.4 *Combined low-power mode* means the aggregate of available modes other than active mode, but including the delay start mode portion of active mode.

1.5 *Cooking area* is an area on a conventional cooking top surface heated by an inducted magnetic field where cookware is placed for heating, where more than one cookware item can be used simultaneously and controlled separately from other cookware placed on the cooking area, and that is either—

(1) An area where no clear limitative markings for cookware are visible on the surface of the cooking top; or

(2) An area with limitative markings.

1.6 *Cooking zone* is a conventional cooking top surface that is either a single electric resistance heating element or multiple concentric sizes of electric resistance heating elements, an inductive heating element, or a gas surface unit that is defined by limitative markings on the surface of the cooking top and can be controlled independently of any other cooking area or cooking zone.

1.7 *Cooking top control* is a part of the conventional cooking top used to adjust the power and the temperature of the cooking zone or cooking area for one cookware item.

1.8 *Cycle finished mode* is a standby mode in which a conventional cooking top provides continuous status display following operation in active mode.

1.9 *Drop-in* means the product is supported by horizontal surface cabinetry.

1.10 *EN 60350–2:2013* means the CENELEC test standard titled, ''Household electric cooking appliances Part 2: Hobs—Methods for measuring performance,'' Publication 60350–2 (2013) (incorporated by reference; see § 430.3).

1.11 *Freestanding* means the product is supported by the floor and is not specified in the manufacturer's instructions as able to be installed such that it is enclosed by surrounding cabinetry, walls, or other similar structures.

1.12 *IEC 62301 (First Edition)* means the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 (First Edition 2005–06) (incorporated by reference; see § 430.3).

1.13 *IEC 62301 (Second Edition)* means the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 (Edition 2.0 2011–01) (incorporated by reference; see § 430.3).

1.14 *Inactive mode* means a standby mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display.

1.15 *Maximum power setting* means the maximum possible power setting if only one cookware item is used on the cooking zone or cooking area of a conventional cooking top.

1.16 *Normal non-operating temperature* means a temperature of all areas of an appliance to be tested that is within 5 °F (2.8 °C) of the temperature that the identical areas of the same basic model of the appliance would attain if it remained in the test room for 24 hours while not operating with all oven doors closed.

1.17 *Off mode* means any mode in which a cooking product is connected to a mains power source and is not providing any active mode or standby function, and where the mode may persist for an indefinite time. An indicator that only shows the user that the product is in the off position is included within the classification of an off mode.

1.18 *Standard cubic foot (or liter (L)) of gas* means that quantity of gas that occupies 1 cubic foot (or alternatively expressed in L) when saturated with water vapor at a temperature of 60 °F (15.6 °C) and a pressure of 30 inches of mercury (101.6 kPa) (density of mercury equals 13.595 grams per cubic centimeter).

1.19 *Standby mode* means any mode in which a cooking product is connected to a mains power source and offers one or more of the following user-oriented or protective functions which may persist for an indefinite time:

(1) Facilitation of the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, or timer;

(2) Provision of continuous functions, including information or status displays (including clocks) or sensor-based functions. A timer is a continuous clock function (which may or may not be associated with a display) that allows for regularly scheduled tasks and that operates on a continuous basis.

1.20 *Thermocouple* means a device consisting of two dissimilar metals which are joined together and, with their associated wires, are used to measure temperature by means of electromotive force.

1.21 *Symbol usage.* The following identity relationships are provided to help clarify the symbology used throughout this procedure.

A—Number of Hours in a Year
C—Specific Heat
E—Energy Consumed
H—Heating Value of Gas
K—Conversion for Watt-hours to Kilowatt-hours or Btu to kBtu
Ke—3.412 Btu/Wh, Conversion for Watt-hours to Btu
M—Mass
n—Number of Units
P—Power
Q—Gas Flow Rate
T—Temperature
t—Time
V—Volume of Gas Consumed

2. Test Conditions

2.1 *Installation.* Install a freestanding combined cooking product with the back directly against, or as near as possible to, a vertical wall which extends at least 1 foot above the appliance and 1 foot beyond both sides of the appliance, and with no side walls. Install a drop-in or built-in cooking product in a test enclosure in accordance with manufacturer's instructions. If the

manufacturer's instructions specify that the cooking product may be used in multiple installation conditions, install the appliance according to the built-in configuration and, for cooking tops, with the back directly against, or as near as possible to, a vertical wall which extends at least 1 foot above the appliance and 1 foot beyond both sides of the appliance. Completely assemble the product with all handles, knobs, guards, and similar components mounted in place. Position any electric resistance heaters, gas burners, and baffles in accordance with the manufacturer's instructions.

2.1.1 *Conventional electric cooking tops.* Connect these products to an electrical supply circuit with voltage as specified in section 2.2.1 of this appendix with a watt-hour meter installed in the circuit. The watt-hour meter shall be as described in section 2.8.1.1 of this appendix. For standby mode and off mode testing, install these products in accordance with Section 5, Paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes.

2.1.2 *Conventional gas cooking tops.* Connect these products to a gas supply line with a gas meter installed between the supply line and the appliance being tested, according to manufacturer's specifications. The gas meter shall be as described in section 2.8.2 of this appendix. Connect conventional gas cooking tops with electrical ignition devices or other electrical components to an electrical supply circuit of nameplate voltage with a watt-hour meter installed in the circuit. The watt-hour meter shall be as described in section 2.8.1.1 of this appendix. For standby mode and off mode testing, install these products in accordance with Section 5, Paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes.

2.1.3 *Microwave ovens, excluding any microwave oven component of a combined cooking product.* Install the microwave oven in accordance with the manufacturer's instructions and connect to an electrical supply circuit with voltage as specified in section 2.2.1 of this appendix. Install the microwave oven also in accordance with Section 5, Paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes. A watt meter shall be installed in the circuit and shall be as described in section 2.8.1.2 of this appendix.

2.1.4 *Combined cooking products standby mode and off mode.* For standby mode and off mode testing of combined cooking products, install these products in accordance with Section 5, Paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes.

2.2 *Energy supply.*

2.2.1 *Electrical supply.*

2.2.1.1 *Voltage.* For the test of conventional cooking tops, maintain the electrical supply requirements specified in Section 5.2 of EN 60350–2:2013 (incorporated by reference; see § 430.3). For microwave oven testing, maintain the electrical supply to the unit at 240/120 volts ±1 percent. For combined cooking product standby mode and off mode measurements, maintain the electrical supply to the unit at 240/120 volts ±1 percent. Maintain the electrical supply frequency for all products at 60 hertz ±1 percent.

2.2.2.1 *Gas burner adjustments.* Test conventional gas cooking tops with all of the gas burners adjusted in accordance with the installation or operation instructions provided by the manufacturer. In every case, adjust the burner with sufficient air flow to prevent a yellow flame or a flame with yellow tips.

2.2.2.2 *Natural gas.* For testing convertible cooking appliances or appliances which are designed to operate using only natural gas, maintain the natural gas pressure immediately ahead of all controls of the unit under test at 7 to 10 inches of water column (1743.6 to 2490.8 Pa). The regulator outlet pressure shall equal the manufacturer's recommendation. The natural gas supplied should have a heating value of approximately 1,025 Btu per standard cubic foot (38.2 kJ/L). The actual gross heating value, H_n, in Btu per standard cubic foot (kJ/L), for the natural gas to be used in the test shall be obtained either from measurements made by the manufacturer conducting the test using equipment that meets the requirements described in section 2.8.4 of this appendix or by the use of bottled natural gas whose gross heating value is certified to be at least as accurate a value that meets the requirements in section 2.8.4 of this appendix.

2.2.2.3 *Propane.* For testing convertible cooking appliances with propane or for testing appliances which are designed to operate using only LP-gas, maintain the propane pressure immediately ahead of all controls of the unit under test at 11 to 13 inches of water column (2740 to 3238 Pa). The regulator outlet pressure shall equal the manufacturer's recommendation. The propane supplied should have a heating value of approximately 2,500 Btu per standard cubic foot (93.2 kJ/L). Obtain the actual gross heating value, H_p, in Btu per standard cubic foot (kJ/L), for the propane to be used in the test either from measurements made by the manufacturer conducting the test using equipment that meets the requirements described in section 2.8.4 of this appendix, or by the use of bottled propane whose gross heating value is certified to be at least as accurate a value that meets the requirements described in section 2.8.4 of this appendix.

2.2.2.4 *Test gas.* Test a basic model of a convertible cooking appliance with natural gas or propane. Test with natural gas any basic model of a conventional cooking top that is designed to operate using only natural gas as the energy source. Test with propane gas any basic model of a conventional cooking top which is designed to operate using only LP gas as the gas energy source.

2.3 *Air circulation.* Maintain air circulation in the room sufficient to secure a reasonably uniform temperature distribution, but do not cause a direct draft on the unit under test.

2.5 *Ambient room test conditions*

2.5.1 *Active mode ambient room air temperature.* During the active mode test for conventional cooking tops, maintain the ambient room air temperature and pressure specified in Section 5.1 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

2.5.2 *Standby mode and off mode ambient temperature.* For standby mode and off mode testing, maintain room ambient air temperature conditions as specified in Section 4, Paragraph 4.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3).

2.6 *Normal non-operating temperature.* All areas of the appliance to be tested must attain the normal non-operating temperature, as defined in section 1.16 of this appendix, before any testing begins. Measure the applicable normal non-operating temperature using the equipment specified in sections 2.8.3.1 and 2.8.3.2 of this appendix. For conventional cooking tops, forced cooling may be used to assist in reducing the temperature of the appliance, as specified in Section 5.5 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

2.7 *Conventional cooking top test vessels*

2.7.1 *Conventional electric cooking top test vessels.* The test vessels and water amounts required for the test of conventional electric cooking tops must meet the requirements specified in Section 7.1.Z2 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

2.7.2 *Conventional gas cooking top test vessels.* The test vessels for conventional gas cooking tops must be constructed according to Section 7.1.Z2 of EN 60350–2:2013 (incorporated by reference; see § 430.3). Use the following test vessel diameters and water amounts to test gas cooking zones having the burner input rates as specified:

Nominal gas burner input rate		Test vessel diameter inches (mm)	Water load mass lbs (kg)
Minimum Btu/h (kW)	Maximum Btu/h (kW)		
3,958 (1.16)	5,596 (1.64)	8.27 (210)	4.52 (2.05)
5,630 (1.65)	6,756 (1.98)	9.45 (240)	5.95 (2.70)
6,790 (1.99)	8,053 (2.36)	10.63 (270)	7.54 (3.42)

Nominal gas burner input rate		Test vessel diameter inches (mm)	Water load mass lbs (kg)
Minimum Btu/h (kW)	Maximum Btu/h (kW)		
8,087 (2.37)	14,331 (4.2)	10.63 (270)	7.54 (3.42)
>14,331 (4.2)		11.81 (300)	9.35 (4.24)

2.8 *Instrumentation.* Perform all test measurements using the following instruments, as appropriate:

2.8.1 *Electrical Measurements.*

2.8.1.1 *Watt-hour meter.* The watt-hour meter for measuring the electrical energy consumption of conventional cooking tops must have a resolution as specified in Table Z1 of Section 5.3 of EN 60350–2:2013 (incorporated by reference; see § 430.3). The watt-hour meter for measuring the electrical energy consumption of microwave ovens must have a resolution of 0.1 watt-hour (0.36 kJ) or less and a maximum error no greater than 1.5 percent of the measured value.

2.8.1.2 *Standby mode and off mode watt meter.* The watt meter used to measure standby mode and off mode power must meet the requirements specified in Section 4, Paragraph 4.4 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). For microwave oven standby mode and off mode testing, if the power measuring instrument used for testing is unable to measure and record the crest factor, power factor, or maximum current ratio during the test measurement period, measure the crest factor, power factor, and maximum current ratio immediately before and after the test measurement period to determine whether these characteristics meet the requirements specified in Section 4, Paragraph 4.4 of IEC 62301 (Second Edition).

2.8.2 *Gas Measurements.*

2.8.2.1 *Positive displacement meters.* The gas meter to be used for measuring the gas consumed by the gas burners of the conventional cooking top must have a resolution of 0.01 cubic foot (0.28 L) or less and a maximum error no greater than 1 percent of the measured valued for any demand greater than 2.2 cubic feet per hour (62.3 L/h).

2.8.3 *Temperature measurement equipment.*

2.8.3.1 *Room temperature indicating system.* For the test of microwave ovens, the room temperature indicating system must have an error no greater than ±1 °F (±0.6 °C) over the range 65° to 90 °F (18 °C to 32 °C). For conventional cooking tops, the room temperature indicating system must be as specified in Table Z1 of Section 5.3 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

2.8.3.2 *Temperature indicator system for measuring surface temperatures.* Measure the temperature of any surface of a conventional cooking top by means of a thermocouple in firm contact with the surface. The temperature indicating system must have an error no greater than ±1 °F (±0.6 °C) over the range 65° to 90 °F (18 °C to 32 °C).

2.8.3.3 *Water temperature indicating system.* For the test of conventional cooking tops, measure the test vessel water temperature by means of a thermocouple as specified in Table Z1 of Section 5.3 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

2.8.3.4 *Room air pressure indicating system.* For the test of conventional cooking tops, the room air pressure indicating system must be as specified in Table Z1 of Section 5.3 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

2.8.4 *Heating Value.* Measure the heating value of the natural gas or propane with an instrument and associated readout device that has a maximum error no greater than ±0.5% of the measured value and a resolution of ±0.2% or less of the full scale reading of the indicator instrument. Correct the heating value of natural gas or propane to standard pressure and temperature conditions in accordance with U.S. Bureau of Standards, circular C417, 1938.

2.8.5 *Scale.* The scale used to measure the mass of the water amount must be as specified in Table Z1 of Section 5.3 of EN 60350–2:2013 (incorporated by reference; see § 430.3).

3. Test Methods and Measurements

3.1. *Test methods.*

3.1.1 *Conventional cooking top.* Establish the test conditions set forth in section 2, *Test Conditions,* of this appendix. Turn off the gas flow to the conventional oven(s), if so equipped. The temperature of the conventional cooking top must be its normal non-operating temperature as defined in section 1.16 and described in section 2.6 of this appendix. For conventional electric cooking tops, select the test vessel(s) and test position(s) according to Sections 6.2.Z1, 7.1.Z2, 7.1.Z3, 7.1.Z4, Annex ZA to ZD, and Annex ZF of EN 60350–2:2013 (incorporated by reference; see § 430.3). When measuring the surface unit cooking zone diameter, the outer diameter of the cooking zone printed marking shall be used for the measurement. For conventional gas cooking tops, select the appropriate test vessel(s) from the test vessels specified in section 2.7.2 of this appendix based on the burner input rate. Use the test methods set forth in Section 7.1.Z6 of EN 60350–2:2013 to measure the energy consumption of electric and gas cooking zones and electric cooking areas. The temperature overshoot, ΔT_0, calculated in Section 7.1.Z6.2.2 is the difference between the highest recorded temperature value and T_{70} as shown in Figure Z2. During the simmering energy consumption measurement specified in Section 7.1.Z6.3, the 20-minute simmering period starts when the water temperature first reaches 90 °C and does not drop below 90 °C for more than 20 seconds after initially reaching 90 °C. Do not test specialty cooking zones that are for use only with non-circular cookware, such as bridge zones, warming plates, grills, and griddles.

3.1.1.1 *Conventional cooking top standby mode and off mode power except for any conventional cooking top component of a combined cooking product.* Establish the standby mode and off mode testing conditions set forth in section 2, *Test Conditions,* of this appendix. For conventional cooking tops that take some time to enter a stable state from a higher power state as discussed in Section 5, Paragraph 5.1, Note 1 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), allow sufficient time for the conventional cooking top to reach the lower power state before proceeding with the test measurement. Follow the test procedure as specified in Section 5, Paragraph 5.3.2 of IEC 62301 (Second Edition) for testing in each possible mode as described in sections 3.1.1.1.1 and 3.1.1.1.2 of this appendix. For units in which power varies as a function of displayed time in standby mode, set the clock time to 3:23 at the end of the stabilization period specified in Section 5, Paragraph 5.3 of IEC 62301 (First Edition), and use the average power approach described in Section 5, Paragraph 5.3.2(a) of IEC 62301 (First Edition), but with a single test period of 10 minutes +0/−2 sec after an additional stabilization period until the clock time reaches 3:33.

3.1.1.1.1 If the conventional cooking top has an inactive mode, as defined in section 1.14 of this appendix, measure and record the average inactive mode power of the conventional cooking top, P_{IA}, in watts.

3.1.1.1.2 If the conventional cooking top has an off mode, as defined in section 1.17 of this appendix, measure and record the average off mode power of the conventional cooking top, P_{OM}, in watts.

3.1.2 *Combined cooking product standby mode and off mode power.* Establish the standby mode and off mode testing conditions set forth in section 2, *Test Conditions,* of this appendix. For combined cooking products that take some time to enter a stable state from a higher power state as discussed in Section 5, Paragraph 5.1, Note 1 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), allow sufficient time for the combined cooking product to reach the lower power state before proceeding with the test measurement. Follow the test procedure as specified in Section 5, Paragraph 5.3.2 of IEC 62301 (Second Edition) for testing in each possible mode as described in sections 3.1.2.1 and 3.1.2.2 of this appendix. For units in which power varies as a function of displayed time in standby mode, set the clock time to 3:23 at the end of the stabilization period specified in Section 5, Paragraph 5.3 of IEC 62301 (First Edition), and use the average power approach described in Section 5, Paragraph 5.3.2(a) of IEC 62301 (First Edition), but with a single

test period of 10 minutes +0/−2 sec after an additional stabilization period until the clock time reaches 3:33.

3.1.2.1 If the combined cooking product has an inactive mode, as defined in section 1.14 of this appendix, measure and record the average inactive mode power of the combined cooking product, P_{IA}, in watts.

3.1.2.2 If the combined cooking product has an off mode, as defined in section 1.17 of this appendix, measure and record the average off mode power of the combined cooking product, P_{OM}, in watts.

3.1.3 *Microwave oven.*

3.1.3.1 *Microwave oven test standby mode and off mode power except for any microwave oven component of a combined cooking product.* Establish the testing conditions set forth in section 2, *Test Conditions,* of this appendix. For microwave ovens that drop from a higher power state to a lower power state as discussed in Section 5, Paragraph 5.1, Note 1 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), allow sufficient time for the microwave oven to reach the lower power state before proceeding with the test measurement. Follow the test procedure as specified in Section 5, Paragraph 5.3.2 of IEC 62301 (Second Edition). For units in which power varies as a function of displayed time in standby mode, set the clock time to 3:23 and use the average power approach described in Section 5, Paragraph 5.3.2(a) of IEC 62301 (First Edition), but with a single test period of 10 minutes +0/−2 sec after an additional stabilization period until the clock time reaches 3:33. If a microwave oven is capable of operation in either standby mode or off mode, as defined in sections 1.19 and 1.17 of this appendix, respectively, or both, test the microwave oven in each mode in which it can operate.

3.2 *Test measurements.*

3.2.1 *Conventional cooking top test energy consumption.*

3.2.1.1 *Conventional cooking area or cooking zone energy consumption.* Measure the energy consumption for each electric cooking zone and cooking area, in watt-hours (kJ) of electricity according to section 7.1.Z6.3 of EN 60350–2:2013 (incorporated by reference; see § 430.3). For the gas surface unit under test, measure the volume of gas consumption, V_{CT}, in standard cubic feet (L) of gas and any electrical energy, E_{IC}, consumed by an ignition device of a gas heating element or other electrical components required for the operation of the conventional gas cooking top in watt-hours (kJ).

3.2.1.2 *Conventional cooking top standby mode and off mode power except for any conventional cooking top component of a combined cooking product.* Make measurements as specified in section 3.1.1.1 of this appendix. If the conventional cooking top is capable of operating in inactive mode, as defined in section 1.15 of this appendix, measure the average inactive mode power of the conventional cooking top, $P_{IA,}$ in watts as specified in section 3.1.1.1.1 of this appendix. If the conventional cooking top is capable of operating in off mode, as defined in section 1.17 of this appendix, measure the average off mode power of the conventional cooking top, P_{OM}, in watts as specified in section 3.1.1.1.2 of this appendix.

3.2.2 *Combined cooking product standby mode and off mode power.* Make measurements as specified in section 3.1.2 of this appendix. If the combined cooking product is capable of operating in inactive mode, as defined in section 1.15 of this appendix, measure the average inactive mode power of the combined cooking product, $P_{IA,}$ in watts as specified in section 3.1.2.1 of this appendix. If the combined cooking product is capable of operating in off mode, as defined in section 1.17 of this appendix, measure the average off mode power of the combined cooking product, P_{OM}, in watts as specified in section 3.1.2.2 of this appendix.

3.2.3 *Microwave oven standby mode and off mode power except for any microwave oven component of a combined cooking product.* Make measurements as specified in Section 5, Paragraph 5.3 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). If the microwave oven is capable of operating in standby mode, as defined in section 1.19 of this appendix, measure the average standby mode power of the microwave oven, P_{SB}, in watts as specified in section 3.1.3.1 of this appendix. If the microwave oven is capable of operating in off mode, as defined in section 1.17 of this appendix, measure the average off mode power of the microwave oven, P_{OM}, as specified in section 3.1.3.1.

3.3 *Recorded values.*

3.3.1 Record the test room temperature, T_R, at the start and end of each conventional cooking top or combined cooking product test, as determined in section 2.5 of this appendix.

3.3.2 Record the relative air pressure at the start of the test and at the end of the test in hectopascals (hPa).

3.3.3 For conventional cooking tops and combined cooking products, record the standby mode and off mode test measurements P_{IA} and P_{OM}, if applicable.

3.3.4 For each test of an electric cooking area or cooking zone, record the values listed in 7.1.Z6.3 in EN 60350–2:2013 (incorporated by reference; see § 430.3) and the total test electric energy consumption, E_{TV}.

3.3.5 For each test of a conventional gas surface unit, record the gas volume consumption, V_{CT}; the time until the power setting is reduced, t_c; the time when the simmering period starts, t_{90}; the initial temperature of the water; the water temperature when the setting is reduced, T_c; the water temperature at the end of the test, T_s; and the electrical energy for ignition of the burners, E_{IC}.

3.3.6 Record the heating value, H_n, as determined in section 2.2.2.2 of this appendix for the natural gas supply.

3.3.7 Record the heating value, H_p, as determined in section 2.2.2.3 of this appendix for the propane supply.

3.3.8 Record the simmering setting selected in accordance with section 7.1.Z6.2.3.

3.3.9 For microwave ovens except for any microwave oven component of a combined cooking product, record the average standby mode power, P_{SB}, for the microwave oven standby mode, as determined in section 3.2.3 of this appendix for a microwave oven capable of operating in standby mode. Record the average off mode power, P_{OM}, for the microwave oven off mode power test, as determined in section 3.2.3 of this appendix for a microwave oven capable of operating in off mode.

4. Calculation of Derived Results From Test Measurements

4.1 *Conventional cooking top.*

4.1.1 *Conventional cooking top energy consumption.*

4.1.1.1 *Energy consumption for electric cooking tops.* Calculate the energy consumption of a conventional electric cooking top, $E_{CTE,}$ in Watt-hours (kJ), using the following equation:

$$E_{CTE} = \frac{2853g}{n_{tv}} \times \sum_{tv=1}^{n_{tv}} \frac{E_{tv}}{m_{tv}}$$

Where:

n_{tv} = the total number of tests conducted for the conventional electric cooking top

E_{tv} = the energy consumption measured for each test with a given test vessel, tv, in Wh

m_{tv} is the mass of water used for the test, in g

2853 = the representative water load mass, in g

4.1.1.2 *Gas energy consumption for conventional gas cooking tops.* Calculate the energy consumption of the conventional gas cooking top, $E_{CTG,}$ in Btus (kJ) using the following equation:

$$E_{CTG} = \frac{2853g}{n_{tv}} \times \sum_{tv=1}^{n_{tv}} \frac{E_{tvg}}{m_{tv}}$$

Where:

n_{tv} = the total number of tests conducted for the conventional gas cooking top

m_{tv} = the mass of the water used to test a given cooking zone or area

E_{tvg} = ($V_{CT} \times H$), the gas energy consumption measured for each test with a given test vessel, tv, in Btu (kJ)

Where:

V_{CT} = total gas consumption in standard cubic feet (L) for the gas surface unit test as measured in section 3.2.1.1 of this appendix.

H = either H_n or H_p, the heating value of the gas used in the test as specified in sections 2.2.2.2 and 2.2.2.3 of this appendix, expressed in Btus per standard cubic foot (kJ/L) of gas.

2853 = the representative water load mass, in g

4.1.1.3 *Electrical energy consumption for conventional gas cooking tops.* Calculate the energy consumption of the conventional gas cooking top, $E_{CTGE,}$ in Watt-hours (kJ) using the following equation:

$$E_{CTGE} = \frac{2853g}{n_{tv}} \times \sum_{tv=1}^{n_{tv}} \frac{E_{IC}}{m_{tv}}$$

Where:

n_{tv} = the total number of tests conducted for the conventional gas cooking top

m_{tv} = the mass of the water used to test a given cooking zone or area

E_{IC} = the electrical energy consumed in watt-hours (kJ) by a gas surface unit as measured in section 3.2.1.1 of this appendix.

2853 = the representative water load mass, in g

4.1.2 *Conventional cooking top annual energy consumption.*

4.1.2.1 *Conventional electric cooking top.*

4.1.2.1.1 *Annual energy consumption of a conventional electric cooking top.* Calculate the annual energy consumption of a conventional electric cooking top, E_{CA}, in kilowatt-hours (kJ) per year, defined as:

$$E_{CA} = E_{CTE} \times K \times N_{CE}$$

Where:

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours.

N_{CE} = 207.5 cooking cycles per year, the average number of cooking cycles per year normalized for duration of a cooking event estimated for conventional electric cooking tops.

E_{CTE} = energy consumption of the conventional electric cooking top as defined in section 4.1.1.1 of this appendix.

4.1.2.1.2 *Integrated annual energy consumption of a conventional electric cooking top.* Calculate the integrated annual electrical energy consumption, E_{IAEC}, of a conventional electric cooking top, except for any conventional electric cooking top component of a combined cooking product, in kilowatt-hours (kJ) per year, defined as:

$$E_{IAEC} = E_{CA} + E_{CTLP}$$

Where:

E_{CA} = the annual energy consumption of the conventional electric cooking top as defined in section 4.1.2.1.1 of this appendix.

E_{CTLP} = conventional cooking top annual combined low-power mode energy consumption = $[(P_{IA} \times S_{IA}) + (P_{OM} \times S_{OM})] \times K$,

Where:

P_{IA} = conventional cooking top inactive mode power, in watts, as measured in section 3.1.1.1.1 of this appendix.

P_{OM} = conventional cooking top off mode power, in watts, as measured in section 3.1.1.1.2 of this appendix.

If the conventional cooking top has both inactive mode and off mode annual hours, S_{IA} and S_{OM} both equal 4273.4;

If the conventional cooking top has an inactive mode but no off mode, the inactive mode annual hours, S_{IA}, is equal to 8546.9, and the off mode annual hours, S_{OM}, is equal to 0;

If the conventional cooking top has an off mode but no inactive mode, S_{IA} is equal to 0, and S_{OM} is equal to 8546.9;

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours.

4.1.2.2 *Conventional gas cooking top*

4.1.2.2.1 *Annual gas energy consumption of a conventional gas cooking top.* Calculate the annual gas energy consumption, E_{CCG}, in kBtus (kJ) per year for a conventional gas cooking top, defined as:

$$E_{CCG} = E_{CTG} \times K \times N_{CG}$$

Where:

N_{CG} = 214.5 cooking cycles per year, the average number of cooking cycles per year normalized for duration of a cooking event estimated for conventional gas cooking tops.

E_{CTG} = gas energy consumption of the conventional gas cooking top as defined in section 4.1.1.2 of this appendix.

K = 0.001 conversion factor for Btu to kBtu.

4.1.2.2.2 *Annual electrical energy consumption of a conventional gas cooking top.* Calculate the annual electrical energy consumption, E_{CCE}, in kilowatt-hours (kJ) per year for a conventional gas cooking top, defined as:

$$E_{CCE} = E_{CTGE} \times K \times N_{CG}$$

Where:

N_{CG} = 214.5 cooking cycles per year, the average number of cooking cycles per year normalized for duration of a cooking event estimated for conventional gas cooking tops.

E_{CTGE} = secondary electrical energy consumption of the conventional gas cooking top as defined in section 4.1.1.3 of this appendix.

K = 0.001 conversion factor for Wh to kWh.

4.1.2.2.3 *Integrated annual energy consumption of a conventional gas cooking top.* Calculate the integrated annual energy consumption, E_{IAEC}, of a conventional gas cooking top, except for any conventional gas cooking top component of a combined cooking product, in kBtus (kJ) per year, defined as:

$$E_{IAEC} = E_{CC} + (E_{CTSO} \times K_e)$$

Where:

$E_{CC} = E_{CCG} + (E_{CCE} \times K_e)$ the total annual energy consumption of a conventional gas cooking top

Where:

E_{CCG} = the primary annual energy consumption of a conventional gas cooking top as determined in section 4.1.2.2.1 of this appendix.

E_{CCE} = the secondary annual energy consumption of a conventional gas cooking top as determined in section 4.1.2.2.2 of this appendix.

K_e = 3.412 Btu/Wh (3.6 kJ/Wh), conversion factor of watt-hours to Btus.

E_{CTSO} = conventional cooking top annual combined low-power mode energy consumption = $[(P_{IA} \times S_{IA}) + (P_{OM} \times S_{OM})] \times K$,

Where:

P_{IA} = conventional cooking top inactive mode power, in watts, as measured in section 3.1.1.1.1 of this appendix.

P_{OM} = conventional cooking top off mode power, in watts, as measured in section 3.1.1.1.2 of this appendix.

If the conventional cooking top has both inactive mode and off mode annual hours, S_{IA} and S_{OM} both equal 4273.4;

If the conventional cooking top has an inactive mode but no off mode, the inactive mode annual hours, S_{IA}, is equal to 8546.9, and the off mode annual hours, S_{OM}, is equal to 0;

If the conventional cooking top has an off mode but no inactive mode, S_{IA} is equal to 0, and S_{OM} is equal to 8546.9;

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours.

4.2 *Combined cooking products.*

4.2.1 Combined cooking product annual combined low-power mode energy consumption. Calculate the combined cooking product annual combined low-power mode energy consumption, E_{CCLP}, defined as:

$$E_{CCLP} = (P_{IA} \times S_{IA}) + (P_{OM} \times S_{OM})] \times K,$$

Where:

P_{IA} = combined cooking product inactive mode power, in watts, as measured in section 3.1.2.1 of this appendix.

P_{OM} = combined cooking product off mode power, in watts, as measured in section 3.1.2.2 of this appendix.

S_{TOT} equals the total number of inactive mode and off mode hours per year, 8,329.2;

If the combined cooking product has both inactive mode and off mode, S_{IA} and S_{OM} both equal $S_{TOT}/2$;

If the combined cooking product has an inactive mode but no off mode, the inactive mode annual hours, S_{IA}, is equal to S_{TOT}, and the off mode annual hours, S_{OM}, is equal to 0;

If the combined cooking product has an off mode but no inactive mode, S_{IA} is equal to 0, and S_{OM} is equal to S_{TOT};

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours.

4.2.2 *Integrated annual energy consumption of any conventional cooking top component of a combined cooking product.*

4.2.2.1 *Integrated annual energy consumption of any conventional electric cooking top component of a combined cooking product.* Calculate the integrated annual energy consumption of a conventional electric cooking top component of a combined cooking product, E_{IAEC}, in kilowatt-hours (kJ) per year and defined as:

$$E_{IAEC} = E_{CA} + E_{CCTLP}$$

Where,

E_{CA} = the annual energy consumption of the conventional electric cooking top as defined in section 4.1.2.1.1 of this appendix.

E_{CCTLP} = annual combined low-power mode energy consumption for the conventional cooking top component of a combined cooking product, in kWh (kJ) per year, calculated as:

$$E_{CCTLP} = E_{CCLP} \times \frac{H_{CT}}{H_T}$$

Where:

E_{CCLP} = combined cooking product annual combined low-power mode energy consumption, determined in section 4.2.1 of this appendix.

H_{CT} = 213.1 hours per year, the average number of cooking hours per year for a conventional cooking top.

$H_T = H_{OV} + H_{CT} + H_{MWO}$

Where:

H_{OV} = average number of cooking hours per year for a conventional oven, which

is equal to 219.9 hours per year. If the combined cooking product does not include a conventional oven, then H_{OV} = 0.

H_{MWO} = average number of cooking hours per year for a microwave oven, which is equal to 44.9 hours per year. If the combined cooking product does not include a microwave oven, then H_{MWO} = 0.

4.2.2.2 *Integrated annual energy consumption of any conventional gas cooking top component of a combined cooking product.* Calculate the integrated annual energy consumption of a conventional gas cooking top component of a combined cooking product, E_{IAEC}, in kBtus (kJ) per year and defined as:

$E_{IAEC} = E_{CC} + (E_{CCTLP} \times K_e)$

Where,

$E_{CC} = E_{CCG} + E_{CCE}$, the total annual energy consumption of a conventional gas cooking top,

Where:

E_{CCG} = the annual gas energy consumption of a conventional gas cooking top as determined in section 4.1.2.2.1 of this appendix.

E_{CCE} = the annual electrical energy consumption of a conventional gas cooking top as determined in section 4.1.2.2.2 of this appendix.

K_e = 3.412 kBtu/kWh (3,600 kJ/kWh), conversion factor for kilowatt-hours to kBtus.

E_{CCTLP} = annual combined low-power mode energy consumption for the conventional cooking top component of a combined cooking product, in kWh (kJ) per year, calculated as:

$$E_{CCTLP} = E_{CCLP} \times \frac{H_{CT}}{H_T}$$

Where:

E_{CCLP} = combined cooking product annual combined low-power mode energy consumption, determined in section 4.2.1 of this appendix.

H_{CT} = 213.1 hours per year, the average number of cooking hours per year for a conventional cooking top.

$H_T = H_{OV} + H_{CT} + H_{MWO}$

Where:

H_{OV} = average number of cooking hours per year for a conventional oven, which is equal to 219.9 hours per year. If the combined cooking product does not include a conventional oven, then H_{OV} = 0.

H_{MWO} = average number of cooking hours per year for a microwave oven, which is equal to 44.9 hours per year. If the combined cooking product does not include a microwave oven, then H_{MWO} = 0.

4.2.3 *Annual combined low-power mode energy consumption for any microwave oven component of a combined cooking product.* Calculate the annual combined low-power mode energy consumption of a microwave oven component of a combined cooking product, E_{CMWOLP}, in kWh (kJ) per year, and defined as:

$$E_{CMWOLP} = E_{CCLP} \times \frac{H_{MWO}}{H_T}$$

Where:

E_{CCLP} = combined cooking product annual combined low-power mode energy consumption, determined in section 4.2.1 of this appendix.

H_{MWO} = 44.9 hours per year, the average number of cooking hours per year for a microwave oven.

$H_T = H_{OV} + H_{CT} + H_{MWO}$

H_{OV} = average number of cooking hours per year for a conventional oven, which is equal to 219.9 hours per year. If the combined cooking product does not include a conventional oven, then H_{OV} = 0.

H_{CT} = average number of cooking hours per year for a conventional cooking top, which is equal to 213.1 hours per year. If the combined cooking product does not include a conventional cooking top, then H_{CT} = 0.

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Part V

Commodity Futures Trading Commission

17 CFR Part 150

Aggregation of Positions; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 150

RIN 3038–AD82

Aggregation of Positions

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is issuing a final rule to amend part 150 of the Commission's regulations with respect to the policy for aggregation under the Commission's position limits regime for futures and option contracts on nine agricultural commodities. The Commission notes that if its proposed position limits regime for other exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts are finalized, these amended regulations would also apply to the position limits regime for those contracts and swaps.

DATES: The effective date for this final rule is February 14, 2017.

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I. Background

The Commission has long established and enforced speculative position limits for futures and options contracts on various agricultural commodities as authorized by the Commodity Exchange Act (''CEA'').[1] The part 150 position limits regime [2] generally includes three components: (1) The level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, individual month, and all months combined,[3] (2) exemptions for positions that constitute bona fide hedging transactions and certain other types of transactions,[4] and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.[5]

The Commission's existing aggregation policy under regulation 150.4 generally requires that unless a particular exemption applies, a person must aggregate all positions and accounts for which that person controls the trading decisions with all positions and accounts in which that person has a 10 percent or greater ownership interest, and with the positions of any other persons with which the person is acting pursuant to an express or implied agreement or understanding.[6] The scope of exemptions from aggregation include the ownership interests of limited partners in pooled accounts,[7] discretionary accounts and customer trading programs of futures commission merchants (''FCM''),[8] and eligible entities with independent account controllers (''IAC'') that manage customer positions.[9] Market participants claiming one of the exemptions from aggregation are subject to a call by the Commission for information demonstrating compliance with the conditions applicable to the claimed exemption.[10]

The Commission adopted aggregation rules in 2011, as part of its adoption of part 151 of its regulations, that were largely similar to the existing aggregation policy under regulation 150.4.[11] In 2012, the Commission proposed to amend the aggregation rules in part 151.[12] Prior to finalization of the 2012 amendments, however, part 151 of the Commission's regulations was vacated by court order.[13]

In November 2013, the Commission proposed to amend the existing aggregation rules in regulation 150.4, and certain related regulations, to modify rules to determine which accounts and positions a person must aggregate.[14] This proposal and the related notice of proposed rulemaking are referred to herein as the ''Proposed Rule.'' The Proposed Rule was substantially similar to the aggregation rules that had been adopted in part 151 of the Commission's regulations in 2011, as they were proposed to be amended in May 2012.[15] After reviewing public comments on the Proposed Rule, the Commission supplemented it with a limited revision in September 2015 that would permit the disaggregation of positions of owned entities in expanded circumstances.[16] This supplement to the proposal and the

[1] 7 U.S.C. 1 *et seq.*

[2] *See* 17 CFR part 150. Part 150 of the Commission's regulations establishes federal position limits on certain enumerated agricultural contracts; the listed commodities are referred to as enumerated agricultural commodities. The Commission has proposed to amend its position limits to also encompass other exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. *See* Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013).

[3] *See* 17 CFR 150.2.

[4] *See* 17 CFR 150.3.

[5] *See* 17 CFR 150.4.

[6] *See* 17 CFR 150.4(a) and (b).

[7] *See* 17 CFR 150.4(c).

[8] *See* 17 CFR 150.4(d).

[9] *See* 17 CFR 150.3(a)(4).

[10] *See* 17 CFR 150.3(b) and 150.4(e).

[11] *See* Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011). With regard to determining which accounts and positions a person must aggregate, regulation 151.7 (now vacated, see footnote 13, below) implemented the Commission's existing aggregation policy under regulation 150.4 and also provided additional exemptions for underwriters of securities, and for where the sharing of information between persons would cause either person to violate federal law or regulations adopted thereunder. With the exception of the exemption for underwriters, vacated regulation 151.7 required market participants to file a notice with the Commission demonstrating compliance with the conditions applicable to each exemption.

[12] *See* Aggregation, Position Limits for Futures and Swaps, 77 FR 31767 (May 30, 2012).

[13] *See International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012). The revised position limit levels in amended section 150.2 were not vacated.

[14] *See* Aggregation of Positions; Proposed Rule, 78 FR 68946 (Nov. 15, 2013).

[15] *See* Proposed Rule, 78 FR at 68947–48.

[16] *See* Aggregation of Positions: Supplemental notice of proposed rulemaking, 80 FR 58365 (Sept. 29, 2015).

related supplemental notice of proposed rulemaking are referred to herein as the ''Supplemental Notice.''

II. Final Rules

The Commission is adopting the amendments to its aggregation rules in regulation 150.4, and certain related regulations, as set forth in the Proposed Rule and modified in the Supplemental Notice, with certain further changes made in response to public comments. The amendments and the public comments relevant to each amendment are discussed below.[17]

A. Aggregation on the Basis of Ownership or Control of Positions in Rule 150.4(a)(1) and Related Exemption From Aggregation in Rule 150.4(b)(2)

1. Proposed Approach

The Proposed Rule reflected the Commission's long-standing incremental approach to exemptions from the aggregation requirement for persons owning a financial interest in an entity. The Proposed Rule highlighted the relevant statutory language of section 4a(a)(1) of the CEA, which requires aggregation of an entity's positions on the basis of either ownership or control of the entity, and the related legislative history and regulatory developments which support the Commission's approach.[18] In addition, the Proposed Rule explained that the Commission's historical practice has been to craft narrowly-tailored exemptions, when and if appropriate, to the basic requirement of aggregation when there is either ownership or control of an entity. On this basis, proposed rule 150.4(a)(1) would maintain the requirement in existing regulation 150.4(b) that all positions in accounts for which any person, by power of attorney or otherwise, directly or indirectly, controls trading or holds a 10 percent or greater ownership or equity interest be aggregated with the positions held and trading done by such person.

To explain the basis for maintaining the existing 10 percent threshold level, the Commission noted that it has generally found that an ownership or equity interest of less than 10 percent in an account or position that is controlled by another person who makes discretionary trading decisions does not present a concern that such ownership interest results in control over trading or can be used indirectly to create a large speculative position through ownership interests in multiple accounts.[19] As such, the Commission has exempted an ownership interest below 10 percent from the aggregation requirement, while requiring aggregation when there is an ownership interest above 10 percent.[20] Prior comments, discussed in the Proposed Rule, had advocated that an ownership interest of 10 percent or more should also be exempt from the aggregation requirement, so long as such ownership represents a passive investment that does not involve control of the trading decisions of the owned entity.[21] The prior commenters had asserted that such passive investments would be unlikely to allow the owner to directly or indirectly control the trading of the owned entity, and therefore would be unlikely to present a risk that persons would be able to hold an unduly large overall position through positions in multiple accounts.[22]

Responding to these prior comments, the Commission explained in the Proposed Rule that it had previously considered, but not adopted, a broad passive investment exemption from the aggregation requirement, and had instead generally restricted exemptions based on ownership to those for FCMs, limited partner investors in commodity pools, and IACs managing customer funds for an eligible entity.[23] Further, the Proposed Rule reiterated the Commission's belief in incremental development of aggregation exemptions over time.[24] Consistent with that incremental approach, the Proposed Rule maintained the 10 percent threshold in the existing regulation but proposed to adopt specific, tailored relief from the ownership criteria of aggregation for certain situations.

a. Initial Ownership Threshold for Disaggregation Relief in the Proposed Rule

The Proposed Rule included two tiers of relief from the ownership criteria of aggregation—relief on the basis of a notice filing, effective upon submission, by persons holding an interest of between 10 percent and 50 percent in an owned entity, and relief on the basis of an application by persons holding an interest of more than 50 percent in an owned entity.[25] Each of these procedures for relief in the Proposed Rule is described briefly below.

The Proposed Rule set out a notice filing procedure, effective upon submission, to permit a person with either an ownership or an equity interest in an owned entity of 50 percent

[17] The public comments on the Proposed Rule and the Supplemental Notice are available at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1620.*

[18] *See* Proposed Rule, 78 FR at 68956, citing 7 U.S.C. 6a(a)(1) (''In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person'').

[19] *See* Proposed Rule, 78 FR at 68958.

[20] The Commission codified this aggregation threshold in its 1979 statement of policy on aggregation, which was derived from the administrative experience of the Commission's predecessor. *See* Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules, 44 FR 33839, 33843 (June 13, 1979) (''1979 Aggregation Policy''). Note, however, that proposed rule 150.4(a)(2) would also separately require aggregation of investments in accounts with substantially identical trading strategies.

[21] *See* Proposed Rule, 78 FR at 68951.

[22] *See id.*

[23] *See id,* citing Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions; Proposed Rule, 53 FR 13290, 13292 (Apr. 22, 1988). The 1988 proposal for the independent account controller rule requested comment on the possibility of a broader passive investment exemption, and specifically noted:

[Q]uestions also have been raised regarding the continued appropriateness of the Commission's aggregation standard which provides that a beneficial interest in an account or positions of ten percent or more constitutes a financial interest tantamount to ownership. This threshold financial interest serves to establish ownership under both the ownership criterion of the aggregation standard and as one of the indicia of control under the 1979 Aggregation Policy.

In particular, certain instances have come to the Commission's attention where beneficial ownership in several otherwise unrelated accounts may be greater than ten percent, but the circumstances surrounding the financial interest clearly exclude the owner from control over the positions. The Commission is requesting comment on whether further revisions to the current Commission rules and policies regarding ownership are advisable in light of the exemption hereby being proposed. If such financial interests raise issues not addressed by the proposed exemption for independent account controllers, what approach best resolves those issues while maintaining a bright-line aggregation test?

[24] *See* Proposed Rule, 78 FR at 68951, citing Aggregation, Position Limits for Futures and Swaps, 77 FR 31767, 31773 (May 30, 2012). This incremental approach to account aggregation standards reflects the Commission's historical practice. *See, e.g.,* Exemptions from Speculative Position Limits for Positions Which Have a Common Owner But Which are Independently Controlled and for Certain Spread Positions; Final Rule, 53 FR 41563, 41567 (Oct. 24, 1988) (the definition of eligible entity for purposes of the IAC exemption originally only included commodity pool operators (''CPOs''), or exempt CPOs or pools, but the Commission indicated a willingness to expand the exemption after a ''reasonable opportunity'' to review the exemption.); Exemption From Speculative Position Limits for Positions Which Have a Common Owner, But Which Are Independently Controlled, 56 FR 14308, 14312 (Apr. 9, 1991) (the Commission expanded eligible entities to include commodity trading advisors, but did not include additional entities requested by commenters until the Commission had the opportunity to assess the current expansion and further evaluate the additional entities); and Revision of Federal Speculative Position Limits and Associated Rules, 64 FR 24038 (May 5, 1999) (''1999 Amendments'') (the Commission expanded the list of eligible entities to include many of the entities commenters requested in the 1991 rulemaking).

[25] *See* Proposed Rule, 78 FR at 68958–61.

or less to disaggregate the positions of an owned entity in specified circumstances, even if such person has a 10 percent or greater interest in the owned entity.[26] The notice filing would have to demonstrate compliance with certain conditions set forth in proposed rule 150.4(b)(2)(i). Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but under proposed rule 150.4(c) the Commission would be able to subsequently call for additional information, and to amend, terminate or otherwise modify the person's aggregation exemption for failure to comply with the provisions of proposed rule 150.4(b)(2). Further, the person would be obligated by proposed rule 150.4(c) to amend the notice filing in the event of a material change to the circumstances described in the filing.

In the Proposed Rule, the Commission stated its preliminary belief that a 50 percent limit on the ownership interest in another entity is a reasonable, ''bright line'' standard for determining when aggregation of positions is required, even where the ownership interest is passive.[27] In the Proposed Rule, the Commission explained that majority ownership (*i.e.,* over 50 percent) is indicative of control, and this standard addresses the Commission's concerns about circumvention of position limits by coordinated trading or direct or indirect influence between entities. For these reasons, the Commission preliminarily believed that the 50 percent limit would be appropriate to address the heightened risk of direct or indirect influence over the owned entity and therefore a threshold at this level would be a reasonable approach to the aggregation of owned accounts pursuant to Section 4a(a)(1) of the CEA.[28]

With respect to a person who has a greater than 50 percent ownership or equity interest in the owned entity, proposed rule 150.4(b)(3) included disaggregation relief in limited situations where the owned entity is not required to be, and is not, consolidated on the financial statement of the person, if the person can demonstrate that the person does not control the trading of the owned entity, based on the criteria in proposed rule 150.4(b)(2)(i), and if both the person and the owned entity have procedures in place that are reasonably effective to prevent coordinated trading.

Under proposed rule 150.4(b)(3), a person with a greater than 50 percent ownership of an owned entity would have to apply on a case-by-case basis to the Commission for permission to disaggregate, and await the Commission's decision as to whether certain conditions specified in the proposed rule had been satisfied and therefore disaggregation would be permitted.[29] The person would be required to demonstrate to the Commission that:

i. The owned entity is not required to be, and is not, consolidated on the financial statement of the person,

ii. the person does not control the trading of the owned entity (based on criteria in proposed rule 150.4(b)(2)(i)), with the person showing that it and the owned entity have procedures in place that are reasonably effective to prevent coordinated trading in spite of majority ownership,

iii. each representative of the person (if any) on the owned entity's board of directors attests that he or she does not control trading of the owned entity, and

iv. the person certifies that either (a) all of the owned entity's positions qualify as bona fide hedging transactions or (b) the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect, and the person agrees in either case that:

- If this certification becomes untrue for the owned entity, the person will aggregate the owned entity for three complete calendar months and if all of the owned entity's positions qualify as bona fide hedging transactions during that time the person would have the opportunity to make the certification again and stop aggregating,
- upon any call by the Commission, the owned entity(ies) will make a filing responsive to the call, reflecting the owned entity's positions and transactions only, at any time (such as when the Commission believes the owned entities in the aggregate may exceed a visibility level), and
- the person will provide additional information to the Commission if any owned entity engages in coordinated activity, short of common control (understanding that if there were common control, the positions of the owned entity(ies) would be aggregated).

The relief under proposed rule 150.4(b)(3) would not be automatic, but rather would be available only if the Commission finds, in its discretion, that the four conditions above are met. There would be no time limits on the Commission's process for making the determination of whether relief under proposed rule 150.4(b)(3) is appropriately granted, and relief would be available only if and when the Commission acts on a particular request for relief.[30]

b. Ownership Threshold for Disaggregation Relief in the Supplemental Notice

The Supplemental Notice discussed the public comments received on this aspect of the Proposed Rule. In brief, it noted that commenters generally praised the proposed relief for owners of between 10 percent and 50 percent of an owned entity, but commenters asserted that the proposed application procedures under proposed rule 150.4(b)(3) for owners of a more than 50 percent equity or ownership interest were unnecessary and inappropriate.[31] Several commenters said that the Commission should provide the same disaggregation relief for owners of more than 50 percent of an owned entity as was proposed to be provided for owners of 50 percent or less.[32] On the other hand, the Supplemental Notice noted that a few commenters opposed providing aggregation relief for owners of more than 10 percent of an owned entity.[33]

In view of the points raised by commenters on the Proposed Rule, the Commission proposed in the Supplemental Notice to delete proposed rules 150.4(b)(3) and 150.4(c)(2), and to change proposed rule 150.4(b)(2) so that it would apply to all persons with an ownership or equity interest in an owned entity of 10 percent or greater (*i.e.,* an interest of up to and including 100 percent) in the same manner as proposed rule 150.4(b)(2) would have applied, before this revision, to owners

[26] Under the Proposed Rule, and in a manner similar to current regulation, if a person qualifies for disaggregation relief, the person would nonetheless have to aggregate those same accounts or positions covered by the relief if they are held in accounts with substantially identical trading strategies. *See* proposed rule 150.4(a)(2). The exemptions in proposed rule 150.4 were set forth as alternatives, so that, for example, the applicability of the exemption in paragraph (b)(2) would not affect the applicability of a separate exemption from aggregation (*e.g.,* the independent account controller exemption).

[27] *See* Proposed Rule, 78 FR at 68959.

[28] *See id.*

[29] *See* Proposed Rule, 78 FR at 68959–61. This approach was consistent with the Commission's preliminary view that relief from the aggregation requirement should not be available merely upon a notice filing by a person who has a greater than 50 percent ownership or equity interest in the owned entity. The Commission explained that, in its view, a person with a greater than 50 percent ownership interest in multiple accounts would have the ability to hold and control a significant and potentially unduly large overall position in a particular commodity, which position limits are intended to prevent. *See id.*

[30] *See* Proposed Rule, 78 FR at 68960.

[31] *See* Supplemental Notice, 80 FR at58369.

[32] *See id.*

[33] *See id.*

of an interest of between 10 percent and 50 percent.[34] The Commission stated in the Supplemental Notice that, while the language in section 4a of the CEA, its legislative history, subsequent regulatory developments, and the Commission's historical practices in this regard all support aggregation on the basis of either ownership or control of an entity as a necessary part of the Commission's position limit regime,[35] the Commission is also mindful that, as discussed by commenters on the Proposed Rule, aggregation of positions held by owned entities may in some cases be impractical, burdensome, or not in keeping with modern corporate structures.

The Commission explained that the modifications in the Supplemental Notice would address comments that ownership of a greater than 50 percent interest in an entity (and the related consolidation of financial statements) may not mean that the owner actually controls day-to-day trading decisions of the owned entity.[36] The Commission stated in the Supplemental Notice that, on balance, the overall purpose of the position limits regime (to diminish the burden of excessive speculation which may cause unwarranted changes in commodity prices) would be better served by focusing the aggregation requirement on situations where the owner is, in view of the circumstances, actually able to control the trading of the owned entity.[37] The Commission reasoned that the ability to cause unwarranted changes in the price of a commodity derivatives contract would result from the owner's control of the owned entity's trading activity, while due to variances in corporate structures there may be instances where one entity has a 100 percent ownership interest in another entity yet does not control day-to-day business activities of the owned entity. In this situation the owned entity would not have knowledge of the activities of other entities owned by the same owner, nor would it raise the heightened concerns, triggered when one entity both owns and controls trading of another entity, that the owner would necessarily act in a coordinated manner with other owned entities.[38]

Prior to issuing the Supplemental Notice, the Commission considered the views of commenters who warned that inappropriate relief from the aggregation requirements could allow circumvention of position limits through the use of multiple subsidiaries. However, the Commission believed that the criteria in proposed rule 150.4(b)(2)(i), which must be satisfied in order to disaggregate, will appropriately indicate whether an owner has control of or knowledge of the trading activity of the owned entity, such that if the disaggregation criteria are satisfied, the ability of an owner and the owned entity to act together to engage in excessive speculation should not differ significantly from that of two separate individuals.[39]

A commenter on the Proposed Rule had said the Commission should eliminate the proposed aggregation exemptions for ownership interests up to 50 percent, because such notices would make it virtually impossible for the Commission to make timely, informed decisions about whether one person in fact controls the trading decisions of another and whether all proffered certifications are accurate.[40] This commenter said that, alternatively, the Commission should only provide aggregation exemptions where the ownership interest is no greater than 25 percent, in order to prevent abusive practices, which should not become effective prior to Commission review of the facts.[41]

The Commission pointed out in the Supplemental Notice that finalization of proposed rule 150.4(b)(2), which would allow persons with ownership or equity interests in an owned entity of up to and including 100 percent to disaggregate the positions of the owned entity if certain conditions were satisfied, would not mean that there would be no aggregation on the basis of ownership. Rather, aggregation would still be the ''default requirement'' for the owner of a 10 percent or greater interest in an owned entity, unless the conditions of proposed rule 150.4(b)(2) are satisfied.[42]

[34] *See* Supplemental Notice, 80 FR at 58371. The Supplemental Notice also laid out conforming changes in proposed rule 150.4(b)(7), to delete a cap of 50 percent on the ownership or equity interest for broker-dealers to disaggregate, in proposed rule 150.4(e)(1)(i), to delete a delegation of authority referencing proposed rule 150.4(b)(3), and in proposed rule 150.4(c)(1), to delete a cross-reference. *See id.*

[35] *See* Supplemental Notice, 80 FR at 58372, citing 1999 Amendments, 64 FR at 24044 (''[T]he Commission . . . interprets the 'held or controlled' criteria as applying separately to ownership of positions or to control of trading decisions.''). *See also,* Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions; Proposed Rule, 53 FR 13290, 13292, (Apr. 22, 1988) (responding to petitions, the Commission proposed the IAC exemption from speculative position limits, but declined to remove the ownership standard from its aggregation policy).

[36] *See* Supplemental Notice, 80 FR at 58371.

[37] *See id.* The Commission notes in this regard that there may be significant burdens in meeting the requirements of proposed rule 150.4(b)(3) even where there is no control of the trading of the owned entity, as was suggested by the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce, the Asset Management Group of the Securities Industry and Financial Markets Association and the other commenters. *See* Supplemental Notice, 80 FR at 58372.

[38] Supplemental Notice, 80 FR at 58371. In the Supplemental Notice, the Commission also considered that aggregation of the positions of majority-owned subsidiaries could require corporate groups to establish procedures to monitor and coordinate trading activities across disparate owned entities, which could have unpredictable consequences including not only the cost of establishing these procedures, but also the impairment of corporate structures which were established to ensure that the various owned entities engage in business independently. On the other hand, the Commission believed that the disaggregation criteria in proposed rule 150.4(b)(2)(i) are in line with prudent corporate practices that are maintained for longstanding, well-accepted reasons with which the Commission did not intend to interfere. *See* Supplemental Notice, 80 FR at 58372.

In the Proposed Rule, the Commission noted that if the aggregation rules adopted by the Commission would be a precedent for aggregation rules enforced by designated contract markets (''DCMs'') and swap execution facilities (''SEFs''), it would be even more important that the aggregation rules set out, to the extent feasible, ''bright line'' rules that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention. *See* Proposed Rule, 78 FR at 68596, n. 103. In the Supplemental Notice, the Commission stated that implementing an approach to aggregation that is in keeping with longstanding corporate practices would promote the goal of setting out ''bright line'' rules that are relatively easy to apply while not being susceptible to circumvention. *See* Supplemental Notice, 80 FR at 58372.

[39] *See* Supplemental Notice, 80 FR at 58371. *See also* Proposed Rule, 78 FR at 68961, referring to regulation 150.3(a)(4) (proposed to be replaced by proposed rule 150.4(b)(5)). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities. The disaggregation criteria require that the two entities not have knowledge of each other's trading and, moreover, have and enforce written procedures to preclude such knowledge.

[40] *See* Honorable Carl Levin, United States Senate on February 10, 2014 (''CL-Sen. Levin Feb 10''), *see also* Americans for Financial Reform on February 10, 2014 (Commission should trigger automatic aggregation for an ownership interest well under 50 percent, because potential aggregation exemptions for ownership interests over 10 percent may undermine the proposed limits).

[41] *See* CL-Sen. Levin Feb 10.

[42] *See* Supplemental Notice, 80 FR at 58371. The Commission noted in the Proposed Rule that if there were no aggregation on the basis of ownership, it would have to apply a control test in all cases, which would pose significant administrative challenges to individually assess control across all market participants. *See* Proposed Rule, 78 FR at 68956. Further, the Commission considered that if the statute required aggregation only if the existence of control were proven, market participants may be able to use an ownership interest to directly or indirectly influence the account or position and thereby circumvent the aggregation requirement. *See id.* On further review and after considering the comments on the Proposed Rule, the Commission stated in the Supplemental Notice that the disaggregation criteria in proposed rule 150.4(b)(2)(i) provide an effective, easily implemented means of applying a ''control test'' to determine if disaggregation should be allowed, without creating a loophole through which

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2. Commenters' Views

a. Comments on the Ownership Threshold

The large majority of comments received after the Supplemental Notice was issued supported proposed rule 150.4(b)(2) as it was modified in the Supplemental Notice, and said the Commission should not adopt proposed rule 150.4(b)(3). The commenters said that the modifications described in the Supplemental Notice would provide for a more workable aggregation standard, enhance the Commission's regulatory goals, and focus the Commission's limited resources on only those disaggregation filings which might reasonably warrant additional discretionary review.[43]

Many of the commenters who supported the revisions in the Supplemental Notice had also provided comments on the Proposed Rule to the effect that the Commission should provide the same disaggregation relief for owners of more than 50 percent of an owned entity as was proposed to be provided for owners of 50 percent or less. For example, one commented that the Commission should permit majority-owned affiliates to be disaggregated regardless of whether the entities are required to consolidate financial statements, another commented that the requirement to submit an application to the Commission and await its approval would be unworkable in practice and not provide any apparent regulatory benefit, and a third commented that aggregation relief for majority-owned affiliates was necessary to avoid ''serious regulatory costs and consequences.''[44]

Three commenters, each a public policy organization, opposed the modifications described in the Supplemental Notice, saying the modifications would impermissibly weaken the aggregation regime by allowing entities with majority ownership not only to qualify for disaggregation, but also to do so through a simple, immediately effective filing. One commenter said that to allow this would be fundamentally at odds with the statutory mandate of limiting speculation and the requirement of aggregation based on indirect control of an owned entity, because the proposal in the Supplemental Notice would effectively remove the distinction between minority and majority ownership by implementing a presumption that ownership does not entail control over the owned entity's trading activity.[45] This commenter believes the Commission should reinstate a requirement of aggregation of positions whenever an ownership interest in an owned entity exceeds 10 percent.[46] Another commenter asserted that the procedure in the Supplemental Notice may be contrary to the CEA, because it allows an entity other than the Commission (*i.e.,* the entity which files an automatically-effective compliance notice) to make the determination of whether aggregation is required.[47] The third commenter in this group also maintained that relief from the aggregation requirement should not be available to an owner of more than 10 percent of a subsidiary, because ''allowing [position] disaggregation of majority-owned subsidiaries would violate the clear language'' of CEA section 4a(a)(1) and would allow the owner of such subsidiaries to circumvent position limits through the creation of multiple subsidiaries.[48]

One commenter opposed to the approach in the Supplemental Notice argued that it would lead to inconsistent results because it calls for a case-by-case, discretionary assessment of compliance with standards that test separation of trading activity, instead of an easy to understand, bright-line test premised on ownership percentage. This commenter feared that entities subject to this discretionary standard would be able to attack the Commission's efforts to enforce the aggregation requirement as arbitrary and capricious.[49] Therefore, the Commission would have to be vigilant in enforcing regulations requiring aggregation by unaffiliated individuals acting pursuant to an implied agreement.[50] For example, this commenter asserted that unaffiliated investment vehicles could serve as a conduit for the trading strategies of a sponsor that holds no equity interest in the investment vehicle, the trading decisions of which are nominally outsourced to an unaffiliated investment advisor.[51] The commenter believes that aggregation must be applied in such a case, despite the apparent absence of an ownership relationship between the sponsor and the investment vehicle.[52]

b. Comments Suggesting Additional Relief From the Aggregation Requirement, or a Different Ownership Threshold

Several commenters believed that the proposal should be modified to provide relief from the aggregation requirement in additional situations. For instance, one commenter said that the Commission should provide an exemption from aggregation for transitory ownership or equity interests in an owned-entity, such as those acquired through foreclosure or a similar credit event.[53] Other commenters said the Commission

market participants could circumvent the aggregation requirement. *See* Supplemental Notice, 80 FR at 58371.

[43] *See* Electric Power Supply Association on November 13, 2015 (''CL–EPSA Nov 13''); International Swaps and Derivatives Association on November 12, 2015 (''CL–ISDA Nov 12''); Alternative Investment Management Association on November 12, 2015 (''CL–AIMA Nov 12''); Asset Management Group of the Securities Industry and Financial Markets Association (''SIFMA AMG'') on November 13, 2015 (''CL–SIFMA AMG Nov 13''); International Energy Credit Association on November 13, 2015 (''CL–IECA Nov 13''); Energy Transfer Partners, L.P., on behalf of itself and Energy Transfer Equity, L.P. on November 13, 2015 (''CL-Energy Transfer Nov 13''); CME Group, Inc. on November 13, 2015 (''CL–CME Nov 13''); Coalition of Physical Energy Companies on November 13, 2015 (''CL–COPE Nov 13''); Commercial Energy Working Group on November 13, 2015 (''C-Working Group Nov 13''); Morgan, Lewis & Bockius LLP on November 13, 2015 (''CL-Morgan Lewis Nov 13''); Sempra Energy on November 13, 2015 (''CL-Sempra Nov 13''); Commodity Markets Council, November 13, 2015 (''CL–CMC Nov 13''); ECOM Agroindustrial Corp., Ltd. on November 13, 2015 (''CL–ECOM Nov 13''); Edison Electric Institute on November 13, 2015 (''CL–EEI Nov 13''); Futures Industry Association (''FIA'') on November 13, 2015 (''CL–FIA Nov 13''); Ontario Teachers' Pension Plan on November 13, 2015 (''CL–OTPP Nov 13''); ICE Futures US, Inc. on November 13, 2015 (''CL–ICE Nov 13''); Natural Gas Supply Association on November 13, 2015 (''CL–NGSA Nov 13''); Managed Funds Association on November 12, 2015 (''CL–MFA Nov 12''); Private Equity Growth Capital Council on November 12, 2015 (''CL–PEGCC Nov 12'') ; Minneapolis Grain Exchange, Inc. on November 13, 2015.

[44] *See* Supplemental Notice, 80 FR at 58369–70 (describing comments of FIA, the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce, and MidAmerican Energy Holdings Company).

[45] *See* Better Markets, Inc. (''Better Markets'') on November 13, 2015 (''CL-Better Markets Nov 13''). The commenter had also commented on the Proposed Rule, saying that allowing disaggregation of majority-owned subsidiaries would ignore the clear language of CEA section 4a(a)(1). *See* Supplemental Notice, 80 FR at 58369 (describing comment of Better Markets).

[46] *See* CL-Better Markets Nov 13.

[47] *See* Occupy the SEC on November 13, 2015 (''CL-Occupy the SEC Nov 13''). This commenter warned that challenges to the Commission's handling of large amounts of data could likely allow many companies that should have their positions aggregated to evade that restriction. *See id.* The commenter had also commented on the Proposed Rule, saying that no relief from aggregation should be allowed for owners of more than 50 percent of an owned entity because in this case the two firms are ''largely interconnected.'' *See* Supplemental Notice, 80 FR at 58369 (describing comment of Occupy the SEC).

[48] *See* Institute for Agriculture and Trade Policy (''IATP'') on November 13, 2015 (''CL–IATP Nov 13'').

[49] *See* CL-Occupy the SEC Nov 13.

[50] *See id.* Along similar lines, another commenter said that the increasing ease of electronic interoffice communication could allow for circumvention of the aggregation requirements. *See* CL–IATP Nov 13.

[51] *See* CL-Occupy the SEC Nov 13.

[52] *See id.*

[53] *See* FIA on February 6, 2014 (''CL–FIA Feb 6'') and CL–FIA Nov 13.

should establish a process for entities that do not squarely meet the criteria for disaggregation relief in proposed rule 150.4(b)(2), allowing them to seek disaggregation relief based upon particular facts and circumstances demonstrating that the owner does not control or have shared knowledge of the owned entity's trading activities.[54] Other commenters asked for clarification of whether relief from aggregation on the basis of ownership is available to general partners or other persons holding interests in various forms of partnerships.[55]

Although commenters generally supported the modifications made in the Supplemental Notice, and in particular the removal of the distinction between ownership interests of less than 50 percent and more than 50 percent, several commenters maintained that the Commission should not apply a threshold of 10 percent for the requirement of a notice filing in order to claim disaggregation relief.

Some commenters said that the Commission should apply a higher threshold below which a claim for disaggregation relief would not be required. Three commenters advocated for the threshold to be moved to 25 percent.[56] Other commenters said the threshold should be 50 percent, claiming that minority ownership generally does not permit control over operational aspects of the owned entity's activities, including trading strategy and decisions.[57] One commenter supporting a higher threshold remarked that maintaining the 10 percent threshold will trigger ''false positives'' requiring owners with no actual control over an owned-entity's trading activity to file a notice with the Commission, which will impose significant costs on market participants to prepare and file a notice, and on the Commission which will have to review and administer all of the filed notices.[58] In contrast, this commenter said, a higher threshold would allow the Commission to focus its surveillance resources on entities where there is a greater likelihood of commonly controlled trading activity.[59]

c. Comments Asserting That Aggregation Should Not Be Based on Ownership Alone

Other commenters said that there should be no ownership percentage threshold for disaggregation relief, but rather aggregation should be required solely on the basis of actual control of trading.[60] Certain of these commenters asserted that the CEA requires that a person control the owned entity's accounts in order to require aggregation.[61] Other commenters focused on the operational challenges of aggregation based on ownership, and asserted that limiting the aggregation requirement to cases where there is control would more closely match how affiliated companies operate.[62] One DCM argued that aggregation should be required only when there is both ownership and control of the owned entity, and said that it (*i.e.,* the DCM) does not automatically aggregate positions of companies with 100 percent common ownership, so long as the commonly-owned companies operate independently from one another in terms of decision-making and control of trading decisions.[63]

A commenter representing investment managers maintained that the Commission should not require passive investors in owned entities to aggregate the owned entities' positions when the passive investors do not have actual control over the owned entities' trading.[64] This commenter focused on the requirement to file a notice to claim relief from aggregation (which it said would be burdensome for entities that manage a large number of investment funds), and suggested instead that the criteria in proposed rule 105.4(b)(2)(i) be treated as a non-exclusive safe harbor, with other relief from aggregation being available in various circumstances.[65] The commenter asserted that the CEA requires aggregation only when there is actual control of the owned entity's derivatives trading, which the Commission has traditionally interpreted not to follow necessarily from mere corporate control of the owned entity.[66]

A holding company for a number of DCMs commented that the Commission did not identify any basis or justification for the various features of the Proposed Rule.[67] This commenter contended that features of the Proposed Rule (regarding the owned entity aggregation rules, the IAC exemption, and the ''substantially identical trading strategies'' rule) are not in accordance with law, are arbitrary and capricious, are an unexplained departure from the Commission's administrative precedent, and are not more permissive than existing aggregation standards.[68] Two other commenters were also of the opinion that the Proposed Rule was not supported by the Commission's administrative precedent.[69]

[54] *See* CL–COPE Nov 13. *See also* CL-Morgan Lewis Nov 13 (exemption from aggregation requirement should be a non-exclusive safe harbor, not excluding the possibility of relief for owners and owned entities that do not satisfy every criteria; delegate authority under 4a(a)(7) to staffs of the Commission, DCMs and SEFs to provide disaggregation relief to such firms on a case-by-case basis); CL–EPSA Nov 13 (10 percent ownership should invoke a rebuttable presumption that can be overcome by making the required notice filing in good faith).

[55] *See* Managed Funds Association on February 7, 2014 (''CL–MFA Feb 7''); CL-Energy Transfer Nov 13.

[56] *See* CL–ISDA Nov 12; CL–MFA Feb 7; CL–AIMA Feb 10.

[57] *See* CSC Sugar, LLC on February 10, 2014; CL–IECA Nov 13; CL–PEGCC Nov 12; CL–OTPP Nov 13; CL–FIA Nov 13; CL–NGSA Nov 13.

[58] *See* CL–FIA Nov 13.

[59] *See id.*

[60] *See* Wilmar International Limited on November 13, 2015 (''CL-Wilmar Nov 13''); U.S. Chamber of Commerce's Center for Capital Markets Competitiveness on February 10, 2014 (''CL-Chamber Feb 10''); National Council of Farmers Cooperatives on August 4, 2014 (''CL–NCFC Aug 4''); Commodity Markets Council on January 22, 2015 (''CL–CMC Jan 22''); Natural Gas Supply Association on February 10, 2014 (''CL–NGSA Feb 10''); Archer Daniels Midland Company on January 20, 2015; The Andersons, Inc. on January 15, 2014. *See also* CL–ECOM Nov 13 (Commission should apply a facts and circumstances approach that permits disaggregation conditioned on independence of control of trading decisions).

[61] *See* CL-Wilmar Nov 13 and CL-Chamber Feb 10.

[62] *See* CL–NCFC Aug 4; CL–CMC Jan 22; CL–NGSA Feb 10.

[63] *See* ICE Futures US, Inc. on February 10, 2014 (''CL–ICE Feb 10''). *See also* CL–NGSA Feb 10 (arguing that aggregation should require findings of both ownership and control).

[64] *See* CL–SIFMA AMG Nov 13.

[65] *See* SIFMA AMG on August 1, 2014 (discussing practical difficulties such as monitoring the equity ownership held by managed funds/accounts, and monitoring the commodity derivatives positions held by the operating companies in which managed funds/accounts hold equity ownership). *See also* CL–SIFMA AMG Nov 13; CL-Wilmar Nov 13.

[66] *See* SIFMA AMG on February 10, 2014 (''CL–SIFMA AMG Feb 10'') (referring to requirement to file reports on Form 40 and asserting that the Commission's pre-2011 rulemakings required aggregation on the basis of direct ownership in accounts, not on the basis of ownership interests in third parties who, in turn, owned positions in derivatives trading accounts).

[67] *See* CME Group, Inc. on February 10, 2014 (''CL–CME Feb 10'').

[68] CL–CME Feb 10 (opining that under Commission precedent, a 10 percent or more ownership or equity interest in an *account* is an indicia of trading control, but precedent does not support a requirement for aggregation based on a 10 percent or more ownership or equity interest in an *entity*). This commenter reasoned that the Commission's use of the term ''account'' has never referred to an owned entity that itself has accounts, that the 1979 Aggregation Policy suggests the Commission contemplated a definition of ''account'' that means no more than a personally owned futures trading account, and that the 1999 Amendments to the aggregation rules were focused on directly owned accounts. *Id.*

[69] One of these commenters contended that under the Commission's precedents ''[l]egal affiliation [between companies] has been an indicium but not necessarily sufficient for position aggregation.'' *See* Commodity Markets Council on Feb 10, 2014 (''CL–CMC Feb 10'').

The other commenter asserted that the Commission has never specifically required

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Commenters asserted that section 4a(a)(1) of the CEA provides no basis for requiring aggregation of positions held by another person in the absence of control of such other person.[70] One of these commenters also stated that existing regulation 150.4(b) generally exempts a commodity pool's participants with an ownership interest of 10 percent or greater from aggregating the positions held by the pool.[71] Finally, commenters contended that two of the Commission's enforcement cases indicate that the Commission has viewed aggregation as being required only where there is common trading control.[72]

d. Other Comments Related to Aggregation

The Commission received conflicting comments about passive index-tracking commodity pools. One commenter asserted that the operators of such pools do not have discretion to react to market movements and, thus, do not ''control'' trading in the usual meaning of that word, so the positions of such pools should not be aggregated with other pools operated by the same operator.[73] Another commenter said the Commission should mandate aggregation of all positions of a group or class of traders such as operators of passive index-tracking commodity pools, because the Commission should focus on excessive concentration of positions and potential market manipulation.[74] This commenter noted that the CEA includes language extending the CFTC's aggregation powers to cover ''any group or class of traders.'' [75]

Two commenters suggested that the rule provide an explicit exemption from aggregation for pension plans, because the proposed rule creates a complicated and potentially unavailable route to relief to entities that are required to operate only in the best interests of plan beneficiaries and thus cannot be used to further the interests of the pension plan's sponsor.[76]

3. Final Rule

The Commission is adopting rule 150.4(a)(1) as it was stated in the Proposed Rule and reiterated in the Supplemental Notice. This rule sets forth the requirements to aggregate positions on the basis of ownership or control, or when two or more persons act together under an express or implied agreement. The Commission is also adopting rule 150.4(b)(2) substantially as it was proposed in the Supplemental Notice (with certain modifications discussed below) but, as stated in the Supplemental Notice, it is not adopting proposed rule 150.4(b)(3).[77] The Commission is also adopting the conforming change in rule 150.4(b)(6) from the Supplemental Notice, to delete a cap of 50 percent on the ownership or equity interest for broker-dealers to disaggregate.[78] The Commission is persuaded by the commenters that rule 150.4(b)(2) should apply to all persons with an ownership or equity interest in an owned entity of 10 percent or greater (*i.e.,* an interest of up to and including 100 percent) in the same manner.

a. Ownership Threshold for Aggregation

The Commission continues to believe that, as stated in the Supplemental Notice, the overall purpose of the position limits regime (to diminish the burden of excessive speculation which may cause unwarranted changes in commodity prices) would be better served by focusing the aggregation requirement on situations where the owner is, in view of the circumstances, actually able to control the trading of the owned entity.[79] The Commission reasons that the ability to cause unwarranted changes in the price of a commodity derivatives contract would result from the owner's control of the owned entity's trading activity.

Rule 150.4(b)(2) will continue the Commission's longstanding rule that persons with either an ownership or an equity interest in an account or position of less than 10 percent need not aggregate such positions solely on the basis of the ownership criteria, and persons with a 10 percent or greater ownership interest will generally be required to aggregate the account or position.[80] The Commission has found,

aggregation solely on the basis of ownership of another legal person. CL–NGSA Feb 10. To support its view, this commenter said that the 1979 Aggregation Policy and the 1999 Amendments apply to only trading accounts that are directly or personally held or controlled by an individual or legal entity, the Commission's large trader rules require aggregation of multiple accounts held by a particular person, not the accounts of a person and its owned entities, and existing regulation 18.04(b) distinguishes between owners of the ''reporting trader'' and the owners of the ''accounts of the reporting trader.'' *Id.*

[70] *See* CL–CME Feb 10; CL–NGSA Feb 10. One commenter asserted that the Commission's citation of prior rules requiring aggregation of owned entity positions at a 10 percent ownership level was not a sufficient consideration of the statutorily required factors. CL–CME Feb 10.

Another commenter contended that ''CEA section 4a(a)(1) only allows the Commission to require the aggregation of positions on ownership alone when those positions are directly owned by a person. The positions of another person are only to be aggregated when the person has direct or indirect control over the trading of another person.'' CL–NGSA Feb 10.

[71] *See* CL–CME Feb 10 (noting that the Commission's proposal to amend regulation 150.3 to include the separately incorporated affiliates of CPOs, CTAs or FCMs as eligible entities for the exemption relief of regulation 150.3 (63 FR 38525 at 38532 n. 27 (July 17, 1998)) states: ''Affiliated companies are generally understood to include one company that owns, or is owned by, another or companies that share a common owner''). This commenter also asserted that the term ''principals'' under existing regulation 3.1(a)(2)(ii) include entities that have a direct ownership interest that is 10 percent or greater in a lower tier entity, such as the parent of a wholly-owned subsidiary. *Id.* From these two provisions, the commenter concluded that the corporate parent of a wholly-owned CPO would be affiliated with, and a principal of, its wholly-owned subsidiary.

[72] *See* CL–CME Feb 10, citing In the Matter of Vitol Inc. et al., Docket No. 10–17 (Sept. 14, 2010), available at *http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfvitolorder09142010.pdf* and In the Matter of Citigroup Inc. et al., Docket No. 12–34 (Sept. 21, 2012), available at *http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcitigroupcgmlorder092112.pdf.* Another commenter contended that In the Matter of Vitol was based on facts that would be relevant only if common trading control was necessary for aggregating the positions of affiliated companies. *See* CL–NGSA Feb 10.

[73] *See* DB Commodity Services LLC (a wholly-owned, indirect subsidiary of Deutsche Bank AG) on February 10, 2014 (''CL–DBCS Feb 10'').

[74] *See* CL-Better Markets Nov 13.

[75] *See id.* (citing CEA section 4a(a)(1)).

[76] *See* Commercial Energy Working Group on February 10, 2014 (''CL-Working Group Feb 10''); CL-Working Group Nov 13; CL–CMC Nov 13; CL–CMC Feb 10. One of these commenters asserted that a common structure for U.S. pension plans is to have employees of the sponsor serve as members of the investment committee of the plan, which is a separate legal entity from and unaffiliated with the sponsor. The commenter claimed that these employees typically have an investment background and may serve in trading-related roles for the plan sponsor, and may have knowledge of both the plan and the sponsor's trading activity, which may prevent the plan and the sponsor from utilizing the proposed exemption from aggregation for pension plans. Aggregation would, the commenter said, put the fiduciaries of these plans in the position of having to account for the trading strategies of the sponsor, which may not be in the best interests of plan participants. *See* CL-Working Group Nov 13; CL-Working Group Feb 10.

[77] Because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Also, as proposed in the Supplemental Notice, the Commission is not adopting proposed rule 150.4(e)(1)(i) which contained a delegation of authority referencing proposed rule 150.4(b)(3), and the final rule also reflects the deletion of a cross-reference to proposed rule 150.4(b)(3)(vii) in rule 150.4(c)(1). *See* Supplemental Notice, 80 FR at 58371.

[78] *See id.* Final rule 150.4(b)(6) (proposed as rule (b)(7)) is discussed more fully in section II.F, below.

[79] The Commission notes in this regard that there may have been significant burdens in meeting the requirements of proposed rule 150.4(b)(3) even where there is no control of the trading of the owned entity, as was suggested by the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce, SIFMA AMG and other commenters on the Proposed Rule. *See* Supplemental Notice, 80 FR at 58371.

[80] For purposes of aggregation, the Commission continues to believe, as stated in the Proposed Rule,

over the decades that the 10 percent threshold has been in effect, that this is an appropriate level at which aggregation should be required, and no change to this threshold was proposed.

The Commission considered the comments that suggested different ownership thresholds (*e.g.,* 25 percent or 50 percent) for the aggregation requirement. In contrast to the satisfactory experience with the 10 percent threshold, the Commission believes that none of the commenters presented a compelling analysis to justify a different threshold. That is, while it is undoubtedly true that application of different ownership thresholds would result in differences in which persons would be required to aggregate or seek exemptions from aggregation, the commenters did not provide a persuasive explanation of how application of a 25 percent or 50 percent ownership threshold would more appropriately further the purposes of the position limit regime than the 10 percent threshold which has been applied to date.

For example, one commenter posited that maintaining the 10 percent threshold would require owners to file unnecessary notices seeking exemptions from aggregation, imposing a burden on both market participants and the Commission.[81] However, the Commission believes that preparation of the required notices (and the Commission's review of them) will not impose undue burdens, and the notices will be helpful to the Commission in monitoring the use of exemptions from aggregation.[82] So while raising the threshold would presumably decrease the number of notices that are filed, it is not clear that the benefit would be significant since the filing burden is minimal; at the same time, however, the amount of information available to the Commission for use in monitoring and enforcement would be reduced, a potential harm. Because of this uncertainty, the Commission cannot conclude that a 25 percent, 50 percent or other threshold would be significantly better than the 10 percent threshold which has been satisfactorily applied to date, and the Commission has determined to leave the 10 percent threshold in place.

After considering the comments on the proposed procedure in rule 150.4(b)(2) for a notice filing to permit a person with an ownership or an equity interest in an owned entity of 10 percent or greater to disaggregate the positions of the owned entity in specified circumstances, the Commission has determined to adopt this proposal.[83] The notice filing must demonstrate compliance with the conditions set forth in rule 150.4(b)(2), which are discussed below. Similar to other exemptions from aggregation, the notice filing will be effective upon submission to the Commission, but the Commission is able to subsequently call for additional information, and to amend, terminate or otherwise modify the person's aggregation exemption for failure to comply with the provisions of rule 150.4(b)(2). Further, the person is obligated to amend the notice filing in the event of a material change to the circumstances described in the filing.[84]

The Commission notes that commenters raised valid concerns about permitting disaggregation following a notice filing that is effective upon submission.[85] The Commission has instructed its staff to conduct ongoing surveillance and monitoring of disaggregation filings and related information for red flags which could include, but would not be limited to, the creation of multiple subsidiaries, filings that are only superficially complete, and patterns of trading that suggest coordination after a filing has been made. The Commission is sensitive to the potential for circumvention of position limits through the use of multiple subsidiaries, but it continues to believe, as stated in the Supplemental Notice, that the criteria in rule 150.4(b)(2)(i), which must be satisfied in order to disaggregate, will appropriately indicate whether an owner has control of or knowledge of the trading activity of the owned entity.[86] The disaggregation criteria require that the two entities not have knowledge of each other's trading and, moreover, have and enforce written procedures to preclude such knowledge.[87] And, in fact, as noted in the Proposed Rule, the Commission has applied, and expects to continue to apply, certain of the same conditions in connection with the IAC exemption to ensure independence of trading between an eligible entity and an affiliated independent account controller.[88]

If the disaggregation criteria are satisfied, the Commission believes that disaggregation may be permitted without weakening the aggregation regime, even if the owner has a greater than 50 percent ownership or equity interest in the owned entity. Even in the case of majority ownership, if the disaggregation criteria are satisfied, the ability of an owner and the owned entity to act together to engage in excessive speculation or to cause unwarranted price changes should not differ significantly from that of two separate individuals. The Commission reaches this conclusion based in part on commenters' descriptions of relevant corporate structures. For example, one commenter described instances where an entity has a 100 percent ownership interest in another entity, yet does not control day-to-day business activities of the owned entity.[89] In this situation the owned entity would not have knowledge of the activities of other entities owned by the same owner, nor would it raise the heightened concerns, triggered when one entity both owns and controls trading of another entity, that the owner would necessarily act in a coordinated manner with other owned entities.

As explained in the Supplemental Notice, the Commission believes it would be inappropriate to disallow the possibility of a notice filing to disaggregate the positions of majority-owned subsidiaries, because without this possibility of relief, corporate groups may be required to establish procedures to monitor and coordinate trading activities across disparate owned entities, which could have unpredictable consequences.[90] The Commission recognizes that these consequences could include not only the cost of establishing these procedures, but also the impairment of corporate structures which were established to ensure that the various

that contingent ownership rights, such as an equity call option, would not constitute an ownership or equity interest. *See* Proposed Rule at 68958.

[81] *See* CL–FIA Nov 13.

[82] As discussed below, the Commission has instructed its staff to conduct ongoing surveillance and monitoring of disaggregation filings and related information for red flags.

[83] Under the rule adopted here, and in a manner similar to current regulation, if a person qualifies for disaggregation relief, the person would nonetheless have to aggregate those same accounts or positions covered by the relief if they are held in accounts with substantially identical trading strategies. *See* rule 150.4(a)(2). The exemptions in rule 150.4 are set forth as alternatives, so that, for example, the applicability of the exemption in paragraph (b)(2) would not affect the applicability of a separate exemption from aggregation (*e.g.,* the independent account controller exemption in paragraph (b)(4)).

[84] *See* rule 150.4(c), discussed in section II.C., below.

[85] *See* CL-Better Markets Nov 13; CL-Occupy the SEC Nov 13; CL–IATP Nov 13.

[86] *See* Supplemental Notice, 80 FR at 58371.

[87] *See* rule 150.4(b)(2)(i), discussed in section II.B., below.

[88] *See* Proposed Rule, 78 FR at 68961, referring to existing regulation 150.3(a)(4) (to be replaced by rule 150.4(b)(4)). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities.

[89] *See* MidAmerican Energy Holdings Company on February 7, 2014 (''CL-MidAmerican Feb 7'').

[90] *See* Supplemental Notice, 80 FR at 58369–70.

owned entities engage in business independently. This independence may serve important purposes which could be lost if the aggregation requirement were imposed too widely. The Commission does not intend that the aggregation requirement interfere with existing corporate structures and procedures adopted to ensure the independence of owned entities.[91]

Adoption of rule 150.4(b)(2) is in accordance with the Commission's authority under CEA section 4a(a)(7) to provide relief from the position limits regime. The notice filing requirement in the rule will appropriately implement the CEA. The 10 percent threshold historically applied by the Commission continues to have importance, because it demarcates the level at which the notice filing and the procedures underlying the notice are required. Relief under rule 150.4(b)(2) will not be automatic, but rather will require a certification (provided in the notice under rule 150.4(c)) that procedures to ensure independence are in place.

Furthermore, as the Commission noted in the Supplemental Notice, satisfaction of the criteria in rule 150.4(b)(2) would not foreclose the possibility that positions of owners and owned entities would have to be aggregated.[92] For example, aggregation is and would continue to be required under rule 150.4(a)(1) if two or more persons act pursuant to an express or implied agreement; and this aggregation requirement would apply whether the two or more persons are an owner and owned entity(ies) that meet the conditions in proposed rule 150.4(b)(2), or are unaffiliated individuals.

b. Ownership Is a Valid Basis for Aggregation

Regarding those commenters who said that ownership of an entity should not be a basis for aggregation of that entity's positions, the Commission continues to interpret section 4a(a)(1) of the CEA, as stated in the Proposed Rule and reiterated in the Supplemental Notice, to provide for the general aggregation standard with regard to position limits, and specifically supports aggregation on the basis of ownership, because it provides that in determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.[93]

The Commission explained in the Proposed Rule that this interpretation is supported by Congressional direction and Commission precedent from as early as 1957 and continued through 1999.[94]

For example, in 1968, Congress amended the aggregation standard in CEA section 4a to include positions ''held by'' one trader for another,[95] supporting the view that an owner should aggregate the positions held by an owned entity (because the owned entity is holding the positions for the owner). During the Commission's 1986 reauthorization, witnesses at Congressional hearings suggested that ''aggregation of positions based on ownership without actual control unnecessarily restricts a trader's use of the futures and options markets,'' but the Congressional committee did not recommend any changes to the statute based on these suggestions.[96]

In 1988, the Commission reviewed petitions by the Managed Futures Trade Association and the Chicago Board of Trade which argued against aggregation based only on ownership.[97] In response to the petition, however, the Commission stated that:

> Both ownership and control have long been included as the appropriate aggregation criteria in the Act and Commission regulations. Generally, inclusion of both criteria has resulted in a bright-line test for aggregating positions. And as noted above, although the factual circumstances surrounding the control of accounts and positions may vary, ownership generally is clear.
>
> . . . In the absence of an ownership criterion in the aggregation standard, each potential speculative position limit violation would have to be analyzed with regard to the individual circumstances surrounding the degree of trading control of the positions in question. This would greatly increase uncertainty.[98]

[91] The Commission noted in the Supplemental Notice that the disaggregation criteria in rule 150.4(b)(2)(i) should be relatively familiar to corporate groups, because they are in line with prudent corporate practices that are maintained for longstanding, well-accepted reasons. *See id.* The Commission also notes that since the aggregation rules may be a precedent for aggregation rules enforced by DCMs and SEFs, it is even more important that the aggregation rules set out, to the extent feasible, ''bright line'' rules that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention. *See* Proposed Rule, 78 FR at 68596, n. 103. The Commission believes that by implementing an approach to aggregation that is in keeping with longstanding corporate practices, rule 150.4(b)(2) promotes the goal of setting out ''bright line'' rules that are relatively easy to apply while not being susceptible to circumvention.

[92] *See* Supplemental Notice, 80 FR at 58371.

[93] 7 U.S.C. 6a(a)(1), *cited in* Proposed Rule, 78 FR at 68956, and Supplemental Notice, 80 FR 58366.

[94] *See* Proposed Rule, 78 FR at 68956.

[95] *See* S. Rep No. 947, 90th Cong., 2 Sess. 5 (1968) regarding the CEA Amendments of 1968, Public Law 90–258, 82 Stat. 26 (1968). This Senate Report provides:

> Certain longstanding administrative interpretations would be incorporated in the act. As an example, the present act authorizes the Commodity Exchange Commission to fix limits on the amount of speculative ''trading'' that may be done. The Commission has construed this to mean that it has the authority to set limits on the amount of buying or selling that may be done and on the size of positions that may be held. All of the Commission's speculative limit orders, dating back to 1938, have been based upon this interpretation. The bill would clarify the act in this regard. . . .
>
> Section 2 of the bill amends section 4a(1) of the act to show clearly the authority to impose limits on ''positions which may be held.'' It further provides that trading done and positions held by a person controlled by another shall be considered as done or held by such other; and that trading done or positions held by two or more persons acting pursuant to an express or implied understanding shall be treated as if done or held by a single person.

[96] *See* H.R. Rep. No. 624, 99th Cong., 2d Sess. (1986) at page 43. The Report noted that:

> During the subcommittee hearings on reauthorization, several witnesses expressed dissatisfaction with the manner in which certain market positions are aggregated for purposes of determining compliance with speculative limits fixed under Section 4a of the Act. The witnesses suggested that, in some instances, aggregation of positions based on ownership without actual control unnecessarily restricts a trader's use of the futures and options markets. In this connection, concern was expressed about the application of speculative limits to the market positions of certain commodity pools and pension funds using multiple trading managers who trade independently of each other. The Committee does not take a position on the merits of the claims of the witnesses. *Id.*

[97] The Managed Futures Trade Association petition requested that the Commission amend the aggregation standard for exchange-set speculative position limits in regulation 1.61(g) (now regulation 150.5(g)), by adding a proviso to exclude the separate accounts of a commodity pool where trading in those accounts is directed by unaffiliated CTAs acting independently. *See* Exemption From Speculative Position Limits for Positions Which Have a Common Owner but Which Are Independently Controlled; Proposed Rule, 53 FR 13290, 13291–92 (Apr. 22, 1988). The petition argued the ownership standard, as applied to ''multiple-advisor commodity pools, is unfair and unrealistic'' because while the commodity pool may own the positions in the separate accounts, the CPO does not control trading of those positions (the unaffiliated commodity trading advisor (''CTA'') does) and therefore the pool's ownership of the positions will not result in unwarranted price fluctuations. *See id.* at 13292.

The petition from the Chicago Board of Trade (which is now a part of CME Group, Inc.) sought to revise the aggregation standard so as not to require aggregation based solely on ownership without control. *See id.*

[98] *See id.* In response to the petitions, however, the Commission proposed the IAC exemption, which provides ''an additional exemption from speculative position limits for positions of commodity pools which are traded in separate accounts by unaffiliated account controllers acting independently.'' *Id.*

Even earlier administrative determinations, as well as regulations of the Commodity Exchange Authority, announced standards that included control of trading and financial interests in positions. As early as 1957, the Commission's predecessor issued determinations requiring that accounts in which a person has a financial interest be included in aggregation.[99] In addition, the definition of ''proprietary account'' in regulation 1.3(y), which has been in effect for decades, includes any account in which there is 10 percent ownership.[100]

In light of the language in section 4a, its legislative history, subsequent regulatory developments, and the Commission's historical practices in this regard, the Commission continues to interpret section 4a to require aggregation on the basis of either ownership or control of an entity. The Commission also believes that aggregation of positions across accounts based upon ownership is a necessary part of the Commission's position limit regime.[101]

Moreover, an ownership standard establishes a bright-line test that provides certainty to market participants and the Commission.[102] Without aggregation on the basis of ownership, the Commission would have to apply a control test in all cases, which would pose significant administrative challenges to individually assess control across all market participants. Further, the Commission considers that if the statute were read to require aggregation based only on control, market participants may be able to use an ownership interest to directly or indirectly influence the account or position and thereby circumvent the aggregation requirement.

In the Supplemental Notice, the Commission responded to commenters' assertions that the Proposed Rule was not in accordance with the Commission's statutory authority or precedents.[103] In brief, the Commission explained that the aggregation requirement in CEA section 4a is not phrased in terms of whether the owner holds an interest in a trading account.[104] The Commission also explained why its enforcement history does not contradict the Commission's traditional view of aggregation of owned entity positions as being required on the basis of either control or ownership.[105] The relevant commenters did not discuss these points in the comments they submitted on the Supplemental Notice,[106] and the Commission considers that the discussion of these matters in the Supplemental Notice explains how the final rule is in accordance with law and the Commission's precedents.[107]

c. Other Considerations Relevant to the Proposed Rule

The Commission does not believe, as suggested by some commenters, that the aggregation requirement in rule 150.4(a)(1) would lead to significantly more information sharing or significantly increased levels of coordinated speculative trading by the entities subject to aggregation. Among other things, the position limits would affect the trading of only entities that hold positions in excess of the limits, which the Commission expects to be relatively small in comparison to all entities that are active in the relevant markets.[108] Thus, the Commission continues to believe that the final rule will not result in a significantly increased level of information sharing that would increase coordinated speculative trading. The Commission notes that rule 150.4(b) sets out various aggregation exemptions, lessening the need to share information regarding speculative trading to ensure compliance with position limits.

The Commission has also considered that relief from any rule requiring the aggregation of positions held by separate entities is only necessary where the entities would be below the relevant limits on an individual basis, but above a limit when aggregated. Thus, as the Commission suggested in the Proposed Rule, if a group of affiliated entities can take steps to maintain an aggregate

[99] *See* Administrative Determination 163 (Aug. 7, 1957) (''[I]n the application of speculative limits, accounts in which the firm has a financial interest must be combined with any trading of the firm itself or any other accounts in which it in fact exercises control.''). In addition, the Commission's predecessor, and later the Commission, provided the aggregation standards for purposes of position limits in the large trader reporting rules. *See* Supersedure of Certain Regulations, 26 FR 2968 (Apr. 7, 1961). In 1961, then regulation 18.01(a) (''Multiple Accounts'') stated that if any trader holds or has a financial interest in or controls more than one account, whether carried with the same or with different futures commission merchants or foreign brokers, all such accounts shall be considered as a single account for the purpose of determining whether such trader has a reportable position and for the purpose of reporting. 17 CFR 18.01 (1961).

In the 1979 Aggregation Policy, the Commission discussed regulation 18.01, stating:

Financial Interest in Accounts. Consistent with the underlying rationale of aggregation, existing reporting Rule 18.10(a) a (sic) basically provides that if a trader holds or has a financial interest in more than one account, all accounts are considered as a single account for reporting purposes. Several inquiries have been received regarding whether a nomial (sic) financial interest in an account requires the trader to aggregate. Traditionally, the Commission's predecessor and its staff have expressed the view that except for the financial interest of a limited partner or shareholder (other than the commodity pool operator) in a commodity pool, a financial interest of 10 percent or more requires aggregation. The Commission has determined to codify this interpretation at this time and has amended Rule 18.01 to provide in part that, ''For purposes of this Part, except for the interest of a limited partner or shareholder (other than the commodity pool operator) in a commodity pool, the term 'financial interest' shall mean an interest of 10 percent or more in ownership or equity of an account.''

Thus, a financial interest at or above this level will constitute the trader as an account owner for aggregation purposes.

1979 Aggregation Policy, 44 FR at 33843.

The provisions concerning aggregation for position limits generally remained part of the Commission's large trader reporting regime until 1999 when the Commission incorporated the aggregation provisions into existing regulation 150.4 with the existing position limit provisions in part 150. *See* 1999 Amendments. The Commission's part 151 rulemaking also incorporated the aggregation provisions in vacated regulation 151.7 along with the remaining position limit provisions in part 151. *See* 76 FR 71626, Nov. 18, 2011.

[100] 17 CFR 1.3(y). This provision has been in existing regulation 1.3(y)(1)(iv) since at least 1976, which the Commission adopted from regulations of its predecessor, with ''for the most part, procedural, housekeeping-type modifications, conforming the regulations to the recently enacted CFTCA.'' *See* 41 FR 3192, 3195 (January 21, 1976).

[101] *See* 1999 Amendments, 64 FR at 24044 (''[T]he Commission . . . interprets the 'held or controlled' criteria as applying separately to ownership of positions or to control of trading decisions.''). *See also,* Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions, 53 FR 13290, 13292 (Apr. 22, 1988). In response to two separate petitions, the Commission proposed the independent account controller exemption from speculative position limits, but declined to remove the ownership standard from its aggregation policy. The 1999 Amendments' reference to the Commission's large-trader reporting system, 64 FR at 24043, is not related to the aggregation rules for the position limits regime. Rather, the 1999 Amendments included an explanation of situations in which reporting could be required based on both control and ownership. 1999 Amendments, 64 FR at 24043 and n. 26. (the ''routine large trader reporting system is set up so that it does not double count positions which may be controlled by one and traded for the beneficial ownership of another. In such circumstances, although the routine reporting system will aggregate the positions reported by FCMs using only the control criterion, the staff may determine that certain accounts or positions should also be aggregated using the ownership criterion or may by special call receive reports directly from a trader.'')

[102] *See* footnote 91, above.

[103] *See* Supplemental Notice, 80 FR at 58373.

[104] In fact, the word ''account'' does not even appear in the statute. As noted above, section 4a(a)(1) of the CEA provides that in determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person. 7 U.S.C. 6a(a)(1).

[105] *See* Supplemental Notice, 80 FR at 58373.

[106] *See* CL–CME Nov 13 and CL–NGSA Nov 13.

[107] *See* Supplemental Notice, 80 FR at 58373.

[108] *See, e.g.,* Position Limits for Futures and Swaps, 76 FR 71626, 71668 (Nov. 18, 2011) (describing the number of traders estimated to be subject to position limits).

position that does not exceed any limit, then the group will not have to seek disaggregation relief.[109]

In other words, the Commission continues to believe that seeking disaggregation relief is one option for those groups of affiliated entities that may exceed a limit on an aggregate basis but will remain below the relevant limits on an individual basis. Other avenues are also available to corporate groups that seek to remain in compliance with the position limit regime. For example, the affiliated entities may put into place procedures to avoid exceeding the limits on an aggregate basis.[110] One potential approach that could be available to a holding company with multiple subsidiaries would be to assign each subsidiary an internal limit based on a percentage of the level of the position limit. The holding company would allocate no more in aggregate internal limits than the level of the position limit.[111] Further, a breach of an internal limit would provide the holding company with notice that it should consider filing for bona fide hedging exemptions or taking other compliance steps, as applicable.

The Commission also considered whether aggregation of positions is unnecessary because information about ownership and control is available to the Commission through reports on Commission Form 40.[112] However, the Commission is not persuaded that these reports are a sufficient substitute for the position limits regime. While these reports provide some information necessary for surveillance of positions, some owned entities may not file these reports. On a more fundamental level, the Commission believes that compliance with the position limit rules, including aggregation of the positions of owned entities, is primarily the responsibility of the owned entities and their owners. Even if the information on Form 40 were sufficient, it would be impractical and inefficient for the Commission to use that information to monitor compliance with the position limit rules, as compared to the ability of the entities themselves to maintain compliance with the position limits.

d. Consideration of Alternatives Suggested by Commenters

Regarding the requests for specific exemptions or other special treatment for various types of entities or situations, such as investment companies, pension plans, passive index-tracking commodity pools, and cases of transitory ownership, the Commission is not persuaded that any further relief for such entities (*i.e.,* beyond the relief already provided in the final rule) would justify the complexity of applying the new rules that would be necessary for such specific treatment, which would likely include definitional rules to set out the scope of entities that qualify for the special treatment. For example, the Commission believes that distinguishing ''transitory'' ownership from other forms of ownership would be more complicated than completing the notice required to obtain relief, and in such situations it is reasonable to expect that the notice filing would be made on a summary basis appropriate to the transitory situation.

The Commission reached a similar conclusion regarding the suggestions for different types of filings in various situations. Again, the Commission believes that the filing required by rule 150.4(c) is relatively simple because it requires only a description of the relevant circumstances that warrant disaggregation, and a statement certifying that the conditions set forth in the applicable aggregation exemption provision have been met. Therefore, the complexity of determining which filing to provide in various situations would be greater than that involved in completing the required filing.

As for the commenters that suggested certain categories of persons (such as passive investors) should be exempt from the aggregation requirement without making any filing at all, the Commission concluded that this approach would put at risk the satisfactory experience under the existing regulation, under which aggregation is required without exemption. For this reason, the Commission did not propose to provide categorical exemptions from the aggregation requirement. As explained above, the Commission believes it is important that its staff be able to conduct ongoing surveillance and monitoring of disaggregation filings and related information for red flags. If greater than 10 percent owners were permitted to avoid the aggregation requirement without making any filing, there could be a greater potential for circumvention of position limits.

Last, the Commission emphasizes that the categories of relief from the aggregation requirement set forth in the final rule do not limit the Commission's existing authority under section 4a(a)(7) of the CEA to grant exemptions from the aggregation requirement on a case-by-case basis.

B. Criteria for Aggregation Relief in Rule 150.4(b)(2)(i)

1. Proposed Approach

The proposed criteria to claim relief addressed the Commission's concerns that an ownership or equity interest of 10 percent and above may facilitate or enable control over trading of the owned entity, or allow a person to accumulate a large position through multiple accounts that could overall amount to an unduly large position.[113] The Proposed Rule grouped these criteria into five paragraphs in proposed rule 150.4(b)(2)(i). The Commission stated its intent that these criteria would be interpreted and applied in accordance with the Commission's past practices in this regard.[114] In accordance with these precedents, the Commission would not expect that the criteria would impose requirements beyond a reasonable, plain-language interpretation of the

[109] *See* Proposed Rule, 78 FR at 68958.

[110] The procedures adopted by the affiliates may obviate more complex steps such as the implementation of real-time monitoring software to consolidate all derivative activities of the affiliates, especially if the group currently does not have an aggregate position approaching the size of a position limit and has historically not changed position sizes day-over-day by a significant percentage of the position limit.

[111] An even more cautious approach would be for the holding company to limit the overall allocation to the subsidiaries to less than 100 percent of the position limit. For example, a holding company with three subsidiaries may assign each subsidiary an internal limit equal to 30 percent of the level of the federal limit. Thus, the holding company has allocated permission to subsidiaries to hold, in the aggregate, positions equal to up to 90 percent of the level of the relevant position limit. Each subsidiary would simply report at close of business its derivative position to the holding company. The 10 percent cushion provides the holding company with the ability to remain in compliance with the limit, even if all subsidiaries slightly exceed the internal limits on the same side of the market at the same time.

[112] *See* 17 CFR part 18, Appendix A.

[113] The Proposed Rule noted that the criteria would apply to the person filing the notice as well as the owned entity. *See* Proposed Rule, 78 FR at 68961. In addition, the Proposed Rule noted that for purposes of meeting the criteria, such ''person'' would include any entity that such person must aggregate pursuant to proposed rule 150.4. For example, if company A files a notice under proposed rule 150.4(c) for company A's equity interest of 30 percent in company B, then company A must comply with the conditions for the exemption, including any entity with which company A aggregates positions under proposed rule 150.4. In this connection, if company A controlled the trading of company C, then company A's 150.4(c) notice filing must demonstrate that there is independence between company B and company C. *See id.*

[114] *See id.,* citing 1979 Aggregation Policy, 44 FR 33839 (providing indicia of independence); CFTC Interpretive Letter No. 92–15 (CCH ¶ 25,381) (ministerial capacity overseeing execution of trades not necessarily inconsistent with indicia of independence); 1999 Amendments, 64 FR at 24044 (intent in issuing final aggregation rule ''merely to codify the 1979 Aggregation Policy, including the continued efficacy of the [1992] interpretative letter'').

criteria. For example, routine pre- or post-trade systems to effect trading on an operational level (such as trade capture, trade risk or order-entry systems) would not, broadly speaking, have to be independently developed in order to comply with the criteria. Also, employees that do not direct or participate in an entity's trading decisions would generally not be subject to these requirements.

Proposed rule 150.4(b)(2)(i)(A) would condition aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other. The Commission noted its preliminary belief that where an entity has an ownership interest in another entity and neither entity shares trading information, such entities demonstrate independence.[115] In contrast, persons with knowledge of trading decisions of another in which they have an ownership interest are likely to take such decisions into account in making their own trading decisions, which implicates the Commission's concern about independence and enhances the risk for coordinated trading.[116] This proposed criterion would address concerns regarding knowledge of employees who control, direct or participate in an entity's trading decisions, and would not prohibit information sharing solely for risk management, accounting, compliance, or similar purposes and information sharing among mid- and back-office personnel that do not control, direct or participate in trading decisions. In the Proposed Rule, the Commission clarified that this criterion would generally not require aggregation solely based on knowledge that a party gains during execution of a transaction regarding the trading of the counterparty to that transaction, nor would it encompass knowledge that an entity would gain when carrying out due diligence under a fiduciary duty, so long as such knowledge is not directly used to affect the entity's trading.[117]

Proposed rule 150.4(b)(2)(i)(B) would condition aggregation relief on a demonstration that the person seeking disaggregation relief and the owned entity trade pursuant to separately developed and independent trading systems. Further, proposed rule 150.4(b)(2)(i)(C) would condition relief on a demonstration that such person and the owned entity have, and enforce, written procedures to preclude the one entity from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures would have to include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities. As noted in the Proposed Rule, the Commission has applied these same conditions in connection with the IAC exemption to ensure independence of trading between an eligible entity and an affiliated IAC.[118] Similar to the IAC exemption, proposed rule 150.4(b)(2) would permit disaggregation in certain circumstances where there is independence of trading between two entities. Thus, the Commission proposed these conditions, which were already applicable and working well in the IAC context, and which were expected to strengthen the independence between the two entities for the owned entity exemption.

The Commission proposed that the phrase ''separately developed and independent trading systems'' be interpreted in accordance with the Commission's prior practices in this regard.[119] The Commission stated that it generally would not expect that this criterion would prevent an owner and an owned entity from both using the same ''off-the-shelf'' system that is developed by a third party.[120] Rather, the concern driving the Commission's proposal was that trading systems (in particular, the parameters for trading that are applied by the systems) could be used by multiple parties who each know that the other parties are using the same trading system as well as the specific parameters used for trading and, therefore, are indirectly coordinating their trading.[121]

The requirement of ''separate physical locations'' in proposed rule 150.4(b)(2)(i)(C) would not necessarily require that the relevant personnel be located in separate buildings. In the Proposed Rule, the Commission stated that the important factor is that there be a physical barrier between the personnel that prevents access between the personnel that would impinge on their independence.[122] For example, locked doors with restricted access would generally be sufficient, while merely providing the purportedly ''independent'' personnel with desks of their own would not. Similar principles would apply to sharing documents or other resources.

Proposed rule 150.4(b)(2)(i)(D) would condition aggregation relief on a demonstration that the person does not share employees that control the owned entity's trading decisions, and the employees of the owned entity do not share trading control with such persons. The Proposed Rule noted the Commission's concern that shared employees with control of trading decisions may undermine the independence of trading between entities.[123] Regarding the sharing of

[115] *See* Proposed Rule, 78 FR at 68961.

[116] As noted in the Proposed Rule, the Commission does not consider knowledge of overall end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies. As such, the knowledge of end-of-day positions for the purpose of monitoring credit limits for corporate guarantees does not necessarily constitute knowledge of trading information. However, the ability to monitor the development of positions on a real time basis could constitute knowledge of trading decisions because of the substantial likelihood that such knowledge might affect trading strategies or influence trading decisions of the other. *See id.*

[117] As explained in the Proposed Rule, proposed paragraph (A) was along the lines suggested by commenters on the proposed amendments to part 151. These commenters had said that the limits on sharing information between the person and the owned entity should not apply to employees that do not direct or influence trading (such as attorneys or risk management and compliance personnel), although the employees may have knowledge of the trading of both the person and the owned entity. Also, a commenter representing employee benefit plan managers said that restrictions on information sharing are, in general, a problem for plan managers, which have a fiduciary duty to inquire as to an owned entities' activities, so the Commission should recognize that acting as required by fiduciary duties does not constitute a violation of the information sharing restriction. And a commenter had said that information sharing resulting when the person and the owned entity (or two owned entities) are counterparties in an arm's length transaction should not be a violation of the rule. *See id.*

[118] *See id. See also* existing regulation150.3(a)(4). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities.

[119] *See, e.g.,* 1979 Aggregation Policy, 44 FR at 33840–1 (futures commission merchant (FCM) ''deemed to control'' trading of customer accounts in trading program where FCM gives specific advice or recommendations not made available to other customers, unless such accounts and programs are traded independently and for different purposes than proprietary accounts).

[120] Commenters on the proposed amendments to part 151 had said that this requirement should not prevent the use of third party ''off-the-shelf'' execution algorithms, should permit the sharing of virtual documentation, so long as such document can be accessed only by persons that do not manage or control trading, and should apply only to systems that direct trading decisions, but not trade capture, trade risk or trade facilitation systems. *See* Proposed Rule, 78 FR at 68962.

[121] *Compare* 1979 Aggregation Policy, 44 FR at 33841. ''However, the Commission also recognizes that purportedly different programs which in fact are similar in design and purpose and are under common control may be initiated in an attempt to circumvent speculative limit and reporting requirements.''

[122] *See* Proposed Rule, 78 FR at 68962.

[123] Commenters on the proposed amendments to part 151 said this criteria should not prohibit sharing of board or advisory committee members who do not influence trading decisions, sharing of

Continued

attorneys, accountants, risk managers, compliance and other mid- and back-office personnel, the Commission proposed that sharing of such personnel between entities would generally not compromise independence so long as the employees do not control, direct or participate in the entities' trading decisions.[124] Similarly, sharing of board or advisory committee members, research personnel or sharing of employees for training, operational or compliance purposes would not result in a violation of the criteria if the personnel do not influence (*e.g.,* ''have a say in'') or direct the entities' trading decisions.[125]

Proposed rule 150.4(b)(2)(i)(E) would condition aggregation relief on a demonstration that the person and the owned entity do not have risk management systems that permit the sharing of trades or trading strategies with the other. This condition was intended to address concerns that risk management systems that permit the sharing of trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of information.[126] The Commission proposed that this criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions.[127] Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees' risk management or compliance activities could be considered to have an ''influence'' on the entity's trading.

2. Commenters' Views

As a general matter, some commenters said that the disaggregation criteria in the Proposed Rule were appropriately stated. One described the disaggregation criteria as a balanced and effective approach that gets to the heart of the Commission's aggregation policy, while another said the criteria provide appropriate indications of whether an owner has knowledge or control of the trading activity of an owned entity.[128] On the other hand, another commenter believed that the criteria are vague and unclear, especially for global enterprises which are active in more than one aspect of a market (*e.g.,* both production and trading activities).[129]

Set forth below is a brief discussion of the comments on each aspect of the proposed disaggregation criteria.

a. Proposed Rule 150.4(b)(2)(i)(A)—No Shared Knowledge of Trading Decisions

Commenters said that passive investors in an owned entity should be required to certify only that they have no knowledge of the owned entity's trading, not whether the owned entity has knowledge of the trading of the passive investors (*i.e.,* the owners), since passive investors would not have insight into the knowledge of the owned entity.[130] One commenter asked that the Commission clarify that the gain of information as a counterparty to a transaction would not in itself violate this criterion regardless of how the information is transmitted.[131]

Another commenter questioned how this criterion would be applied to trading decisions triggered by an algorithm over which human intervention is rarely exercised. For example, the commenter asserted that the use of off-the-shelf third party algorithms by entities owned by a single owner could enable a de facto coordination without intentional indirect coordination.[132]

b. Proposed Rule 150.4(b)(2)(i)(B)—Have Separately Developed and Independent Trading Systems

Several commenters suggested that the Commission modify this paragraph so that it refers to ''trading strategies'' instead of ''trading systems.'' That is, they suggested that the paragraph require that the owner and the owned entity ''Trade pursuant to separately developed and independent trading strategies.'' One commenter was of the view that because proposed rule 150.4(b)(2)(i)(A) would require that the owner and the owned entity not have shared knowledge of trading decisions, there is no need for this paragraph to require separate ''trading systems'' when the purpose of this rule should be to prohibit use of ''trading strategies'' that were developed in coordination.[133] The commenter believed that this change would allow the owner and the owned entity to utilize a single shared system for trading, which would be appropriate and could enhance risk management so long as the owner and the owned entity can demonstrate that the condition of no shared knowledge of trading decisions is met.[134]

research personnel, or sharing for training, operational or compliance purposes, so long as trading of the person and the owned entity remains independent. *See id.*

[124] As noted in the Proposed Rule, the condition barring the sharing of employees that control the owned entity's trading decisions would include a prohibition on sharing of attorneys, accountants, risk managers, compliance and other mid-and back-office personnel, to the extent such employees participate in control of the trading decisions of the person or the owned entity. *See id.*

[125] In this respect, proposed rule 150.4(b)(2)(i)(D) was consistent with the Commission's Interpretive Letter No. 92–15 (CCH ¶ 25,381), where an employee both oversaw the execution of orders for a commodity pool, as well as maintained delta neutral option positions in non-agricultural commodities for the proprietary account of an affiliate of the sponsor of the commodity pool. The Commission concluded that the use of clerical personnel who are dual employees of both affiliates would not require aggregation when the clerical personnel engage in ministerial activities and steps are taken to maintain independence, such as: (i) Limiting trading authority so that the personnel do not have responsibility for the two entities' activities in the same commodity; and (ii) separating the times at which the personnel conduct activities for the two entities.

[126] The Commission remains concerned, as stated in the Proposed Rule and as noted above, that a trading system, as opposed to a risk management system, that is not separately developed from another system can subvert independence because such a system could apply the same or similar trading strategies even without the sharing of trading information. *See* Proposed Rule, 78 FR at 68962.

[127] *See id.*

[128] *See* CL-Sempra Nov 13 and CL–EEI Nov 13, respectively. A third commenter thought the criteria are reasonable and practicable, but cautioned that it is difficult to eliminate knowledge sharing between related business entities, citing Paul Volcker describing as naïve the view that ''Chinese Walls can remain impermeable against the pressures to seek maximum profit and personal remuneration.'' *See* Chris Barnard on November 12, 2015.

[129] *See* CL-Wilmar Nov 13.

[130] *See* CL–SIFMA AMG Nov 13; CL–MFA Nov 12; CL–AIMA Feb 10. One of these commenters said that, as a general matter, it can be very difficult for owners to obtain information about owned entities, *e.g.,* when the owned entity is in a different country. CL–MFA Nov 12.

[131] *See* Coalition of Physical Energy Companies on February 10, 2014 (''CL–COPE Feb 10'').

[132] *See* Institute for Agriculture and Trade Policy on February 10, 2014 (''CL–IATP Feb 10'').

[133] *See* CL–IECA Nov 13. *See also* CL–CME Nov 13 (criteria should focus on ensuring that the entities do not share knowledge of or control over trading, which would not be implicated merely because they trade pursuant to commonly-developed trading systems).

[134] This commenter also said that, at a minimum, the Commission should distinguish between front-end systems (used for trade capture and trade booking) and back-end systems (used for risk management and trade reporting). *See* CL–IECA Nov 13.

Another commenter described ''trade capture systems'' as distinct from trading strategies. This commenter said trade capture systems are used to track positions on an enterprise-wide basis across multiple affiliates for risk management, recordkeeping and other business purposes, but these systems do not direct trading and use of a shared trade capture system does not mean that the entities have adopted or employed identical, or even similar, trading strategies. *See* CL–EEI Nov 13.

A third commenter referred to trade capture, trade execution, and related report-generation systems for the confirmation, booking and accounting of orders and for any other mid- and back-office functions. This commenter asserted that since such systems merely record, process, and facilitate reports of trading, but do not establish

Other commenters remarked that a change in the rule text from ''trading systems'' to ''trading strategies'' would allow corporate groups to take advantage of economies of scale by having one trading system developed for multiple companies in the group, and promote efficient trading and risk management practices through the development of trading technologies that are unrelated to trading strategy.[135] A commenter representing investment managers said that disaggregation relief should be available if the original investment decisions are made independently, even if trades are subsequently executed and risk managed on an aggregated basis using a single system.[136]

Commenters referred to the Commission's statement in the Proposed Rule that it generally would not expect that this criterion would prevent an owner and an owned entity from both using the same ''off-the-shelf'' system that is developed by a third party.[137] The commenters asked that this guidance be reiterated in the final rule and be extended beyond off-the-shelf systems or other technologies ''developed by'' third parties, to include any in-house software or custom modules added to third-party software, so long as these internal systems are not used to share trading information with day-day trading personnel or otherwise permit coordinated trading.[138]

On the other hand, another commenter said that the application of this criterion, which implicitly assumes that market participants will self-report common trading strategies, fails to recognize that the participants may be reluctant to report collusive strategies, and therefore DCMs and SEFs should be required to analyze market data for trading strategy correlations.[139]

c. Proposed Rule 150.4(b)(2)(i)(C)—Have Written Procedures To Maintain Independence, Including Separate Physical Locations

A commenter said that the requirement to meet this criteria (to have written procedures restricting access to trading information) should apply only to the owner claiming the exemption from aggregation, and not the owned entity, because depending on the extent of an owner's corporate control over an owned entity, the owner may not be in a position to compel the owned entity to establish the written procedures.[140] This commenter believes that so long as the owner has and enforces written procedures that preclude the owner from sharing trading information with, and receiving trading information from, the owned entity, then each entity will not have access to the information of the other.[141]

Another commenter suggested that the second sentence of this provision should be deleted because, this commenter believes, it is subsumed by the first sentence and such prescriptive criteria are unnecessary in the context of a physical commodity firm as opposed to an IAC.[142] The commenter also asked that the Commission clarify that the requirement of ''separate physical locations'' does not require physically separate buildings, but rather requires only restricted access prohibiting personnel from entering the affiliated company without permission or signing-in or, if on the derivatives trading floors, an escort.[143]

On the other hand, another commenter said that this criterion should be strengthened to provide realistic guidelines for meaningful separations of location and information, because the statute requires an entity to cease trading commodity derivatives in multiple divisions separated by ''mere 'Chinese walls' '' and it is not within the discretion of the Commission to waive this requirement.[144] This commenter cited a research paper which asserted ''that in important contexts Chinese walls fail to prevent the spread of non-public information within financial conglomerates.'' [145]

d. Proposed Rule 150.4(b)(2)(i)(D)—No Shared Employees That Control Trading Decisions

A commenter said that the Commission should clarify that this criterion may be met if a shared employee participates on the board but does not control, direct or participate in the trading decisions.[146] Another commenter requested that the Commission clarify that guidance in the Proposed Rule about research personnel not influencing or directing the entities' trading decisions is properly interpreted to mean that research personnel are not precluded by this criterion from providing market research (including, for example, market fundamentals or technical indicators, support or resistance levels, and trade recommendations), so long as the research personnel do not direct or control trading decisions of the owned entities.[147]

e. Proposed Rule 150.4(b)(2)(i)(E)—No Risk Management Systems That Permit the Sharing of Trades or Trading Strategy

Several commenters focused on a statement in the Proposed Rule that the Commission would interpret this criterion not to prohibit sharing of information for risk management purposes, so long as the information is not used for trading purposes or shared with employees that participate in trading decisions.[148] These commenters asked that the Commission reiterate this guidance in the final rule.[149] Other commenters said that the guidance should be set forth as part of the text of the final rule, in order to provide a safe harbor, or greater certainty, for the

parameters (*e.g.,* algorithms) for trading, their use by multiple entities should be permitted under this criterion so long as they do not enable coordinated trading. *See* CL-Energy Transfer Nov 13.

[135] *See* CL–CME Nov 13; CL–FIA Nov 13; CL–FIA Feb 6.

[136] This commenter said it would be appropriate for trading strategies of separate investment vehicles to be executed via a single execution desk, as long as the vehicles' portfolio managers were not coordinating placement of the trades, in order to achieve risk management goals such as to avoid cross and wash trading or the submission of an excessive numbers of orders, to avoid having vehicles bid against each other, to monitor other trading thresholds, and to achieve fair terms of execution and aggregation. *See* CL–AIMA Nov 12.

[137] *See* Proposed Rule, 78 FR at 68962.

[138] *See* CL–SIFMA AMG Nov 13; CL–AIMA Feb 10; CL-Energy Transfer Nov 13.

[139] *See* Occupy the SEC on August 7, 2014 (''CL-Occupy the SEC Aug 7'').

[140] *See* FIA on July 31, 2014 (''CL–FIA July 31'') and CL–FIA Nov 13.

[141] *See id.*

[142] *See* CL-Energy Transfer Nov 13. The second sentence reads ''Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities.'' The commenter said that if the second sentence is retained, the Commission should provide guidance that the routing of documents to senior management or risk management personnel, and the routing of documents that show aggregate, non-granular, or stale trading positions, may be acceptable so long as such routing does not allow coordinated trading.

[143] *See id.*

[144] *See* Better Markets, Inc. on February 10, 2014 (''CL-Better Markets Feb 10'').

[145] *See id.*

[146] *See* CL–COPE Feb 10.

[147] *See* CL–MFA Feb 7, referring to Proposed Rule, 78 FR at 68962.

[148] *See* CL–AIMA Feb 10, citing Proposed Rule, 78 FR at 68962 (''this criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees' risk management or compliance activities could be considered to have an 'influence' on the entity's trading.''). *See also* CL–ISDA Nov 12; CL–SIFMA AMG Nov 13; CL–PEGCC Nov 12; CL–CME Nov 13.

[149] *See* CL–ISDA Nov 12; CL–SIFMA AMG Nov 13; CL–PEGCC Nov 12; CL–CME Nov 13; CL–AIMA Feb 10.

sharing of risk management information.[150]

A commenter asked the Commission to state that this criterion would not preclude disaggregation relief when there is sharing of information for only risk management and surveillance and other non-trading purposes, such as, for example, information used to assess collateral requirements or verify compliance with applicable credit limits or information maintained by a custodian or other service provider that does not control trading.[151]

Other commenters suggested various formulations for Commission guidance or rule text to set out circumstances in which this criterion would be interpreted not to preclude disaggregation relief, so long as the employees who have access to the shared information do not control, direct or participate in the entities' trading decisions. The circumstances suggested by commenters include:

- Information sharing as is necessary to fulfill fiduciary duties or duties to supervise trading, or to monitor risk limits on an enterprise wide basis;[152]
- sharing of transaction and position information with and among employees who perform risk management, accounting, compliance or similar mid- and back-office functions; [153]
- information sharing for risk management purposes; [154]
- continuous sharing of position information for risk management and surveillance purposes only, sharing of trading and position information for risk management purposes (even on a real-time basis and even if the entity's risk management systems or personnel have authority to require the reduction of positions to comply with applicable limits), and using shared risk management services, including real-time data sharing and position reduction mechanisms, so long as they do not permit coordinated or shared trading;[155]
- sharing of derivative information with senior management or risk committee members that oversee the risks of more than one operating company, for risk management, accounting, compliance, or similar purposes (even if these personnel have authority to reduce exposure or comply with internal risk guidelines), and sharing of trading and position information for risk management purposes, even if such information is shared on a real-time or end-of-day basis and even if the risk management systems or personnel have authority to reduce positions to comply with applicable limits or other restrictions that senior management or the risk personnel may impose; [156] and
- information sharing resulting from use of an affiliated service provider, such as an affiliated FCM, an affiliated custodian, an affiliate engaged in recordkeeping or reporting information, or an affiliate providing clearing, custodial, or other non-trading services for the owned entity.[157]

Commenters also asserted that employees at the owner entity who are not directly or indirectly involved in trading or the supervision of traders, and are prohibited from sharing information with owner entity traders, should be permitted to receive trading activity and position exposure information of the owned entity,[158] and that the categories of employees referred to in the guidance in the Proposed Rule are not intended to be restrictive, so that, for example, entities could share sales staff without leading to shared knowledge of trading decisions.[159] Another commenter said that the Commission should interpret this criterion not to preclude disaggregation relief when information sharing is limited to employees involved in risk-management, compliance, execution or recordkeeping functions, so long as the functions are conducted pursuant to written procedures that protect the information from access by individuals involved in trading decisions, and there is no access by individuals who develop or execute trading strategies to the information shared for risk management.[160]

3. Final Rule

The Commission is adopting rule 150.4(b)(2)(i) largely as proposed, with certain modifications described below in response to commenters and other considerations.

First, the lead in sentence of rule 150.4(b)(2)(i) includes the addition of the phrase ''(to the extent that such person is aware or should be aware of the activities and practices of the aggregated entity or the owned entity).'' The effect of adding this phrase is to apply the criteria in this rule to both the person who is required to aggregate positions and the aggregated or owned entity, but only to the extent that the person required to aggregate is aware or should be aware of the activities and practices of the aggregated or owned entity. This addition recognizes that, as commenters pointed out, an owner may not have knowledge of or an ability to find out about the trading practices of an owned entity. The Commission understands the phrase ''should be aware'' to mean that the owner is charged with awareness of the owned entity's activities if it is, in effect, able to control the owned entity or routinely has access to relevant information about the owned entity. If the owner is not aware, and should not be aware, of the owned entity's activities, it would not have to certify as to the owned entity.

The Commission believes that this modification addresses the comments on subparagraph (A) to the effect that passive investors in an owned entity should be required to certify only that they have no knowledge of the owned entity's trading. Therefore, the final rule adopts subparagraph (A) as it was proposed.

The final rule adopts subparagraph (B), relating to separately developed and independent trading systems, as it was proposed. The term ''system'' is appropriately broad to encompass the various methods, procedures and plans which market participants may use to initiate trading. ''Trading system'' includes, for example, a program (whether automated or not) that provides the impetus for the initiation of trades. The suggested alternative, ''strategy,'' is too narrowly limited to the particular trading decisions a person may make based on particular conditions. The entire ''trading system,'' not just the ''trading strategy,'' must be

[150] *See* CL–FIA Nov 13; CL–FIA July 31; CL–NGSA Nov 13; Commodity Markets Council on February 10, 2014. Another commenter suggested that the rule text should provide that owners and their affiliates may share such trading information as is necessary to manage risk and meet compliance obligations. *See* CL-Working Group Nov 13 (suggesting rule text allowing ''obtaining such information as is necessary to fulfill [the entity's] fiduciary duties or fulfill its duty to supervise the trading activities of an affiliate, or . . . establishing and monitoring compliance or risk policies and procedures, including position limits, for an affiliate or on an enterprise wide basis, or . . . sharing employees so long as such employees do not control, direct or participate in the entities' trading decisions'').

[151] This commenter asserted that the condition that the owner entity and owned entity ''do not have risk management systems that permit the sharing of trades or trading strategy'' is ambiguous and potentially overly broad. *See* CL–ISDA Nov 12.

[152] *See* CL–CMC Nov 13.

[153] *See* CL–CME Nov 13.

[154] *See* CL–COPE Nov 13. *See also* CL–AIMA Feb 10 (criterion should not preclude shared risk management systems from allowing access to share trade and trading strategies by individuals who do not exercise control over trading decisions); CL–ECOM Nov 13 (criterion should not preclude information sharing for risk management and compliance purposes).

[155] *See* CL–SIFMA AMG Nov 13.

[156] *See* CL-Energy Transfer Nov 13.

[157] *See* CL–ISDA Nov 12.

[158] *See id.*

[159] *See* CL–AIMA Feb 10, referring to Proposed Rule, 78 FR at 68962.

[160] *See* CL–ICE Nov 13.

separately developed and independent.[161]

The Commission reiterates that, as stated in the Proposed Rule, the purpose of this requirement is to preclude use of a trading system to coordinate the trading of two or more entities.[162] Thus, it is the trading system that provides the impetus for the initiation of trades which must be separately developed and independent, not the mechanism or software that carries out those trades. For this reason, the Commission does not believe that use of a shared order execution platform, with appropriate firewalls, would necessarily mean that this condition is not met. For purposes of the final rule, an ''order execution platform'' is a computerized process that accepts inputs of terms of trades desired to be made and then uses pre-determined methods to specifically place those trades in the markets, while a ''trading system'' is a process or method for deciding on the timing and direction of trades.[163] Thus, for purposes of the final rule the Commission understands the term ''trading system'' not to include an order execution platform. Nor would the term ''trading system'' include systems used for back-office functions such as order capture or trade reporting. Also, a trading system does not include broad principles to guide trading (*e.g.,* principles one may learn from publicly-available literature).

Subparagraph (C) of the final rule, relating to written procedures to maintain independence, including separate physical locations, reflects the deletion of the phrase ''document routing and other procedures or'' from the second sentence. The Commission believes that the concept of document routing is outmoded and possibly confusing (and the concept is adequately described by the general phrase ''security arrangements'' which is retained in the final rule).[164]

For the avoidance of doubt, the Commission reiterates its guidance from the Proposed Rule on the reference in subparagraph (C) to separate physical locations.[165] Subparagraph (C) would not necessarily require that the relevant personnel be located in separate buildings. The important factor is that there be a physical barrier between the personnel that prevents access between the personnel that would impinge on their independence. For example, locked doors with restricted access would generally be sufficient, while merely providing the purportedly ''independent'' personnel with desks of their own would not. Similar principles would apply to sharing documents or other resources.

The final rule adopts subparagraph (D), relating to sharing of employees that control trading decisions, as it was proposed. For the avoidance of doubt, the Commission reiterates, as it stated in the Proposed Rule, that the sharing of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel between entities would generally not compromise independence so long as the employees do not control, direct or participate in the entities' trading decisions.[166] Similarly, sharing of board or advisory committee members or research personnel, or sharing of employees for training, operational or compliance purposes, would not result in a violation of the criteria if the personnel do not influence (*e.g.,* ''have a say in'') or direct the entities' trading decisions.[167]

One commenter asserted that personnel could provide research about ''technical indicators, support or resistance levels, and trade recommendations'' without being deemed to be participating in trading decisions.[168] The Commission believes this situation should be viewed in light of a previous interpretation, where the Commission stated that it ''is concerned that specific trading recommendations . . . contained in such information not be substituted for independently derived trading decisions. When the person who directs trading in an account or program regularly follows the trading suggestions [from another person], such account or program will be evidence that the account is controlled by the [other person].'' [169]

The final rule adopts subparagraph (E), relating to risk management information sharing, substantially as it was proposed, but with a revision to clarify that the provision is focused on the sharing of trades or trading strategy with employees that control the trading decisions of the other entity.[170] The Commission notes that provisions virtually identical to this rule have been used for years in connection with the IAC exemption, and the Commission's interpretations of those provisions have not changed. The Commission considers this revision to the rule text to be a clarification of its existing interpretations.

Further, the Commission adopts and reiterates its guidance on this provision in the Proposed Rule.[171] That is, subparagraph (E) is intended to address concerns that risk management systems that permit entities to share trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of information.[172] The Commission

[161] The Proposed Rule noted that ''off-the-shelf'' software could be considered to be separately developed and independent for this purpose, so long as the software could not be used by multiple parties to indirectly coordinate their trading. *See* Proposed Rule, 78 FR at 68962. The Commission reaffirms this position, and in response to commenters (*see* footnote 138, above), clarifies that customized software or in-house software could also be considered to be separately developed and independent for this purpose, so long as the same standard is met.

[162] *See* Proposed Rule, 78 FR at 68962.

[163] For example, Trader A may use a trading system to develop trading ideas, and then use a widely-used order execution platform to execute those ideas, while affiliated Trader B (with no knowledge of Trader A's trading system) may qualify for disaggregation when Trader B uses an independent trading system to develop trading ideas, and executes those ideas on the same order execution platform that Trader A uses, provided Trader B does not have access to Trader A's executions (and vice versa).

[164] For consistency, the phrase ''document routing and other procedures or'' is also deleted from rule 150.4(b)(4)(i)(A).

[165] *See* Proposed Rule, 78 FR at 68962.

[166] *See id. See also* the discussion above regarding the condition under rule 150.4(b)(2)(i)(A) (conditioning aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other, and discussing what constitutes ''knowledge'' for this purpose).

[167] In this respect, rule 150.4(b)(2)(i)(D) is consistent with the Commission's Interpretive Letter No. 92–15 (CCH ¶ 25,381), where an employee both oversaw the execution of orders for a commodity pool, as well as maintained delta neutral option positions in non-agricultural commodities for the proprietary account of an affiliate of the sponsor of the commodity pool. In that interpretive letter, the Commission concluded that the use of clerical personnel who are dual employees of both affiliates would not require aggregation when the clerical personnel engage in ministerial activities and steps are taken to maintain independence, such as: (i) Limiting trading authority so that the personnel do not have responsibility for the two entities' activities in the same commodity; and (ii) separating the times at which the personnel conduct activities for the two entities.

[168] *See* CL–MFA Feb 7.

[169] 1979 Aggregation Policy, 44 FR at 33844.

[170] For example, the rule would preclude Trader A and affiliated Trader B from having a risk management system that permits the sharing of Trader A's trades or trading strategy with employees that control the trading decisions of Trader B, or that permits the sharing of Trader B's trades or trading strategy with employees that control the trading decisions of Trader A.

But, in conjunction with that limitation, the rule would not preclude Trader A and affiliated Trader B from having a risk management system that permits the sharing of Trader A's trades or trading strategy with employees that handle risk management functions for Trader B but do not control its trading decisions.

[171] *See* Proposed Rule, 78 FR at 68962.

[172] The Commission remains concerned that a trading system, as opposed to a risk management system, that is not separately developed from another system can subvert independence because such a system could apply the same or similar

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intends that, generally speaking, subparagraph (E) would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees' risk management or compliance activities could be considered to have an ''influence'' on the entity's trading.

In response to questions from commenters, the Commission believes that transaction and position information may be shared among the risk assessment employees of a single entity or of affiliated entities as is necessary for certain explicitly specified risk and compliance purposes, such as complying with internal credit limits or fulfilling a fiduciary responsibility with respect to a third party's investment. However, transaction and position information could not be used for non-hedging purposes or shared with employees who participate in non-hedging decisions. (''Non-hedging'' is defined in this context as activities to take, or liquidate, positions that are not bona fide hedging positions.)

So long as these restrictions are satisfied, the information may be shared on a real-time basis,[173] and may be used to effect reductions in non-hedging positions, but such reductions should be mandated by pre-established credit risk management procedures or compliance procedures regarding permissible investment activities. Within these restrictions, affiliated entities may use shared risk management services, and the information may be used for back-office recordkeeping and middle-office risk assessment, so long as such functions occur independently of any non-hedging decisions made by other employees who did not have access to shared information. Companies within an affiliated partnership or limited liability company structure (*i.e.,* where the relevant entities are under common ownership or control) may be considered to be affiliated for this purpose.

Commenters proposed various alternative criteria which could be used to determine whether the positions of an owner and owned entity could be disaggregated.[174] However, after considering these suggestions, the Commission does not believe that the suggested criteria are significantly different from the criteria in rule 150.4(b)(2)(i). Also, some of the suggested criteria appear to be suitable for particular situations, but not necessarily all corporate groups.[175] Overall, the Commission believes that the criteria in rule 150.4(b)(2)(i) are appropriate and suitable for determining when disaggregation is permissible due to a lack of control and shared knowledge of trading activities.[176]

C. Notice Filing Requirement in Rule 150.4(c)

1. Proposed Approach

The Commission proposed a notice filing requirement in proposed rule 150.4(c).[177] The proposed rule contemplated that the filing would be made before the exemption from aggregation is needed, since the filing would be a pre-requisite for obtaining the exemption. However, where a prior filing is impractical (such as where a person lacks information regarding a newly-acquired subsidiary's activities), the Commission proposed that the filing should be made as promptly as practicable.[178]

Even though a filing under proposed rule 150.4(c) could be made after an ownership or equity interest is acquired, the Commission proposed that the exemption from aggregation would not be effective retroactively because the filing is a pre-requisite to the exemption. The Commission reasoned that retroactive application of such filings could result in administrative difficulty in monitoring the scope of exemptions from aggregation and negatively affect the Commission staff's surveillance efforts.[179]

Generally, the Commission proposed that entities could consolidate their filings in any efficient manner by, for example, discussing more than one owned entity in a single filing, so long as the scope of the filing is made clear.[180] The Commission also emphasized that if an entity determines to no longer apply an exemption (or if an exemption is no longer available), the entity would be required to inform the Commission by making a filing under proposed rule 150.4(c) because this would constitute a material change to the prior filing. Of course, once an exemption no longer applies to an owned entity, the person would be required to subsequently aggregate the positions of the entity in question.[181]

2. Commenters' Views

Commenters addressed the time limit for making the proposed notice filing, the situations in which subsequent filings (after the initial notice) should be required, the consequences for failure to make a timely filing, the contents of the notice filing and how the notice filing should be signed.

Regarding the time limit for making the proposed notice filing, commenters said the rule should provide a reasonable period of time to file, in order to perform due diligence and gather information. Several commenters suggested that a three-month grace period would be reasonable before requiring aggregation, because this would be adequate to conduct the internal review to support and approve the notice filing.[182]

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trading strategies even without the sharing of trading information.

[173] The Commission emphasizes that so long as the restrictions discussed here are satisfied, the information may be shared on a real-time basis, in addition to on an end-of-day basis. As noted above, the Commission does not consider knowledge of end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies, but has been concerned that the ability to monitor the development of positions on a real-time basis could constitute knowledge of trading decisions. *See* footnote 116, above. In response to questions from commenters, the Commission has considered the circumstances in which such information may be shared on a real-time basis, and the purpose of the discussion here is to explain when real-time sharing would be permissible.

[174] *See, e.g.,* CL-MidAmerican Feb 7 and Commodity Markets Council on July 25, 2014.

[175] For example, one commenter recommended factors such as whether the owner and the owned entity have separate trading accounts, separate assets, separate lines of business, independent credit support and other specific indications of separation. *See* CL-MidAmerican Feb 7. In the Commission's view, criteria such as these are specific manifestations of the general principles stated in proposed rule 150.4(b)(2)(i) that the owner and the owned entity not have knowledge of the trading decisions of the other and trade pursuant to separately developed and independent trading systems. Similarly, whether the two entities do or do not have separate assets or separate lines of business would not necessarily indicate whether they are engaged in coordinated trading.

[176] The criteria in rule 150.4(b)(2)(i) will be interpreted and applied in accordance with the Commission's past practices. *See* footnote 114, above.

[177] The Commission also proposed an application procedure for ownership interests of more than 50 percent in proposed rule 150.4(c)(2). However, since the Commission is not adopting proposed rule 150.4(b)(3), that application procedure is not relevant and the Commission is not adopting proposed rule 150.4(c)(2). The text of rule 150.4(c)(2) in the final rule is a new provision discussed below.

[178] *See* Proposed Rule, 78 FR at 68962.

[179] *See id.*

[180] In the Proposed Rule, the Commission clarified that section 8 of the CEA would apply to the information that the Commission may request under proposed rule 150.4(c), and sets out the extent to which such information will be treated confidentially. *See id.*

[181] *See id.*

[182] *See* CL–CME Nov 13; CL–PEGCC Nov 12; CL–FIA Nov 13; CL–FIA July 31; CL–ISDA Nov 12; CL-

Regarding the situations in which subsequent filings (after the initial notice) should be required, several commenters stated that a subsequent filing should be required only in the event of a material change to the facts set forth in the relevant notice filing.[183] One commenter thought that a subsequent filing should be required only if there was a change in the ability to comply with the conditions of the exemption so that the criteria for disaggregation are no longer met, but not upon a mere internal reorganization of an affiliate which does not affect compliance with the criterion.[184] Another commenter said a subsequent filing should be required only when an owner entity is withdrawing the notice filing because it no longer maintains a requisite ownership interest in the owned entity, or in the event that the owner entity is no longer in compliance with the exemption criteria with respect to an owned entity or another material change in the contents of the notice filing has occurred.[185]

Regarding the consequences for failure to make a timely filing, one commenter proposed that the rule allow an entity five business days after exceeding a position limit to make the notice filing, if the entity is otherwise eligible to claim an exemption from aggregation and was deemed in excess of a position limit only because of aggregation from which it could have been exempt.[186] Another commenter said that if an entity is eligible to claim an exemption from aggregation, but fails to make a timely notice filing, that should constitute only a single violation for failure to make the filing, not a separate violation of position limits.[187] Other commenters addressed a slightly different situation, contending that if a market participant relies on an exemption from aggregation in good faith, but the Commission subsequently determines that an exemption was not available, the Commission should require aggregation only from the date of its determination.[188]

Regarding the contents of the notice filing, two commenters requested that the Commission remove the requirement to provide a description of the relevant circumstances that warrant disaggregation in proposed rule 150.4(c)(1)(i), and instead require only a certification that the owner entity, as of the date of the filing, meets the conditions of the exemption with respect to each owned entity specified in the filing.[189]

Regarding signature of the notice filing, two commenters asked that the Commission clarify that the specific senior officer signing or submitting the notice filing may be any individual appropriately determined within the context of a particular owner entity's governance structure.[190] On the other hand, another commenter asserted that the rule should specifically require that the notice filing be signed by the CEO and the chief compliance officer or chief of risk management of the owner entity.[191]

3. Final Rule

The Commission is adopting rule 150.4(c) largely as proposed, with certain modifications to reflect points made by commenters. Primarily, rule 150.4(c) includes a modification to provide for a 60-day period after acquisition of an ownership interest to conduct due diligence and prepare the notice filing.[192] In other words, a notice filing made within 60 days after an acquisition would have retroactive effect as of the date of acquisition. The Commission believes that a 60-day period would be adequate for the acquirer to perform due diligence and gather the information necessary to make the notice filing.

Rule 150.4(c) has also been modified to address a situation where a person is eligible to claim an exemption from aggregation, but does not make a filing at the proper time. In this case, rule 150.4(c)(6) provides that the failure to timely file the notice would be a violation of rule 150.4(c), but there would not be a violation of the aggregation requirement or of a position limit so long as the required filing is made within five business days after the person is aware, or should have been aware, that the notice has not been timely filed. That is, since the person was eligible to claim the exemption, aggregation was not required, but a violation of the filing requirement has occurred.

On the other hand, the Commission does not believe relief is appropriate if a person is not eligible to claim an exemption from aggregation, but erroneously believes that it is (even if the error occurs in good faith). In this case, the person could not ''cure'' the situation by taking steps to become eligible for the exemption, and then attempting to provide the notice filing with retroactive effect.[193] Where the person is not eligible for any exemption from aggregation and therefore aggregation is required, the ineligibility cannot be cured by making a later notice filing.

As for a requirement to make filings subsequent to the initial filing, the Commission believes that a further filing is required only in the event of a material change to the facts set forth in the relevant notice filing, as is stated in rule 150.4(c)(4). The Commission understands that the Proposed Rule referred at one point to persons making one filing each year, but this was in the context of estimating how often filings might occur.[194] The Commission did not intend that notices be filed annually in the absence of a material change.

As for the content of the notice filing, rule 150.4(c) includes the same requirements as were in the proposed rule. The Commission has not removed the requirement to provide a description of the relevant circumstances that warrant disaggregation, because it believes that a short description of circumstances helps the Commission and its staff to understand the context of the filing. In this regard, the Commission notes that under the earlier proposed amendment to part 151, the person claiming the exemption would

Energy Transfer Nov 13. One of these commenters allowed that aggregation would be required if, during the grace period, an owner entity takes active steps to control and direct the trading strategy of a newly acquired owned entity. *See* CL–ISDA Nov 12. The three month time period was said to be adequate for a new owned entity to undertake post-closing diligence and operational measures to confirm whether seeking or claiming the aggregation exemption is necessary. *See* CL-Energy Transfer Nov 13. Another commenter suggested a grace period, but did not suggest a specific time period. *See* CL–SIFMA AMG Nov 13.

[183] *See* CL-Working Group Nov 13; CL–EEI Nov 13; CL–FIA Nov 13; CL–NGSA Nov 13; CL–CME Nov 13.

[184] *See* CL-Energy Transfer Nov 13.

[185] *See* CL–ISDA Nov 12.

[186] *See* CL–CME Nov 13.

[187] This commenter asserted that this modification would not undermine the Commission's aggregation rule because it would apply only where an entity is entitled to an exemption from the aggregation requirement. *See* CL–FIA Nov 13.

[188] *See* CL–FIA Nov 13; CL–FIA July 31; CL–CME Nov 13; CL–IECA Nov 13.

[189] *See* CL–ISDA Nov 12 and CL–PEGCC Nov 12.

[190] *See* CL–ISDA Nov 12 and CL–PEGCC Nov 12.

[191] This commenter felt that the signature requirement in the proposed rule appears casual and may lead the owner entity to assume that granting of exemptions from aggregation would be routine, while they should be exceptional. *See* CL–IATP Feb 10.

[192] *See* rule 150.4(c)(2). Rule 150.4(c)(2) is new text that was not included in the Proposed Rule, but rather is adopted in response to commenters' suggestions. As noted in footnote 177, above, the Commission is not adopting proposed rule 150.4(c)(2).

[193] In this regard, the Commission disagrees with commenters who argued that if a market participant relies on an exemption from aggregation in good faith, but the Commission subsequently determines that an exemption was not available, the Commission should require aggregation only from the date of its determination. *See* CL–FIA Nov 13; CL–FIA July 31; CL–CME Nov 13; CL–IECA Nov 13.

[194] *See* Proposed Rule, 78 FR at 68975.

have been required to demonstrate compliance with each condition of relief, which would likely include an organizational chart showing the ownership and control structure of the involved entities, a description of risk management and information-sharing systems, and an explanation of trade data and position information distribution.[195] The Commission has not specifically adopted this guidance for rule 150.4(c). Instead, the Commission notes the distinction between rule 150.4(c)(1)(i), which requires a description of the relevant circumstances that warrant disaggregation to be included in each filing, and rule 150.4(c)(3), which allows the Commission to obtain information demonstrating that the person meets the requirements of the exemption in those cases where the Commission calls for such information.[196]

With regard to signature of the notice and the certification requirement in rule 150.4(c)(1)(ii), the Commission believes that rule 150.4(c) is satisfied when the notice containing the statement required by 150.4(c)(1)(ii) is signed by a senior officer of the entity claiming relief from the aggregation requirement or, if the entity does not have senior officers, a person of equivalent authority and responsibility with respect to the entity.

D. Other Issues Related to Aggregation on the Basis of Ownership

The Proposed Rule discussed or requested comment on several other issues related to aggregation due to ownership of another entity, or relief from that requirement. In addition, commenters raised certain miscellaneous issues related to the rule. These issues were the effective date for the final rule, how entities that hold an interest in the entity that submits a notice should be treated (*i.e.,* the treatment of ''higher-tier entities''), whether aggregation should be required on a basis pro rata to the ownership interest in the owned entity, and how the aggregation rule would interact with other Commission rules.

1. Proposed Approach

Regarding the effective date for the final rule, the Commission discussed in the Proposed Rule a potential transition period for application of the requirement of aggregation based on ownership. However, the Commission concluded that this would not be necessary because the Proposed Rule would apply to existing position limits currently in effect and would provide further aggregation exemptions.[197] Therefore, the Proposed Rule did not suggest any compliance period or delayed effectiveness of the final rule.

Regarding the treatment of higher-tier entities, proposed rule 150.4(b)(9) [198] provided that if an owned entity has filed a notice under proposed rule 150.4(c), any person with an ownership or equity interest of 10 percent or greater in the owned entity need not file a separate notice identifying the same positions and accounts previously identified in the notice filing of the owned entity, if such person complies with the conditions applicable to the exemption specified in the owned entity's notice filing, other than the filing requirements; and does not otherwise control trading of the accounts or positions identified in the owned entity's notice. Further, proposed rule 150.4(b)(9) provided that any person relying on the exemption for higher-tier entities must provide to the Commission information concerning the person's claim for exemption called for by the Commission.

In the Proposed Rule, the Commission noted that the proposed approach for higher-tier entities should significantly reduce the filing requirements for aggregation exemptions.[199] The proposed approach would allow higher-tier entities to rely upon a notice for exemption filed by the owned entity, and such reliance would only go to the accounts or positions specifically identified in the notice.[200] The proposed approach would also mean that a higher-tier entity that wishes to rely upon an owned entity's exemption notice would be required to comply with conditions of the applicable aggregation exemption other than the notice filing requirements.[201] The Commission did not anticipate that the reduction in filing would impact the Commission's ability to effectively surveil the proper application of exemptions from aggregation. The first filing of an owned entity exemption notice should provide the Commission with sufficient information regarding the appropriateness of the exemption, while repetitive filings of higher-tier entities would not be expected to provide additional substantive information.[202]

Regarding aggregation on a basis that is pro rata to the relevant ownership interest, the Commission preliminarily concluded in the Proposed Rule that a pro rata approach would be administratively burdensome for both owners and the Commission.[203] For example, the Commission suggested that the level of ownership interest in a particular owned entity may change over time for a number of reasons, including stock repurchases, stock rights offerings, or mergers and acquisitions, any of which may dilute or concentrate an ownership interest. Thus, it may be burdensome to determine and monitor the appropriate pro rata allocation on a daily basis. Moreover, the Commission stated that it has historically interpreted the statute to require aggregation of all the relevant positions of owned entities, absent an exemption, which is consistent with the view that a holder of a significant ownership interest in another entity may have the ability to influence all the trading decisions of the entity in which such ownership interest is held. However, the Commission asked commenters to address whether the Commission should permit a person to aggregate only a pro rata allocation of the owned entity's positions based on that person's less than 100 percent ownership, including a system for aggregation based on ownership tiers.[204]

[195] *See* Proposed Rule, 78 FR at 68952.

[196] The Commission is adopting a delegation of authority to the Director of the Division of Market Oversight or the Director's designee to call under rule 150.4(c)(3) for additional information from a person claiming an aggregation exemption. *See* rule 150.4(e)(1)(ii). This parallels a provision in proposed rule 150.4(e)(1) delegating authority to call for additional information from a person claiming the exemption in proposed rule 150.4(b)(9) (renumbered (b)(8) in the final rule). The subparagraphs in rule 150.4(e)(1) have been renumbered from the proposed rule, because as noted in footnote 77, the Commission is not adopting proposed rule 150.4(e)(1)(i), which contained a delegation of authority referencing proposed rule 150.4(b)(3). Also, the cross-references in rule 150.4(e)(1)(i) have been corrected to refer to paragraph (b)(8)(iv) and paragraph (b)(8).

[197] *See* Proposed Rule, 78 FR at 68959.

[198] As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(8) corresponds to proposed rule 150.4(b)(9).

[199] *See* Proposed Rule, 78 FR at 68975.

[200] For example, if company A had a 30 percent interest in company B, and company B filed an exemption notice for the accounts and positions of company C, then company A could rely upon company B's exemption notice for the accounts and positions of company C. Should company A wish to disaggregate the accounts or positions of company B, company A would have to file a separate notice for an exemption. *See* Proposed Rule, 78 FR at 68953.

[201] Although higher-tier entities would not have to submit a separate notice to rely upon the notice filed by an owned entity, the Commission noted that it would be able, upon call, to request that a higher-tier entity submit information to the Commission, or allow an on-site visit, demonstrating compliance with the applicable conditions. *See id.*

[202] *See id.*

[203] *See* Proposed Rule, 78 FR at 68958.

[204] *See* Proposed Rule, 78 FR at 68959.

The Commission also invited comment on the interplay between the Proposed Rule and other Commission rules. In the Proposed Rule, the Commission asked commenters to address the issues or concerns arising from the Proposed Rule that would have to be addressed if the Commission were to adopt its proposal to establish speculative position limits for other exempt and agricultural commodity futures and option contracts, and physical commodity swaps that are ''economically equivalent'' to such contracts.[205] The Commission also asked about implications with respect to the interplay between the proposed disaggregation relief and the Commission's other rules relating to swaps.

2. Commenters' Views

Regarding the effective date for the final rule, several commenters said that the rule should provide for an initial compliance or transition period during which the rule would not be enforced and market participants would be able to adjust their positions to the new aggregation rules.[206] The period of time suggested for this transition ranged from two and one-half months to nine months.[207]

Commenters did not address the terms of proposed rule 150.4(b)(9), relating to higher-tier entities. One commenter said that an entity should be able to file for aggregation relief on behalf of any or all of its affiliates (including joint ventures) as long as the criteria for relief are satisfied for the entities receiving relief.[208]

Regarding aggregation on a basis pro rata to the ownership interest in the owned entity, one commenter thought that the rule should permit entities to aggregate on a basis pro rata to the person's ownership or equity interest, because pro rata aggregation would more accurately reflect the positions owned by market participants and would not unnecessarily restrict the positions of market participants, while reducing the risk of an inadvertent position limits overage.[209] Another commenter supporting pro rata aggregation suggested that the Commission obtain the pro rata percentage that should be attributed to the owner from the owner's filings on Form 40 and the Commission's special call authority.[210] To address potential administrative burdens on the Commission, commenters proposed that entities that apply pro rata aggregation would have to commit to informing the Commission promptly upon a change in the relevant ownership or equity interest, or upon request by the Commission.[211]

In response to the Commission's request for information on implications with respect to the interplay of the aggregation provisions and other Commission rules, one commenter thought that the full implications of disaggregation relief ''will not be readily apparent to physical commodity market participants'' until the Commission finalizes the scope of contracts to be included in position limits, especially with regards to trade options, the treatment of which may have a ''dramatic impact on whether or not affiliated energy business units . . . require disaggregation relief.''[212] Further, this commenter said, the manner of organizing physical commodity contracts is likely to be distinct from how financial transactions are organized and executed, and a policy requiring aggregation of both would ''create undue hardships'' for energy end-users unless there are ''accessible, practicable means'' of acquiring disaggregation relief.[213]

Another commenter, which is a DCM, sought clarification of how the proposed aggregation requirement would affect the reporting of large trader positions, asserting that reporting firms currently aggregate accounts for reporting purposes by ownership and control so that independently operated subsidiaries of a wholly-owned parent currently report such positions separately in large trader reports and open interest.[214] This commenter believed that if both firms were to aggregate those positions, each could carry large positions on opposite sides of the market but would only report a small aggregate position, which could be highly disruptive to the markets.[215] The commenter requested that the Commission make clear that ''the current reporting regime would be maintained and not affected by whatever form the final aggregation rule takes.''[216]

This same commenter also requested the Commission to confirm that ''an exchange will continue to be permitted to grant separate exemptions to commonly owned affiliates when the affiliates are required to be aggregated,'' and that ''if firms that are aggregated submit separate Form 204s to the Commission, . . . the quantities reported roll up to the aggregate level for position limit purposes.''[217] The commenter noted that it currently permits ''commonly owned entities that are under separate decision-making and trading control to transact EFRPs and block trades with each other'' and asked the Commission to indicate if these entities would be required to aggregate for position limit purposes, and whether ''EFRPs and block trades executed between such firms [are] prohibited trades under the CEA.''[218]

3. Final Rule

The final rule will be effective 60 days after publication in the **Federal Register**. The Commission considered comments requesting an additional compliance or transition period during which the rule would not be enforced and has determined additional time would not be necessary or appropriate for this rule. One effect of the final rule is to provide for certain exemptions from the aggregation requirement. Considering both the relief available under the exemptions and the requirements imposed by the final rule, the Commission concluded that a period of 60 days would be appropriate to prepare for effectiveness of the final rule.

As for higher-tier entities, the Commission is adopting rule 150.4(b)(8) largely as it was proposed,[219] but with a modification to provide that one entity may file a notice for aggregation relief on behalf of any or all of its affiliates, as long as the criteria for relief are satisfied. The Commission finds merit in a commenter's suggestion that reliance by affiliates on a filing made by one entity in an affiliated group should be permitted for the same reasons that higher-tier entities would be permitted to rely on filings made by subsidiaries.

[205] *See* Proposed Rule, 78 FR at 68963, referring to Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013).

[206] *See* CL–ISDA Nov 12; CL–PEGCC Nov 12; CL–FIA Feb 6; CL–Working Group Feb 10; CL–AIMA Feb 10; CL–ICE Nov 13.

[207] *See id.*

[208] *See* CL–Working Group Nov 13and CL–Working Group Feb 10. That is, all affiliates, not just higher-tier entities, could rely on a filing made by one entity in an affiliated group.

[209] *See* CL–FIA Feb 6. *See also* CL–COPE Feb 10; CL–SIFMA AMG Feb 10.

[210] *See* CL–MFA Feb 7.

[211] *See* CL–DBCS Feb 10 and CL-Working Group Feb 10, respectively.

[212] *See* American Gas Association on February 10, 2014 (''CL–AGA Feb 10'').

[213] *See id.*

[214] *See* CL–ICE Feb 10.

[215] *See id.* (asserting that lifting one side of a large two-sided spread would result in a big open interest change).

[216] *See id.*

[217] *See id.*

[218] *See id.*

[219] As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(8) corresponds to proposed rule 150.4(b)(9).

The Commission clarifies that, in order to meet the requirements of rule 150.4(c), a filing made on behalf of affiliates must be signed by a senior officer (or equivalent) of each such affiliate. The Commission intends that filing on behalf of affiliates will be optional; affiliates may also file individual notices.

Regarding aggregation on a pro rata basis, the Commission concludes that although the commenters point out the theoretical merits of a pro rata procedure, none of them explained how pro rata aggregation would be workable in practice. The Commission did not propose adopting pro rata aggregation, because it was concerned about the administrative burdens for both owners and the Commission.[220] After considering the comments received, the Commission has determined not to adopt a pro rata procedure because it remains concerned about the difficulty of specifying a broadly applicable procedure for calculating the level of ownership interests and using those levels to allocate positions to the owner entity. The Commission also finds merit in the procedure that has been applied to date (under which owners aggregate all of the relevant positions of the owned entities for which aggregation applies) and concludes that the potential benefits of a pro rata procedure do not support changes in the current practice.

In response to the comments about the interplay of the aggregation provisions and other Commission rules, the Commission clarifies that, generally speaking, the final aggregation rules are intended for purposes of position limits and would not modify practices with respect to other rules. Exchanges will continue to be permitted to require separate reporting by aggregated entities, and to grant separate exemptions to aggregated entities. Also, exchanges will continue to be able to enforce separate limits on entities that are aggregated for federal limits.

E. Exemption for Certain Accounts Held by FCMs in Rule 150.4(b)(3)

1. Proposed Approach

The Commission proposed to move the exemption for certain accounts held by FCMs in existing regulation 150.4(d) to a new proposed rule 150.4(b)(4),[221] so that all aggregation exemptions would be located in paragraph (b) of proposed rule 150.4. The text of proposed rule 150.4(b)(4) was substantially the same as existing regulation 150.4(d), except that it was rephrased in the form of a positive statement of the availability of an exemption from the aggregation requirement, as contrasted to the statement in the existing regulation that the aggregation requirement applies unless certain conditions are met.[222]

2. Commenters' Views and Final Rule

No commenter addressed proposed rule 150.4(b)(4). The Commission is adopting it as proposed, but renumbered as rule 150.4(b)(3).

F. Exemptions From Aggregation for Underwriting and Broker-Dealer Activities in Rules 150.4(b)(5) and (b)(6)

1. Proposed Approach

Proposed rule 150.4(b)(6)[223] stated that a person need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter. This proposal was similar to regulation 151.7(g) (in the now-vacated part 151 regulations), which provided for an exemption from aggregation where an ownership interest is in an unsold allotment of securities.

Proposed rule 150.4(b)(7) stated that a broker-dealer registered with the Securities and Exchange Commission,[224] or similarly registered with a foreign regulatory authority, need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities acquired in the normal course of business as a dealer, so long as the broker-dealer does not have actual knowledge of the trading decisions of the owned entity.[225]

In the Proposed Rule, the Commission noted that the ownership interest of a broker-dealer in an entity based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer is largely consistent with the ownership of an unsold allotment of securities covered by the underwriting exemption in regulation 151.7(g).[226] In both circumstances, the ownership interest is likely not held for investment purposes.[227] Accordingly, the Commission proposed to include an aggregation exemption in proposed rule 150.4(b)(7) for such activity.[228]

2. Commenters' Views

Commenters did not address proposed rule 150.4(b)(6).

One commenter said the rationale for the broker-dealer exemption in proposed rule 150.4(b)(7) should be expanded and clarified, asserting that if a broker-dealer acquires a substantial but not controlling interest in a trading entity, its due diligence would reveal historical information while the availability of an exemption appears to be conditioned upon acquiring no further knowledge.[229] The commenter asked that the Commission provide further explanation of what constitutes ''actual knowledge,'' and in particular whether it is limited to knowledge at the moment of acquisition, or also includes any knowledge of trading decisions by the newly acquired entity and other entities in which the broker-dealer has an equity based interest.[230]

3. Final Rule

The Commission is adopting rule 150.4(b)(6) as it was proposed, but renumbered as rule 150.4(b)(5). For purposes of this rule, the Commission expects to interpret the term ''unsold allotment'' along the lines that it is interpreted under the Securities Exchange Act of 1934.

The Commission is adopting rule 150.4(b)(7) as it was proposed in the Supplemental Notice, but renumbered as rule 150.4(b)(6). In response to the commenter's question, the Commission clarifies that it expects traditional

[220] *See* Proposed Rule, 78 FR at 68958.

[221] As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(3) corresponds to proposed rule 150.4(b)(4).

[222] *See* Proposed Rule, 78 FR at 68964.

[223] As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(5) corresponds to proposed rule 150.4(b)(6).

[224] *See* 15 U.S.C. 78o. Final rule 150.4(b)(6) corresponds to proposed rule 150.4(b)(7).

[225] As initially proposed, the rule also required that the broker-dealer not have a greater than a 50 percent ownership or equity interest in the owned entity. *See* Proposed Rule, 78 FR at 68977. In the Supplemental Notice, the Commission proposed to remove this requirement for the reasons supporting removal of the separate conditions for owners of a greater than a 50 percent ownership or equity interest in general. *See* Supplemental Notice, 80 FR at 58371.

[226] *See* Proposed Rule, 78 FR at 68964.

[227] The Commission specifically noted that this proposed exemption would not apply to registered broker-dealers that acquire an ownership interest in securities with the intent to hold for investment purposes. *See id.*

[228] As proposed, the exemption would encompass a broker-dealer's ownership of securities in anticipation of demand or as part of routine life cycle events, if the activity was in the normal course of the person's business as a broker-dealer. *See id.*

[229] *See* CL–IATP Feb 10.

[230] *See id.*

standards of a broker-dealer's due diligence to apply for this provision. As stated in the Proposed Rule,[231] the Commission would interpret the phrase ''reasonable activity'' to be effectively synonymous with the phrase ''normal course of business'' in this context.

G. Exemption From Aggregation Where Information Sharing Would Violate Law in Rule 150.4(b)(7)

1. Proposed Approach

a. In General

The Commission proposed rule 150.4(b)(8)[232] to provide exemptions from aggregation under certain conditions where the sharing of information would cause a violation of state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. These exemptions have not previously been available under the Commission's existing rules. The Commission intended that the proposed rule make clear that the exemption to the aggregation requirement would include circumstances in which the sharing of information would create a ''reasonable risk'' of a violation—in addition to an actual violation—of law or regulations.[233] The Commission noted that whether a reasonable risk exists would depend on the interconnection of the applicable statute and regulatory guidance, as well as the particular facts and circumstances as applied to the statute and guidance.[234] Also, it would not be necessary to show that a comparable federal law exists in order for a state law to be the basis for an exemption.[235]

The Commission stated that the proposed rule was intended to respond to concerns that market participants could face increased liability under state, federal and foreign law. For example, the proposed rule would reduce risk of liability under antitrust or other laws by allowing market participants to avail themselves of the violation of law exemption in those circumstances where the sharing of information created a reasonable risk of violating the above mentioned bodies of law.[236]

b. Laws of Non-U.S. Jurisdictions and International Law

The proposed rule would not allow local law or principles of international law (as opposed to the specific laws of foreign jurisdictions) to be a basis for the exemption. With regard to local law, the Commission stated that an exemption for local law would be difficult to implement due to the number of laws and regulations that would need to be considered and the number of localities that might issue them. While the number of such laws and regulations may be large, the Commission was not persuaded that there would be a significant number of instances where these laws and regulations would prohibit information sharing that would otherwise be permitted under federal and state law.[237]

Furthermore, the Commission was concerned that reviewing notices of exemptions based on local laws would create a substantial administrative burden for the Commission. That is, balancing the possibility that including local law as a basis for the exemption would be helpful to market participants against the possibility that doing so would lead to confusion or inappropriate results, the Commission concluded that the better course is not to provide for local law to be a basis for the exemption.[238]

With regard to international law, the Commission believed that the sources of international law, such as treaties and international court decisions, would be unlikely to include information sharing prohibitions that would not otherwise apply under foreign or federal law, and that therefore including international law as a basis for the exemption is unnecessary.[239]

c. Memorandum of Law

Under proposed rule 150.4(b)(8), market participants would be required to provide a written memorandum of law (which may be prepared by an employee of the person or its affiliates) which explains the legal basis for determining that information sharing creates a reasonable risk that either person could violate federal, state or foreign law. The Commission explained that requiring a formal opinion of counsel may be expensive and may not provide benefits, in terms of the purposes of this requirement, as compared to a memorandum of law. The memorandum of law would allow Commission staff to review the legal basis for the asserted statutory or regulatory impediment to the sharing of information, and would be particularly helpful where the asserted impediment arises from laws or regulations that the Commission does not directly administer. Further, Commission staff would have the ability to consult with other federal regulators as to the accuracy of the memorandum, and to coordinate the development of rules surrounding information sharing and aggregation across accounts. The Commission stated its expectation that a written memorandum of law would, at a minimum, contain information sufficient to serve these purposes.[240]

The Commission also noted that if there is a reasonable risk that persons in general could violate a provision of federal, state or foreign law of general applicability by sharing information associated with position aggregation, then the written memorandum of law may be prepared in a general manner (*i.e.,* not specifically for the person providing the memorandum) and may be provided by more than one person in satisfaction of the requirement. For example, the Commission noted that trade associations commission law firms to provide memoranda on various legal issues of concern to their members. Under the Proposed Rule, such a memorandum (*i.e.,* one that sets out in detail the basis for concluding that a certain provision of federal, state or foreign law of general applicability creates a reasonable risk of violation arising from information sharing) could be provided by various persons to satisfy the requirement, so long as it is clear from the memorandum how the risk applies to the person providing the memorandum.[241]

On the other hand, the Commission did not believe that simply providing a copy of the law or other legal authority would be sufficient, because this would not set out the basis for a conclusion that the law creates a reasonable risk of violation if the particular person providing the document shared information associated with position aggregation. If the effect of the law is clear, the written memorandum of law need not be complex, so long as it explains in detail the effect of the law on the person's information sharing. Also, the question of what legal

[231] *See* Proposed Rule, 78 FR at 68964.

[232] As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(7) corresponds to proposed rule 150.4(b)(8).

[233] *See* Proposed Rule, 78 FR at 68950.

[234] *See* Proposed Rule, 78 FR at 68948.

[235] *See* Proposed Rule, 78 FR at 68950.

[236] *See* Proposed Rule, 78 FR at 68949.

[237] *See* Proposed Rule, 78 FR at 68950. In addition, in those instances where local law would impose an information sharing restriction that is not present under state or federal law, the Commission believed that it could be inappropriate to favor the local law serving a local purpose to the detriment of the position limits under federal law that serve a national purpose. *See id.*

[238] *See id.*

[239] *See id.*

[240] *See id.*

[241] *See id.*

authorities, in particular, constitute ''state law'' or ''foreign law,'' where it is relevant, is a question to be addressed in the written memorandum of law. In general, any state-level or foreign legal authority that is binding on the person could be a basis for the exemption.[242]

Proposed rule 150.4(b)(8) also included a parenthetical clause to clarify that the types of information that may be relevant in this regard may include, only by way of example, information reflecting the transactions and positions of a such person and the owned entity. The Commission believed it helpful to clarify in the rule text what types of information may potentially be involved. The mention of transaction and position information as examples of this information was not intended to limit the types of information that may be relevant.[243]

2. Commenters' Views

One commenter supported the proposal and said the Commission should include in the final regulatory text or preamble ''all elements'' of the discussion in the Proposed Rule as to what constitutes a state law, who can prepare the memorandum of law, and what must be included in such memorandum, in order to provide clarity and ensure the process for seeking relief has its intended effects.[244] Another commenter called for the Commission to expand on this provision by granting foreign law-based exemptions on cross-border compliance, and developing memoranda of understanding with foreign jurisdiction authorities concerning the criteria for substituted compliance for aggregation exemptions.[245]

Other commenters said the Commission should clarify whether the violation of law exemption would be available for other regulations promulgated by the Commission, or for supranational laws, including those promulgated by the European Union.[246] A commenter asked the Commission to clarify whether the memorandum may be prepared by an employee of the firm, or of an affiliate of the firm, that is seeking the exemption.[247]

Another commenter suggested that the rule permit filing of a summary explanation of legal restrictions in lieu of a full legal memorandum (provided the full memorandum is available for inspection by the Commission upon request), to protect privileged attorney-client communications and confidential work-product.[248] On the other hand, a commenter asserted that while a memorandum of law may entail lower costs it would not provide sufficient accountability, in contrast to an opinion of counsel that the commenter believes would be a reliable, thorough, and formal document that provides a distinct level of accountability to the firm making the attestation.[249]

3. Final Rule

The Commission is adopting rule 150.4(b)(8) as proposed, but renumbered as rule 150.4(b)(7). The Commission also adopts the statements from the Proposed Rule noted above, including the statements as to what constitutes a state law, who can prepare the memorandum of law, and what must be included in such memorandum.[250]

In response to comments, the Commission clarifies that supranational laws (such as EU laws) constitute laws of a foreign jurisdiction which may be a basis for the exemption, if they meet the standard of being the basis for a reasonable risk of violation arising from information sharing. Similarly, the Commission's own regulations may be a basis for the exemption if they meet that standard.

Also, the Commission clarifies that the memorandum of law supporting an exemption may be prepared by an employee of the firm, or of an affiliate of the firm, that is seeking the exemption. However, the Commission does not agree with the commenters who suggested that a more summary document may support an exemption, or that a formal opinion of counsel should be required. Instead, the Commission continues to believe that, as stated in the Proposed Rule,[251] requiring a formal opinion of counsel would be expensive and may not provide benefits, in terms of the purposes of this requirement, as compared to a memorandum of law. The Commission expects that a memorandum of law submitted in support of an exemption will contain information sufficient to allow Commission staff to review the legal basis for the asserted statutory or regulatory impediment to the sharing of information (particularly where the asserted impediment arises from laws or regulations that the Commission does not directly administer), to consult with other federal regulators as to the accuracy of the memorandum, and to coordinate the development of rules surrounding information sharing and aggregation across accounts.

H. Aggregation Requirement for Substantially Identical Trading in Rule 150.4(a)(2)

1. Proposed Approach

The Commission first adopted an aggregation requirement for substantially identical trading in the part 151 rules in order to prevent circumvention of the aggregation requirements.[252] In adopting this proposal, the Commission explained that ''In [the] absence of such aggregation requirement, a trader can, for example, acquire a large long-only position in a given commodity through positions in multiple pools, without exceeding the applicable position limits.'' [253] The Commission further explained that under this provision, no ownership threshold would apply and positions of any size in accounts or pools would require aggregation.[254]

The Proposed Rule, adopted after the part 151 rules were vacated, included a similar provision in proposed rule 150.4(a)(2), noting that the proposed rule was intended to be consistent with the approach taken in vacated rule 151.7(d).[255]

2. Commenters' Views

A commenter representing managers of registered investment companies said aggregation should not be required where a common investment adviser controls the activities of various registered investment companies, so long as the investment companies have different investment strategies, because restructuring of the advisory business to obtain an exemption from aggregation would impose costs on the shareholders in the investment companies.[256]

Another commenter representing investment managers asked the Commission to provide further guidance on the situations that will be covered by

[242] *See id.*

[243] *See id.*

[244] *See* CL–AGA Feb 10.

[245] *See* CL–IATP Feb 10.

[246] *See* CL-Working Group Feb 10 and Alternative Investment Management Association on February 10, 2014 (''CL–AIMA Feb 10''), respectively.

[247] *See* (CL–AIMA Feb 10).

[248] *See* CL–FIA Feb 6.

[249] *See* CL-Better Markets Feb 10 (also arguing that the CEA requires an entity to obtain a legal opinion to avail itself of an aggregation exemption, and it is not within the discretion of the Commission to waive this requirement).

[250] *See* Proposed Rule, 78 FR at 68950.

[251] *See id.*

[252] *See* Position Limits for Futures and Swaps, 76 FR 71626, 71654 (Nov. 18, 2011). The provision was adopted as rule 151.7(d) (since vacated).

[253] *Id.*

[254] *See id.*

[255] *See* Proposed Rule, 78 FR at 68951 n 39.

[256] *See* Investment Company Institute on February 10, 2014 (''CL–ICI Feb 10'') (asserting that investment strategies that do not necessarily dictate the same specific trades should not be considered ''substantially identical,'' noting that registered investment companies may be managed by unaffiliated advisors that follow similar strategies disclosed in their prospectuses).

the ''substantially identical trading strategies'' provision, including whether the Commission may apply the provision to situations other than passively managed index funds.[257] This commenter believed that the aggregation requirement should not apply to accounts placed in ''separate performance composites,'' and suggested that the Commission consider using in this rule the term ''trading program'' as defined in rule 4.10(g), rather than the term ''trading strategies,'' which is not defined.[258] A third commenter representing investment managers suggested that the Commission remove from the rule any requirement that a person holding or controlling the trading of positions in accounts or pools with substantially identical trading strategies aggregate those positions.[259]

Two commenters asserted that the Commission did not provide a statutory or policy rationale for, or consider the costs and benefits of, this requirement, or provide guidance regarding the meaning of ''substantially identical trading strategies.'' [260] Both of these commenters asserted that the proposed rule would result in an absurd consequence requiring a person to aggregate all of the positions of two single-commodity index funds using the same index in which the person invested, or in which a fund-of-funds manager invested for that person.[261]

On the other hand, a commenter argued that the Commission's position limit aggregation regime should limit financial speculation by any group or class of traders in a given contract that becomes large enough to threaten the contract's ability to serve the needs of hedgers.[262] This commenter asserted that commodity index traders, which the commenter believes trade en masse with respect to an explicit programmed common strategy, are clearly covered by the statutory provision on ''two or more persons acting pursuant to an expressed or implied agreement or understanding'' and these traders must be aggregated for position limit purposes.[263] Another commenter endorsed the view that commodity index traders' positions should be aggregated because they ''operate outside of the normal operation of the commodity markets [and] sway market prices due to sheer volume and for exogenous, non-market reasons,'' so that aggregating their positions would significantly reduce market speculation and facilitate predictable commodities market operations.[264]

3. Final Rule

The Commission is adopting rule 150.4(a)(2) substantially as it was proposed, but with clarifying changes discussed below. The Commission continues to believe that this provision is necessary to prevent circumvention of the aggregation requirements. In this regard, the Commission notes, for example, that the exemption in rule 150.4(b)(1) will generally permit limited partners, limited members, shareholders and other similar types of pool participants not to aggregate the accounts or positions of the pool with any other accounts or positions such person is required to aggregate, unless certain circumstances specified in rule 150.4(b)(1) are present.[265] As a result of this exemption, a person could hold significant positions in multiple pools without any aggregation requirement, which the Commission believes to be acceptable so long as the pools do not have substantially identical trading strategies. However, in the absence of rule 150.4(a)(2) the exemption would also permit a trader to separate a large position in a given commodity derivative into positions held in pools that have substantially identical trading strategies (*i.e.,* the example cited in the adoption of vacated regulation 151.7(d)). To ensure that this situation is covered by the aggregation requirement, rule 150.4(a)(2) requires that trader to aggregate its positions in all pools or accounts that have substantially identical trading strategies.

Also, even apart from the exemption in rule 150.4(b)(1), a person would (in the absence of rule 150.4(a)(2)) generally not be required to aggregate positions in accounts or pools if those positions are below the 10 percent threshold in rule 150.4(a)(1) and no control is present. For this reason, and as was the case in vacated regulation 151.7(d), there is no ownership threshold in rule 150.4(a)(2), so that if the accounts or pools have substantially identical trading strategies, a person must aggregate its positions in the accounts or pools regardless of ownership level. Also, as was proposed, aggregation under rule 150.4(a)(2) is not subject to the exemptions in rule 150.4(b).[266] And, as is stated in the rule, aggregation under rule 150.4(a)(2) is required if a person either holds positions in more than one account or pool with substantially identical trading strategies, or controls the trading of such positions without directly holding them.

In response to the commenters, the Commission disagrees that this provision could lead to absurd results. In the example described by one commenter, where a person has holdings of $10,000 each in two commodity index funds with substantially identical strategies,[267] the terms of the rule require the owner to aggregate the positions that it (*i.e.,* the owner) holds in the two commodity index mutual funds, not the positions of the funds themselves. That is, the two holdings would be aggregated into one $20,000 holding.[268] The owner is not required to aggregate all the positions held by the two funds. Effectively, it is the person's pro rata interest (held or controlled) in each account or pool with substantially identical trading strategies that must be included in the aggregation.

The Commission also believes that proposed rule 150.4(a)(2) was slightly unclear when it stated that the person ''must aggregate such positions''

[257] *See* CL–AIMA Feb 10. Passively managed index funds were cited as an example of pools with identical trading strategies in the adoption of rule 151.7(d). *See* Position Limits for Futures and Swaps, 76 FR at 71654.

A commenter representing managers of pension plans asked for guidance on how to determine if two investment vehicles in which an investor holds an interest are pursuing ''substantially identical trading strategies.'' *See* American Benefits Council, Inc. on February 10, 2014 (''CL–ABC Feb 10'').

[258] *See* CL–AIMA Feb 10.

[259] *See* CL–SIFMA AMG Feb 10.

[260] *See* CL–SIFMA AMG Feb 10 and CL–CME Feb 10. As an alternative, one of these commenters suggested that the requirement be limited to persons that directly control the trading of positions in substantially identical accounts or pools. *See* CL–SIFMA AMG Feb 10.

[261] *See* CL–SIFMA AMG Feb 10 and CL–CME Feb 10. One commenter provided an example of its reading of the requirement, asserting that ''a $10,000 investor in two $1 billion commodity index mutual funds using the same index may have to aggregate the positions in those two $1 billion mutual funds'' because the funds follow substantially identical trading strategies. *See* CL–SIFMA AMG Feb 10. This commenter posited that the investor would have to implement a compliance program to prevent inadvertent violations of the position limits rules, which (in addition to imposing significant legal and operational obstacles) would impose costs many times the investor's $10,000 investment. *See id.*

[262] *See* CL-Better Markets Feb 10 and Better Markets, Inc. on March 30, 2015 (''CL-Better Markets Mar 30'').

[263] *See* CL-Better Markets Mar 30 (arguing that Congress did not permit the discretion of the Commission to apply position limits to allow for an ''abdication of responsibility'' to act with respect to commodity index traders).

[264] *See* CL-Occupy the SEC Aug 7.

[265] *See generally* the discussion of rule 150.4(b)(1) in part II.I, below.

[266] *See* Proposed Rule, 78 FR at 68959 n 109.

[267] *See* footnote 256.

[268] The commenter described the holdings in dollar amounts. *See* CL–SIFMA AMG Feb 10. The Commission notes however that the position limits generally are stated in terms of a number of contracts, not a dollar amount. To apply rule 150.4(a)(2), a person holding or controlling the trading of positions in more than one account or pool with substantially identical trading strategies must determine the person's pro rata interest in the number of contracts such accounts or pools are holding.

without stating precisely with what such positions must be aggregated. To clarify how aggregation under rule 150.4(a)(2) is to be effected, the Commission has modified the last clause of the rule so that it reads ''. . . must aggregate each such position (determined pro rata) with all other positions held and trading done by such person and the positions in accounts which the person must aggregate pursuant to paragraph (a)(1) of this section.'' That is, rules 150.4(a)(1) and (a)(2) are to be applied cumulatively, so that a person must aggregate all positions held and trading done by such person with all positions that must be aggregated pursuant to rule 150.4(a)(1) and all positions that must be aggregated pursuant to rule 150.4(a)(2).

I. Exemption for Ownership by Limited Partners, Shareholders or Other Pool Participants in Rule 150.4(b)(1)

1. Proposed Approach

Proposed rule 150.4(b)(1) was substantially similar to existing regulation 150.4(c). The Commission proposed rule 150.4(b)(1) as part of an organizational revision intended to make rule 150.4 easy to understand and apply. In the Proposed Rule, the Commission explained that stating this provision as the first exemption will clarify that this exemption may be applied by any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person, by power of attorney or otherwise, directly or indirectly, has a 10 percent or greater ownership or equity interest in a pooled account or positions.[269] That is, if the requirements of this exemption are satisfied with respect to a person, then the person need not determine if the requirements of the exemption in paragraph (b)(2) are satisfied. The text of paragraph (b)(2), in turn, states that it applies to persons with an ownership or equity interest in an owned entity, other than an interest in a pooled account which is subject to paragraph (b)(1).

Proposed rule 150.4(b)(1) stated that for any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person, by power of attorney or otherwise, directly or indirectly, has a 10 percent or greater ownership or equity interest in a pooled account or positions, aggregation of the accounts or positions of the pool is not required, except as provided in paragraphs (b)(1)(i), (b)(1)(ii) or (b)(1)(iii). Although existing regulation 150.4(c) does not contain any explicit statement of this rule, the lack of an aggregation requirement in these circumstances is implicit in the existing regulation's statement that aggregation is required only in certain specified circumstances. Thus, proposed rule 150.4(b)(1)(i) stated explicitly a principle that is implicit in the existing regulation.[270] Paragraphs (b)(1)(i), (b)(1)(ii) and (b)(1)(iii) of proposed rule 150.4 set out the circumstances in which aggregation requirements apply; these circumstances are substantially similar to those covered by paragraphs (c)(1), (c)(2) and (c)(3) of existing regulation 150.4, but the text of the rule was modified to simplify the wording of the provisions.

The Proposed Rule also briefly addressed the treatment of 4.13 pools in a manner that is equivalent to the treatment of operating companies.[271] The Commission noted that the proposed amendment to the later-vacated part 151 regulations had proposed to expand the definition of independent account controller to include the managing member of a limited liability company, and to amend the definitions of eligible entity and independent account controller to specifically provide for 4.13 pools established as limited liability companies.[272] In the Proposed Rule, the Commission stated that this is a matter that could be the subject of relief granted under CEA section 4a(a)(7) and that persons wishing to seek such relief should apply to the Commission stating the particular facts and circumstances that justify the relief.[273]

2. Commenters' Views

Commenters did not address the proposed reorganization and rephrasing of proposed rule 150.4(b)(1). However, some commenters addressed the substance of the rule, which is the same as existing regulation 150.4(c).

One commenter asked that the Commission make the following technical changes to the proposed rule: Expand the exemption in the rule to include the beneficiary of a trust, clarify that a ''limited member'' of a limited liability company is any person who is not a managing member, construe the term CPO to include a person discharging the function of CPO (to account for situations where the function has been delegated from one person to another), and confirm that a filing generally is not required for relief under 150.4(b)(1), with the exception of relief under rule 150.4(b)(1)(ii).[274]

Several commenters said the Commission should provide an ownership exemption for interests held by a limited partner in a commodity pool—*i.e.,* the rule should permit disaggregation on a showing that the limited partner does not control trading by the commodity pool (for which the CPO is exempt from registration).[275] That is, these commenters believed that the rule requiring aggregation when a limited partner owns more than 25 percent of a pool (*i.e.,* existing regulation 150.4(c)(3)) should be modified to allow for disaggregation following a filing attesting to no control by the limited partner.[276]

One of these commenters asserted that investors holding greater than 25 percent ownership interests in pools often do not have control of the pools' trading (or ability to monitor the pools' positions) and thus would qualify for disaggregation under the criteria in proposed rule 150.4(b)(2)(i).[277] This commenter cited a no-action letter issued by the staff of the Commission, which the commenter interpreted to acknowledge that, in the case of a manager of a fund of funds, there may be a ''lack of visibility . . . regarding the positions of an Investee Fund,'' that ''such opaqueness'' may not allow the manager to have adequate data to determine a position, and when

[269] *See* Proposed Rule, 78 FR at 68963.

[270] The Commission stated that this modification was not intended to effect a substantive change. Rather, it is intended to state explicitly a rule that the Commission has applied since at least 1979. *See* footnote 99, above.

[271] A ''4.13 pool'' is a commodity pool for which the relevant CPO has claimed an exemption from registration under regulation 4.13. A commenter on the proposed amendments to part 151 had addressed 4.13 pools more broadly, and said that the Commission's rules should treat ownership of 4.13 pools in the same way that the rules treat ownership of operating companies. In particular, this commenter said that the Commission should eliminate the requirement that the positions of a 4.13 pool be aggregated with the positions of any person that owns more than 25 percent of the 4.13 pool. *See* Proposed Rule, 78 FR at 68965.

[272] *See id.*

[273] *See id.*

[274] *See* CL–AIMA Feb 10.

[275] *See* CL–OTPP Nov 13; CL–PEGCC Nov 12; CL–DBCS Feb 10; CL–SIFMA AMG Nov 13; CL–MFA Nov 12; CL–MFA Feb 7.

[276] *See id.*

[277] The commenter believes that while the requirement to aggregate for pools run by exempt CPOs was adopted in 1999 when very few CPOs were exempt and there was a concern about small pools, this requirement is no longer appropriate given the expanded number of exempt CPOs. *See* CL–MFA Nov 12 and CL–MFA Feb 7.

Another commenter said that passive investors in 4.13 pools should not be required to aggregate, and they should not have to make a filing with the Commission as a condition of such disaggregation, so that they would be treated the same as unaffiliated passive investors in non-exempt pools under rule 150.4(b)(1). *See* CL–SIFMA AMG Nov 13 and CL–SIFMA AMG Feb 10.

investment managers of underlying investee funds provide full position data, such data is rarely made available on a real-time basis.[278]

A commenter representing managers of pension fund investments believed that it is unclear whether proposed rule 150.4(b)(1)(iii) was meant to require a passive investor that holds a 25 percent or greater ownership interest in a 4.13 pool to aggregate the pool's positions.[279] The commenter felt that the Commission had not provided any rationale for, or evaluated the costs of, such a requirement, with which compliance would be impractical, if not impossible.[280]

3. Final Rule

The Commission is adopting rule 150.4(b)(1) as it was proposed. In response to a commenter, the Commission notes that rule 150.4(c), as was the case for the proposed rule, requires a filing to claim an aggregation exemption under paragraph (b)(1)(ii), but not the other subparagraphs of paragraph (b)(1).

The commenters' other discussion of this rule goes beyond the scope of the proposal, because no substantive changes to the rule were proposed. Rather, this rule was included in the proposal as part of the reorganization of rule 150.4.

The question in the proposal about treating 4.13 pools the same as operating companies was accompanied by a statement that ''this is a matter that could be the subject of relief granted under CEA section 4a(a)(7).'' That is, this question requested comment on the circumstances that could justify relief that may be granted in the future under CEA section 4a(a)(7).

J. Exemption for Accounts Carried by an Independent Account Controller in Rule 150.4(b)(4) and Conforming Change in Rule 150.1

1. Proposed Approach

The Commission proposed rule 150.4(b)(5) to take the place of the existing IAC provision in existing regulation 150.3(a)(4) (which was proposed to be deleted).[281] The Commission also proposed conforming changes to the definition of the term ''eligible entity'' in proposed rule 150.1(d) and (e). Existing regulation 150.3(a)(4) provides an eligible entity with an exemption from aggregation of the eligible entity's customer accounts that are managed and controlled by IACs.[282] The Commission stated that the reason for this organizational change was to place the IAC exemption in the regulatory section providing for aggregation of positions.[283] Proposed rule 150.4(b)(5) was substantially similar to existing regulation 150.3(a)(4) except that the Commission proposed to modify it (and the related definition in proposed rule 150.1(d)) so that it could be applied with respect to any person with a role equivalent to a general partner in a limited liability partnership or a managing member of a limited liability company.[284]

2. Commenters Views'

Commenters did not address the proposed reorganization and rephrasing of proposed rule 150.4(b)(5). However, some commenters addressed the substance of the rule, which is the same as existing regulation 150.3(a)(4).

Several commenters asked that the Commission expand the definition of the term ''eligible entity'' to include a variety of different entities, such as:

- The operators of certain similar investment vehicles, such as governmental or pension-sponsored investment management vehicles;[285]
- non-corporate entities that sponsor plans, such as governmental plans or church plans;[286]
- foreign entities that perform a similar role or function subject to foreign regulation;[287]
- exempt CTAs, and all registered, exempt or excluded CPOs;[288]
- a CPO exempt from registration; all operators excluded from the definition of CPO; a limited partner, a limited member, shareholder or other pool participant of a pool whose operator is either registered or exempt from registration; a CTA that is exempt from registration; a person excluded from the definition of CTA; and a general partner, managing member or manager of a commodity pool whose operator is either registered, exempt from registration, or excluded from the definition of CPO.[289]

Two commenters suggested that the definition of the term ''eligible affiliate'' should include sister companies, consistent with the definition of the term ''eligible affiliate counterparty'' under existing regulation 50.52, because the proposed definition does not appear to cover sister affiliates in a corporate group where neither affiliate holds an ownership interest in the other.[290] Another two commenters suggested the deletion of the proposed filing requirement for the IAC exemption in proposed rule 150.4(c)(1), because, they argued, no filing has been necessary to rely on the IAC exemption, and the Proposed Rule provides no justification for deviating from this established practice.[291]

Last, a commenter argued that the Commission provided no rationale for the proposed amendments to the IAC exemption, and asserted that since at least 1999 the IAC exemption is not limited to ''customer'' positions traded by IACs but rather is available to limited

[278] *See* CL–MFA Feb 7, citing CFTC No-Action Letter No. 12–38 (Nov 29, 2012).

[279] *See* CL–ABC Feb 10.

[280] The commenter asserted that managers of 4.13 pools will be reluctant to provide such information because (i) the selective disclosure of fund position information to only certain investors could raise legal liability issues under the federal securities laws; (ii) certain employee benefit plans could utilize position information provided by the fund to deduce proprietary and confidential investment strategies of the advisor/manager to such funds; and (iii) the operational burdens associated with the fund providing such information to certain employee benefit plans, to the extent not legally prohibited, may be deemed too costly. *See id.*

[281] *See* Proposed Rule, 78 FR at 68965. As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(4) corresponds to proposed rule 150.4(b)(5).

[282] The definition of eligible entity in existing regulation 150.1(d) includes the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13. However, with regard to a CPO that is exempt under regulation 4.13, the definition of an independent account controller in existing regulation 150.1(e)(5) only extends to a general partner of a commodity pool the operator of which is exempt from registration under § 4.13. At the time the Commission expanded the IAC exemption to include regulation 4.13 commodity pools, market participants generally structured such pools as limited partnerships. *See* Proposed Rule, 78 FR at 68964.

[283] *See* Proposed Rule, 78 FR at 68965.

[284] A commenter on the proposed amendments to part 151 had suggested that this rule be expanded to apply to any person with a role equivalent to a general partner in a limited partnership or managing member of a limited liability company, to accommodate various structures that are used for commodity pools in jurisdictions outside the U.S. *See id.*

[285] *See* CL–OTPP Nov 13.

[286] This commenter said that the phrase ''commodity pool the operator of which is excluded from registration'' should be deleted from proposed rule 150.1(e)(5)(ii) and replaced by the following text from proposed rule 150.1(d): ''trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term 'pool' or 'commodity pool operator,' respectively.'' *See* CL–AIMA Feb 10.

[287] This commenter said that disaggregation relief should be available to an affiliate which operates as a Registered Fund Management Company in Singapore managing non-U.S. client accounts holding U.S. futures, options and swaps and, thus, is not subject to U.S. registration requirements. *See* Olam International Limited on February 10, 2014.

[288] *See* CL–AIMA Feb 10 and CL–ICI Feb 10.

[289] *See* CL–MFA Nov 12.

[290] *See* CL–FIA Feb 6 and Commercial Energy Working Group on March 30, 2015.

[291] *See* CL–ABC Feb 10 and CL–SIFMA AMG Nov 13.

partners who may be affiliates or principals of an owned-CPO.[292]

3. Final Rule

The Commission is adopting rules 150.1(d) and (e) and rule 150.4(b)(5) as they were proposed, but proposed rule 150.4(b)(5) is renumbered as 150.4(b)(4).[293] Regarding the comments that the term ''eligible entity'' should include entities such as the operators of governmental or church plans, the Commission notes that rule 150.1(d) defines the term to include the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5, and existing regulation 4.5 has exclusions from the definition of ''pool'' for governmental plans and church plans.[294] Thus, operators of such trading vehicles would be eligible entities.

The commenters' discussion of proposed rule 150.4(b)(5) (final rule (150.4(b)(4)) goes beyond the scope of the proposal. As proposed, this paragraph replaced the existing IAC rule in existing regulation 150.3(a)(4), except that it was expanded to include any person with a role equivalent to a general partner in an limited partnership or managing member of a limited liability company. The Commission did not propose any other changes to the definitions of eligible entity or IAC. Other changes to this regulation would be a matter for future consideration.[295]

The Commission believes that the existing IAC exemption, the substance of which is included in the final rule, is consistent with the CEA and prior Commission precedents. In this regard, it is important to distinguish between the exemption in existing regulation 150.4(c)(2) (*e.g.,* for a limited partner of a CPO who is also a principal or affiliate of the CPO) and the IAC exemption in existing regulation 150.3(a)(4). These two distinct exemptions are incorporated into the final rule as rules 150.4(b)(1)(ii) and (b)(4), respectively. Thus, the comment implying that Commission precedent has not limited the IAC exemption to ''customer'' positions traded by IACs is misplaced. The discussion cited by the commenter related to the definitions of the terms ''eligible entity'' and ''IAC'' and was codified in existing regulation 150.4(c)(2); this precedent did not relate to the exemption language in existing regulation 150.3(a)(4).[296]

Regarding the potential for aggregation between ''sister affiliates'' where neither affiliate holds an ownership interest in the other, the Commission notes that an entity generally would not require relief in this situation because aggregation is required only when one entity owns an interest in, or controls, the other. Last, the definition of the term ''eligible affiliate'' is not part of the Proposed Rule and so comments on this definition are not germane to this rulemaking.

K. Revisions To Clarify Regulations

1. Proposed Approach

In connection with the proposed modifications to rule 150.4, the Commission reviewed whether the text of existing regulation 150.4 is easy to understand and apply. In this regard, the Commission noted that the existing regulation may be unclear, especially in terms of the relationship between the provisions of paragraphs (a) through (d) of the existing regulation and whether a particular paragraph is an exception to another.[297] Also, as more market participants active in different parts of the market have studied existing regulation 150.4, both in connection with the Dodd-Frank Act and otherwise, questions have arisen about the application of the aggregation requirements to a wide variety of circumstances. The Commission believed it is important that the rules setting forth the aggregation requirements be clear in their application to both the circumstances in which they currently apply, and the various circumstances in which they may apply in the future. The textual modifications in the proposed rule were not intended to effect any substantive change to the meaning of rule 150.4.[298]

Therefore, the Commission proposed to modify the text to clarify that paragraph (a) of rule 150.4 states the general requirement to aggregate positions a person may hold in various accounts, and paragraph (b) of the rule sets out the exemptions to the aggregation requirement that may apply. The Commission believed that this format clarifies that the exemptions in rule 150.4(b) are alternatives; that is, aggregation is not required to the extent that any of the exemptions in rule 150.4(b) may apply.[299]

Proposed rule 150.4(b)(1) stated that for any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions, aggregation of the accounts or positions of the pool is not required, except as provided in paragraphs (b)(1)(i), (b)(1)(ii) or (b)(1)(iii). Proposed rule 150.4(b)(2) and proposed rule 150.4(b)(3) set out exemptions permitting disaggregation of the positions of owned entities in certain circumstances.

Paragraphs (b)(4) to (b)(8) of proposed rule 150.4 (renumbered as paragraphs (b)(3) to (b)(7) of the final rule) set forth other exemptions that may apply in various circumstances. The exemption for certain accounts held by FCMs in paragraph (b)(4) of the proposed rule (final rule (b)(3)) was substantially the same as existing regulation 150.4(d), except that it was rephrased in a form of a statement of when an exemption is available, instead of the statement in the existing regulation that the aggregation requirement applies unless certain conditions are met. Paragraph (b)(5) of the proposed rule (final rule (b)(4)) set forth the exemption for accounts carried by an IAC that was substantially similar to existing regulation 150.3(a)(4). Paragraphs (b)(6), (b)(7) and (b)(8) of the proposed rule (final rule paragraphs (b)(5), (b)(6) and (b)(7), respectively) set forth the exemptions for underwriting, broker-dealer activity and circumstances where laws restrict information sharing. Paragraph (b)(9) of the proposed rule (final rule (b)(8)) described how higher-tier entities may apply an exemption pursuant to a notice filed by an owned entity.

[292] *See* CL–CME Feb 10.

[293] Rule 150.1(e)(2), as adopted, reflects two grammatical corrections: The phrase ''fiduciary responsibilities to the managed positions and accounts'' is corrected to read ''fiduciary responsibilities for managed positions and accounts'' and the word ''is'' is added before the second usage of the word ''consistent.''

Rule 150.4(b)(4)(i)(A), as adopted, reflects the deletion of the phrase ''document routing and other procedures or'' for consistency with rule 150.4(b)(2)(i)(C). *See* footnote 164, above.

[294] *See* existing regulations 4.5(a)(4)(iii) and 4.5(a)(4)(v), respectively.

[295] The Commission notes that commenters have suggested that registered CPOs and exempt CTAs should be included in the definition of the term ''eligible entity'' and the definition should clarify the treatment of certain persons who are exempt from registration as CPOs. The Commission is considering these comments and may take them up in a later proceeding.

[296] *See* 1999 Amendments, 64 FR 24038 at 24045.

[297] *See* Proposed Rule, 78 FR at 68953.

[298] *See id.* The textual modifications in the Proposed Rule related to the Commission regulations currently in effect. The Commission noted that its proposal regarding position limits includes amendments to the text of certain Commission regulations (*See* Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013)) and that if the later proposal is adopted, conforming technical changes to reflect the interplay between the two amendments may be necessary.

[299] *See* Proposed Rule, 78 FR at 68963.

2. Commenters' Views and Final Rule

No commenters raised any problems or issues arising from these organizational changes, so they are reflected in the final rule adopted by the Commission.

Finally, it should be noted that the amendments to part 150 adopted here may require further conforming technical changes if the Commission adopts any proposed amendments to its regulations regarding position limits.[300] Such changes would be explained at the time they are adopted.

III. Related Matters

A. Considerations of Costs and Benefits

Section 15(a) of the CEA [301] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

As discussed in Section I (Background), above, the Commission proposed amendments to its existing aggregation rules.[302] In November 2013, the Commission proposed amendments to existing regulations 150.1 and 150.4.[303] In response to commenters, the Commission issued a supplemental notice in September 2015 to modify one of the proposed exemptions to the Commission's proposed aggregation requirement.[304] The modification changed the exemption category that was tied to ownership and equity levels. In the main, the Commission is adopting all of the changes identified in the Proposed Rule, as modified by the Supplemental Notice. The Commission believes that the final rules are a reasoned approach to complying with CEA section 4a(a)(1)'s aggregation requirement. The Commission also believes that the final rules, via exemptions, give market participants opportunities and processes to reduce costs and burdens associated with aggregating positions that might hinder trading or reduce liquidity.

Current part 150 is the baseline against which the costs and benefits associated with these final rules will be identified and considered.[305] The current regulations in part 150 require certain market participants to aggregate positions subject to the position limits.[306] As discussed above in Section II., the Commission's aggregation policy under existing regulation 150.4 generally requires that unless a particular exemption applies, a person must aggregate all positions and accounts for which that person controls the trading decisions with all positions and accounts in which that person has a 10 percent or greater ownership interest, and with the positions of any other persons with whom the person is acting pursuant to an express or implied agreement or understanding.[307] There are several exemptions from aggregation listed, such as the ownership interests of limited partners in pooled accounts,[308] discretionary accounts and customer trading programs of FCMs,[309] and eligible entities with IAC that manage customer positions.[310]

In the Proposed Rule and the Supplemental Notice, the Commission also requested comments on its costs-and-benefits assessments and sought data as well as other information in the estimation of quantifiable costs and benefits of the final changes to part 150.[311] The commenters addressed the cost-and-benefit aspect of the Proposed Rule and the Supplemental Notice in a general manner; commenters did not provide data.[312] Accordingly, since the data requisite to quantification is by-and-large proprietary, specific to individual market participants, and not otherwise reasonably accessible to the Commission, the Commission's cost-and-benefit discussion that follows is largely qualitative in nature. The Commission, nevertheless, attempts to quantify costs and benefits where possible, especially, in the area of market participants' filing exemption notices.

1. Final Rules—Summary

The Commission is adopting final rules that, primarily, have two objectives. First, the final rules state the Commission's aggregation requirement. Second, the final rules identify exemptions that relieve market participants from the requirement to aggregate all held positions that are subject the Commission's position limits.

Final rules 150.4(a)(1) and (a)(2) set out two aggregation requirements: (1) An aggregation requirement for a person exercising trading control or possessing certain ownership or equity interests in positions in accounts, which is the same as in existing regulation 150.4(b); and (2) an aggregation requirement for a person who holds or controls positions in more than one account that employ substantially identical trading strategies, which is new under the final rule. The exemptions are in rules 150.4(b)(1) to (b)(8), and apply only to persons who fall within the first category of persons who must aggregate—*i.e.,* persons subject to rule 150.4(a)(1). The exemption notice filing process is in rules 150.4(c) and (d). In rule 150.4(e), the Commission delegates authority over aggregation and exemption related duties to the Director of the Division of Market Oversight.

There are eight exemptions. Three of them are largely the same as in existing regulations: An exemption for limited partners, shareholders, or other pool participants; an exemption for FCMs that hold certain accounts; and an exemption for independent account controllers that control trading by certain accounts or positions.[313] Five of the exemptions are new in the final rule. There is an exemption from aggregation of the positions and accounts of owned entities if the owner meets certain conditions intended to ensure independence of trading.[314] There is exemptive relief for persons who hold positions or accounts for the purpose of underwriting, and for certain broker-dealers.[315] There also is a violation-of-law exemption for persons who must not share trading information to avoid violating state or federal laws, or the law of a foreign jurisdiction.[316] Finally,

[300] *See* Position Limits for Derivatives, 78 FR 75680 (December 12, 2013).

[301] 7 U.S.C. 19(a).

[302] 17 CFR part 150.

[303] 17 CFR 150.1 and 150.4. *See* Aggregation of Positions; Proposed Rule, 78 FR 68946 (Nov. 15, 2013) (''Proposed Rule'').

[304] *See* Aggregation of Positions: Supplemental notice of proposed rulemaking, 80 FR 58365 (Sept. 29, 2015) (''Supplemental Notice'').

[305] 17 CFR part 150.

[306] *See* Proposed Rule, 78 FR at 68946; Supplemental Notice, 80 FR at 58374 (for a discussion of the baseline).

[307] *See* 17 CFR 150.4(a) and (b).

[308] *See* 17 CFR 150.4(c).

[309] *See* 17 CFR 150.4(d).

[310] *See* 17 CFR 150.3(a)(4).

[311] *See* Proposed Rule, 78 FR at 68972, and Supplemental Notice, 80 FR at 58375.

[312] *See* CL-Working Group Feb 10; CL–CME Feb 10; CL–SIFMA AMG Feb 10; CL–FIA Feb 6; CL–FIA Nov 13; CL–COPE Feb 10. Also, the Proposed Rule included a discussion of comments on costs related to the now-vacated Part 151 received prior to the 2013 proposal. *See* Proposed Rule, 78 FR at 68971.

[313] *See* rules 150.4(b)(1), (b)(3) and (b)(4), respectively. *See also* existing regulations 150.4(c), 150.4(d) and 150.3(a)(4), respectively.

[314] *See* rule 150.4(b)(2).

[315] *See* rules 150.4(b)(5) and (b)(6), respectively.

[316] *See* rule 150.4(b)(7).

there is an exemption that relieves persons who are affiliated with a person who has already filed an exemption notice from filing a duplicative exemption notice with the Commission.[317]

Persons seeking an exemption under most, but not all, of the exemptive categories must file a notice with the Commission to obtain relief from the aggregation requirement. Persons required to file a notice include the following: Certain principals or affiliates of commodity pool operators; persons with ownership or equity levels of 10 percent or greater; independent account controllers, and persons who do not share trading information to avoid violating laws.[318] The notice must describe the relevant circumstances that warrant disaggregation, and have a senior officer's certification.[319] The relevant circumstances that may warrant disaggregation are described in rule 150.4(b)(2)(i)(A)–(E) and include the following four factors for the owner entity and the owned entity: [320] Lack trading-decision knowledge; trade through separately developed and independent trading systems; possess and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other; do not share employees that control the trading decisions of the owned entity or owner; and do not have a risk management system that permits the sharing of trades or trading strategy.

The Commission also is finalizing definition changes to the term ''eligible entity'' in rule 150.1(d), and ''independent account controller'' in rule 150.1(e). These changes reorganize where the defined terms are located in the Commission's regulations, and clarify that they apply not only to limited partnerships (as in the existing regulation), but also to limited liability companies and other equivalent corporate structures. The Commission believes that these definition changes, in and of themselves, have no cost-benefit concerns; their cost-benefit impact relates to implementing the exemptions.

2. Benefits

The purpose of requiring positions to be aggregated among affiliated and otherwise connected entities is to prevent evasion of prescribed position limits through coordinated trading. Because the same reasoning applies to a person who holds or controls positions in more than one account or pool with substantially identical trading strategies, the final rule includes a new provision to require aggregation in these circumstances. The Commission believes that the new requirement to aggregate positions under substantially identical trading strategies will provide benefits by helping to prevent evasion of the position limits.

The Commission also recognizes that an overly restrictive or prescriptive aggregation policy may result in unnecessary burdens or unintended consequences. Therefore, the final rule adopts five new exemptions from the aggregation requirement, as described above. The Commission believes that providing these exemptions will mitigate these burdens and consequences in situations where the risks of coordinated trading are low. Thus, the Commission believes the final rule provides benefits to market participants who would have been subject to such burdens and consequences, while at the same time maintaining an aggregation requirement that is sufficient to maintain the benefit of preventing evasion.

The unnecessary burdens and unintended consequences that could arise from an overly restrictive or prescriptive aggregation policy could take the form of reduced liquidity because the imposition of aggregation requirements on entities that are not susceptible to coordinated trading would restrict their ability to trade commodity derivatives contracts if the aggregation requirements brought them close to the applicable limits. The Commission also recognizes that requiring passive investors to aggregate their positions may potentially diminish capital investments, or interfere with existing decentralized business structures.

The following example illustrates how the final rule is expected to provide benefits by allowing new exemptions to the aggregation requirement. In this example, Entity A seeks to pursue a business or investment strategy that involves the use of futures transactions. Before proceeding, Entity A must consider whether the futures transactions would cause it to exceed any applicable position limit. Under the aggregation requirement in current regulations, which has only limited exceptions, Entity A's decision of whether to proceed could depend on the futures transactions of its subsidiaries or other entities whose positions it is required to aggregate. If one such entity has significant positions in place, then Entity A may be prevented from entering into the desired transactions, because the aggregation of Entity A's positions with the positions of the other entity would exceed a position limit.

The final rules permit Entity A to seek disaggregation relief for the positions of certain of its subsidiaries and potentially other entities. Thus, under the final rules Entity A will have more flexibility to put in place a management structure that allows Entity A to make business and investment decisions independently of its subsidiaries and other potentially aggregated entities so long as applicable criteria (which relate to independent decision making and other indications of separateness) are met. This is beneficial to Entity A because it can focus its business and investment decisions on its own business needs. If disaggregation relief were not available to Entity A, then the requirement to aggregate other entities' positions might unnecessarily distort Entity A's business and investment decisions by requiring Entity A to consider factors that do not relate directly to those decisions. So by establishing exemptive relief that is available to market participants that take steps to establish independent decision making and separateness—for instance, the demonstration of no shared control over trading—potential negative effects, such as impediments to sound decision making, will be reduced.

The exemptions added by the final rules also will benefit market participants by mitigating their compliance burdens associated with meeting the aggregation requirement as well as position limits more generally. Eligible market participants will not have to establish and maintain the infrastructure necessary to aggregate positions across affiliated entities where an exemption is available. Further, an eligible entity with legitimate hedging needs and whose aggregated positions are above the position limits thresholds in the absence of any exemption will have the option of applying for an aggregation exemption (if it meets the stated criteria) instead of applying for a bona fide hedging exemption. In other words, an eligible entity will have the benefit of being able to choose the exemption it deems appropriate, and in many cases the exemption from aggregation, which requires only a notice filing, may be less costly to

[317] *See* rule 150.4(b)(8).

[318] *See* rule 150.4(c)(1).

[319] *See* rules 150.4(c)(1)(i), (ii) and 150.4(b)(2)(ii).

[320] These factors apply to the owned entity to the extent that the owner is or should be aware of the activities and practices of the owned entity. The factors also apply to any other entity that the owner must aggregate, again to the extent the owner is or should be aware of its activities and practices. *See* rule 150.4(b)(2).

obtain than other exemptions from position limits.

The final rules also provide legal consistency for those persons that own multiple entities with multiple ownership or equity interest levels. Because the final rules treat all persons that possess at least a 10 percent ownership or equity interest in another entity (other than persons with an interest in a pooled account subject to rule 150.4(b)(1)) in the same way for purposes of receiving exemptive relief from the Commission's aggregation requirement, there is a unified exemptive framework. This will reduce confusion and further mitigates the burdens facing market participants. Consider, for example, a parent-holding company that has different levels of ownership or equity interest in its various subsidiaries. Under the final unified framework, it may establish and maintain one notice-filing system for the purpose of obtaining aggregation exemptions for any or all of these subsidiaries.

The Commission also has reduced, consistent with regulatory objectives, the administrative and compliance burden of filing the notice required to receive an exemption. For example, for the violations-of-law exemption, the Commission will allow a memorandum of law prepared by internal counsel instead of a formal opinion. This reduces legal costs and is a benefit available to market participants. Finally, the Commission recognizes the benefits of notice filing. This will result in reduced administrative and compliance costs given that updates will be necessary only when there are material changes.

3. Costs

The Commission recognizes that entities subject to the Commission's aggregation policy in rule 150.4, including entities seeking to apply one of the existing or newly-provided exemptions, will incur direct costs. Such costs will include: (i) Initially determining which owned entities, other persons, or transactions qualify for any of the exemptions from aggregation in rule 150.4(b); (ii) developing and maintaining a system of determining the scope of such exemptions over time; (iii) potentially amending current operational structures to achieve eligibility for such exemptions; (iv) preparing and filing notices of exemption with the Commission; and (v) developing a system for aggregating positions across entities, persons or transactions for which no exemption is available.

The Commission has also considered whether its proposed amendments expanding position limits [321] would result in an increase in the number of market participants that will have to consider the effects of the Commission's aggregation policy, as compared to the number of market participants that are currently subject to position limits and potentially subject to aggregation.[322] If the proposed position limits are adopted, market participants would be required to aggregate the accounts and positions of owned entities and other aggregated entities that engage in the contracts and swap equivalents covered by the new position limits. Thus, the Commission's adoption of the proposed position limits would mean that the aggregation requirement in the final rule (even though it largely continues the aggregation requirement in the existing regulations) would apply to new market participants who have not previously been subject to position limits or the aggregation requirement.[323] The Commission has considered the costs that these market participants will face.

Many of these costs—such as building out new compliance systems—would be attributable to complying with position limits that may be adopted in the future and not with the final rule adopted here.[324] However, the Commission has considered that as market participants become subject to position limits or subject to position limits applicable to a wider scope of their derivatives activities, the market participants may face more complex situations involving owned entities or other entities potentially subject to the aggregation requirement. For example, if the scope of the position limits expands, interpretation and application of the criteria for disaggregation relief in rule 150.4(b)(2) may become more complex, even though these criteria are largely the same as criteria previously applied with respect to the exemption used by eligible entities using an IAC.[325] The Commission has considered the potential for these costs but cannot quantify them, because the costs that would be incurred by each market participant will depend upon its management and corporate structure, its trading practices, its information-sharing practices and other factors specific to the market participant.

The Commission has also considered that a large part of the final rule (in particular, paragraphs (2), (5), (6) and (7) of rule 150.4(b)) adds potential exemptions from the aggregation requirement that were not available under the existing regulations. While market participants may incur some costs in determining whether to use these newly-available exemptions and in filing the related notices, the market participants are also free not to use the exemptions if the costs of doing so are too high. In other words, if the costs attributable to paperwork and compliance practices that are necessary to take advantage of one of these exemptions do not make economic sense, market participants will not avail themselves of the exemptions under this rulemaking.

The Commission understands that there will be some costs to investors in commodity pools in aggregating positions under rule 150.4(a)(2), which is a newly adopted requirement to aggregate the positions of accounts or pools with substantially identical trading strategies. First, investors may not be able to easily determine which positions are held by a particular pool. Furthermore, the investors may not be able to easily determine their percentage ownership or equity interest in a pool that is open-ended and allows investors to continuously buy and redeem shares. The Commission is unable to quantify the effect of this rule because there are varying factors such as complicated trading strategies and changing ownership levels within a pool. Nonetheless, the Commission recognizes that there will be costs

[321] *See* Position Limits for Derivatives, 78 FR 75680 (December 12, 2013).

[322] *See generally* Proposed Rule, 78 FR at 68970, and Supplemental Notice, 80 FR at 58375.

[323] The Commission notes that market participants that are currently subject to the aggregation requirement in the existing regulations should have already a system in place for aggregating positions across owned entities or as otherwise required. Further, entities that have been transacting in futures markets have been subject to these aggregation requirements for decades, and have extant operational structures that are appropriate for their trading and other activities. Given these considerations, the Commission believes that for market participants that are currently subject to position limits (and, potentially, the aggregation requirement) prior to any adoption of new position limits, these final rules do not increase significantly the costs of compliance as compared to the status quo—that is, the aggregation requirements of existing part 150 of the Commission's regulations.

[324] The adoption of the proposed position limits for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts would be pursuant to the requirements of CEA section 4a(a)(5). *See* Position Limits for Derivatives, 78 FR 75680 (December 12, 2013). Thus, costs resulting from this statutory requirement and not the Commission's discretion are not subject to the consideration of costs and benefits required by CEA section 15(a). The costs and benefits attributable to the specific position limit levels that may be adopted by the Commission would be considered in the rulemaking establishing those limits.

[325] *See* footnote 118 and accompanying text, above.

associated with the aggregation requirement of this rule.

In addition, DCMs and SEFs will be required to conform their aggregation policies, if their rules do not conform to the Commission's aggregation policy already. As noted above, the requirement to aggregate the positions of accounts or pools with substantially identical trading strategies, as well as the potential application of the aggregation requirement to a broader scope of positions and market participants, may increase the complexity of applying the aggregation requirement. The Commission recognizes that this complexity may increase costs for DCMs and SEFs to enforce their aggregation policies, but for the reasons noted above the Commission cannot quantify these costs at this time. The actual costs will depend on, among other things, the extent to which market participants may become subject to position limits and the characteristics of their corporate structures and trading practices. On the other hand, the Commission understands that some DCMs have made conforming rule changes already. In these cases, there are no incremental costs to consider.

The Commission believes that the final rules will decrease costs by providing market participants new options to elect an exemption and obtain relief from the aggregation requirements. Consequently, the main direct costs associated with the changes to rule 150.4, relative to the standard of existing regulation 150.4, will be those incurred by entities as they determine whether they may be eligible for the final exemptions, if they modify their management or corporate structures or trading practices to comply with the exemptions, and if they make subsequent exemption filings for material changes. These costs will apply to market participants that pursue exemptions because they are a principal or affiliate of an operator of a pooled account; person with a 10 percent or greater owner or equity interest in another entity; a certain type of FCM; a certain type of independent account controller; or a person who must share information to avoid a violation of law.

The Commission believes there will be insignificant costs, if any, for persons electing to take the underwriting and broker-dealer exemptions. These groups are not required to file exemption notices under rule 150.4(c). As a result, the cost these persons will incur will be those dedicated to determining whether they are eligible for the exemption.

There also will be a cost-savings to entities affiliated with an entity who has already filed for an exemption under existing regulation 150.4. The Commission has offered affiliated entities greater relief by affording them an opportunity under rule 150.4(b)(8) to reduce administrative costs because they will not need to file a notice if their affiliated entity has filed an exemption notice previously and updates the previous filing to include the affiliated entities. While there will be some associated costs to monitor records of notices filed by affiliated entities and make the updates, the Commission expects those costs will be small and will likely decline over time as tracking systems are maintained and automated.

In short, the direct costs of the final rules are difficult to quantify in the aggregate because such costs are heavily dependent on each entity's characteristics. In other words, costs vary according to an entity's current systems, its corporate structure, its use of derivatives, the specific modifications it will implement in order to qualify for an exemption, and other circumstances. The Commission, nevertheless, believes that market participants will choose to incur the costs of qualifying for and using the exemptions in the final rules when doing so is less costly than complying with position limits. Thus, by providing these market participants with a lower cost alternative (*i.e.,* qualifying for and using the exemptions) the final rules may ease overall compliance burdens resulting from position limits.

There is an inherent trade-off between the benefits arising from aggregation exemptions in certain circumstances and maintaining the effectiveness of the Commission's position limits. The Commission believes that it has tailored the exemptions sufficiently to circumstances where the exemptions should not weaken the integrity of the Commission's position limits significantly, because, for instance, the exemptions apply only to accounts that pose a low risk of coordinated trading.

In accordance with the Paperwork Reduction Act the Commission has estimated the costs of the paperwork required to claim the final exemptions. As stated in Section III.C., below, the Commission estimates that 240 entities will submit a total of 340 responses per year and incur a total burden of 6,850 labor hours at a cost of approximately $1,096,000 annually to claim exemptive relief under regulation 150.4.

The Commission also considers the cross-border implications of this rulemaking. The Commission believes that the costs might be slightly higher for entities that conduct business in both domestic and foreign jurisdictions. Multi-jurisdictional entities will likely need to consider the implications of memoranda of understanding between the Commission and foreign regulators as well as non-U.S. privacy laws that might apply to them. The Commission believes, however, that while there may be costs for initial assessments, these costs will decline over time for entities as they gain more experience with the aggregation requirements discussed herein.

4. Comments

The Commission received several comments on cost-benefit issues in response to the Proposed Rule and the Supplemental Notice. One commenter argued that market participants faced the burden of building compliance systems and programs to (i) capture the information necessary to determine whether they may exceed position limits and (ii) avoid violating such limits on an intraday basis. The commenter believed that the number of potential market participants at risk of violating limits ''is likely significantly larger'' than the number of those who actually exceed limits, and the obligation to aggregate where there is currently no information sharing increases costs associated with aggregation.[326]

As noted above, the Commission has considered that the requirement to aggregate the positions of accounts or pools with substantially identical trading strategies, along with the potential application of the aggregation requirement to a broader scope of positions and market participants, may increase the complexity of applying the aggregation requirement. On the other hand, the Commission believes that it is important to continue to apply the aggregation requirement in the existing regulation (and to add the aggregation requirement related to substantially identical trading) in order to forestall evasion of the position limits through coordinated trading and to close potential loopholes, as discussed above. To the extent a market participant incurs costs in determining whether to seek an exemption or to comply with an exemption provided in the final rule, the market participant could avoid those costs if they are not sensible in relation to the benefits of using the exemption.

Another commenter asserted that the Commission's cost-benefit consideration of the proposed aggregation rules was inadequate, including for investors applying the substantially identical trading strategies aggregation requirement in rule 150.4(a)(2) to their

[326] *See* CL-Working Group Feb 10.

holdings in multiple funds or funds-of-funds. The commenter also expressed that the Commission did not consider the costs for DCMs and SEFs to implement aggregation standards for all derivatives that would have to conform with proposed rule 150.4. These would include the costs of validating and approving aggregation-related notice filings made under proposed rule 150.4(c).[327]

Regarding the costs faced by investors in multiple funds or funds-of-funds, this rulemaking considers these costs qualitatively but not quantitatively, because quantitative costs depend upon the specific characteristics and activities of market participants—for example, the extent to which investors have to aggregate pro rata interests in multiple funds or funds-of-funds. The Commission recognizes that these costs may be significant in some situations, such as where a single investor transacts in derivatives subject to position limits through multiple entities and funds. As noted in the discussion of costs in Section III.A.3., above, investors may not be able to determine easily which positions are held by an underlying fund or their precise percentage interests in funds.

However, the Commission has determined that the requirements resulting in these costs are appropriate in order to prevent evasion of the position limits through coordinated trading. For example, as noted above in section II.H.3., in the absence of rule 150.4(a)(2) the exemption in rule 150.4(b)(1) would permit an investor to separate a large position in a given commodity derivative into positions held in various funds that have substantially identical trading strategies. As a practical matter, if an investor's positions are near position limits, the investor could consider the merits of holding its positions in a single fund as compared to holding the positions in multiple funds. The investor might elect to hold its positions in a single fund instead of through multiple funds, in order to avoid the requirement under rule 150.4(a)(2) to aggregate the multiple holdings. Of course, the investor would have to comply with position limits whether it holds its positions in a single fund or in multiple funds.

The discussion of costs in Section III.A.3., above, also covered costs to DCMs and SEFs that will be required to conform their aggregation policies to the Commission's aggregation policy. Moreover, the Commission had discussed this issue in the Proposed Rule, when it noted that because the Commission's aggregation rules would be precedent for aggregation rules enforced by DCMs and SEFs, it is important that the aggregation rules set out, to the extent feasible, bright line rules that are capable of easy application in a wide variety of circumstances, without being susceptible to circumvention.[328] The Commission notes that proposed rule 150.4(c)(2), which required a finding as to whether an applicant has satisfied the conditions for an exemption, is not being adopted. This should reduce the costs to DCMs and SEFs in reviewing filings made under rule 150.4(c), which was a concern to the commenter.

One commenter claimed that when considering the costs and benefits of its proposed owned entity aggregation rules, the Commission assumes a cost-benefit baseline that requires position aggregation based solely on ownership, regardless of the existence of common control.[329] The commenter goes further to say that this is an inappropriate baseline, because neither the Commission nor DCMs currently require the aggregation of owned entity positions regardless of the existence of common control, and also because speculative positions outside of the spot month have not been subject to position limits in 19 out of the 28 ''referenced contract'' markets.[330] ''Aggregating non-spot-month positions of entities in which passive investors make investments presents considerable new challenges, which not been adequately considered,'' the commenter stated.[331]

In response to this commenter, the Commission reiterates that the baseline is existing regulation 150.4, which does require aggregation based solely on ownership, regardless of the existence of common control.[332]

Also, as noted previously, the Commission has considered that the requirement to aggregate the positions of accounts or pools with substantially identical trading strategies, as well as the potential application of the aggregation requirement to a broader scope of positions and market participants, may increase the complexity of applying the aggregation requirement. The Commission understands that passive investors may be among those market participants that are affected by the new requirements. In response to this commenter's concerns, the Commission notes that passive investors should be able to qualify for the exemption from aggregation in rule 150.4(b)(2), because if the investor were passive it would meet the conditions for that exemption, which relate to an absence of coordinated trading. Thus, rule 150.4(b)(2) will mitigate the burdens on passive investors.[333]

The commenter also criticized the exemption for ownership interests in rule 150.4(b)(2) because it would not extend to all ownership interests, and would require a ''burdensome'' notice filing in all investment circumstances, despite the absence of any common trading control, ''for no apparent benefit.'' The commenter noted that passive investors in a commodity pool that are not affiliated with the pool operator would not, under the exemption in proposed rule 150.4(b)(1), be required to submit a notice filing to disaggregate the positions of pools in which they have invested, ''regardless of their ownership interest in the pool,'' and the Proposed Rule provides no reason why passive investors in owned entities should not have at least the same degree of deference.[334]

The Commission disagrees with the comment. The Commission does not believe that a notice filing is a heavy burden on any investor, passive or not, because the notice filing merely requires the investor to name the entities involved, describe the relevant circumstances that warrant disaggregation, and certify that the conditions in the applicable aggregation exemption have been met. As discussed above, the Commission believes that the notice filing requirement benefits the public and market participants because it will allow the Commission to monitor usage of the aggregation exemptions and receive notice of potential red flags that warrant further investigation.

Furthermore, the Commission believes that the difference in treatment

[327] *See* CL–CME Feb 10.

[328] *See* Proposed Rule, 78 FR at 68956, n. 103.

[329] *See* CL–SIFMA AMG Feb 10.

[330] *See id.*

[331] *See id.*

[332] *See* the discussion in Section II.A.3, above.

[333] The Commission believes that the newly added exemption in rule 150.4(b)(2) will also mitigate the concerns that this commenter expressed about undue costs on passive investors that have no control over or knowledge of the commodity derivatives trading activities of the owned entities in which they invest. *See* CL–SIFMA AMG Feb 10. In the absence of such control or knowledge, the investor would be eligible for an exemption from the aggregation requirement. Thus, it is not the case, as the commenter argued (*see id.*), that the owned entity aggregation threshold at 10 percent is over-inclusive, or that it would require a purely passive investor to aggregate the positions of all entities in which the investor has beneficial equity ownership of 10 percent or more. Also, passive investors would not necessarily have to determine how owned entities transact in commodity derivatives, as the commenter argued. *See id.* Instead, passive entities would only have to ensure that they meet the requirements for the exemption in rule 150.4(b)(2), which the Commission expects they would, and file the notice required to use that exemption.

[334] *See* CL–SIFMA AMG Feb 10.

between limited partners and similar pool participants in rule 150.4(b)(1), and owners of entities in rule 150.4(b)(2), is sensible. First, the Commission notes that rule 150.4(b)(1) continues the treatment of pool participants under the existing regulation. As the commenter said, rule 150.4(b)(1) does not include a notice filing requirement where the participant is not affiliated with the commodity pool operator. The Commission is comfortable that little additional benefit would be achieved by requiring a notice filing in this situation, because a separate entity is designated as the commodity pool operator (and may be subject to registration with the Commission). By contrast, rule 150.4(b)(2) applies to any type of owned entity. In this situation, the Commission believes that the costs incurred by the owner seeking an exemption to file a notice with the Commission are reasonable in view of the very large variety of corporate structures and management arrangements that may be in place. Given this variety, there are important benefits from a notice filing because the notices inform the Commission of the circumstances in which the exemption is being used and thereby permit the Commission to monitor use of the exemption.

The commenter also maintained that the Commission inadequately considered the costs and benefits of the proposed substantially identical trading strategies requirement at proposed rule 150.4(a)(2), and that the requirement is unworkable in practice. The commenter noted, for example, ''a $10,000 investor in two $1 billion commodity index mutual funds using the same index may have to aggregate the positions in those two $1 billion mutual funds because they follow 'substantially identical trading strategies.' '' The commenter believed such an investor would have to implement a compliance program to prevent inadvertent violations of the position limits rules, which (in addition to imposing significant legal and operational obstacles) would impose costs many times the investor's $10,000 investment.[335]

The Commission disagrees with the commenter's view that it inadequately considered the costs and benefits of the substantially identical trading strategies requirement. The Commission has explained that the requirement under proposed rule 150.4 is effected on a pro rata basis. That is, the terms of the rule require the owner to aggregate the positions that it (*i.e.,* the owner) holds in the two commodity index mutual funds, not the positions of the funds themselves, so that in the commenter's example the two holdings would be aggregated into one $20,000 holding.[336] The Commission acknowledges that the determination of the owner's pro rata interest in the number of contracts such accounts or pools are holding may create practical difficulties for the owner—in particular when the owner is unaware of the underlying positions of the account or pool. However, as discussed above the Commission believes that the requirement in rule 150.4(a)(2) provides important benefits by preventing circumvention of the aggregation requirements.

5. Alternatives

The Commission considered the cost-benefit implications of the following significant alternatives:

- Different ownership thresholds (*e.g.,* 25 percent or 50 percent) for the aggregation requirement in rule 150.4(a)(1). As discussed in Section II.A.3.a, the Commission recognizes that a higher ownership threshold would presumably decrease the number of persons required to aggregate or seek exemptions from aggregation. Yet, there is uncertainty about how beneficial this reduction would be in reducing burdens and how harmful it would be in reducing the amount of information available to the Commission. Because of this uncertainty, the Commission has determined not to change the 10 percent threshold in effect under the current regulations.
- Aggregation on a basis pro rata to the ownership interest in the owned entity. Commenters suggested that Commission base the aggregation requirement on a pro rata ownership or equity interest.[337] Arguably, pro rata aggregation would more accurately reflect the positions owned by market participants and would not unnecessarily restrict the positions of market participants, while reducing the risk of an inadvertent position limits overage. The Commission has decided not to offer such an aggregation method. As explained above, while there are theoretical merits to a pro rata aggregation method as it would measure a market participant's ownership and equity levels more accurately, commenters did not offer suggestions on how such an exemption would work practically, especially when ownership and control may change on an inter-day basis. Nor did commenters provide information regarding the extent to which a pro rata approach would actually mitigate the aggregation requirement (*e.g.,* how often entities which are subject to an aggregation requirement, and not eligible for an exemption, are owned at a level substantially below 100 percent). In such circumstances, implementing a pro rata aggregation standard would be expensive in terms of costs related to developing and maintaining systems that would connect multiple market participants (*e.g.,* CPOs, beneficial owners), DCMs, and SEFs, to share information to perform pro rata calculations. The Commission believes a pro rata aggregation standard would be more costly than the standard the Commission is finalizing.
- No notice filing. A commenter suggested that the Commission eliminate the exemption notice filing for passive investors.[338] The Commission disagrees and has not added any new exemption from the notice filing. A one-time notice filing (with updates upon any material change) is not a substantial burden. It is noteworthy that, as discussed above, commenters made suggestions as to the timing and mechanics of the notice filing, but generally did not object to the requirement to make an exemption-notice filing. Moreover, as discussed above, a notice filing increases the Commission's and other market regulators' abilities to monitor usage of the aggregation exemptions and oversee market participants benefitting from the exemptions.
- Addition of exemptions for passive investors such as pension plans and transitory ownership interests acquired through credit events.[339] As discussed above in Section II.A.3.d., the Commission believes that applying rules for specific treatment of particular situations or classes of entity would be complex and not justified by the potential benefits to the entities receiving different treatment. For example, the Commission believes that distinguishing ''transitory'' ownership from other forms of ownership would be more complicated than completing the notice required to obtain relief, and in such situations it is reasonable to expect that the notice filing would be made on a summary basis appropriate to the

[335] *See id.*

[336] The commenter described the holdings in dollar amounts. *See id.* The Commission notes however that the position limits generally are stated in terms of a number of contracts, not a dollar amount. To apply rule 150.4(a)(2), a person holding or controlling the trading of positions in more than one account or pool with substantially identical trading strategies must determine the person's pro rata interest in the number of contracts such accounts or pools are holding.

[337] *See e.g.,* CL–FIA Feb 6; CL–COPE Feb 10; CL–SIFMA AMG Feb 10.

[338] *See* CL–SIFMA AMG Nov 13.

[339] *See e.g.,* CL–SIFMA AMG Nov 13; CL–FIA Nov 13 CL-Working Group Nov 13.

transitory situation. Similarly, application of definitional rules to delineate when a class of entities such as pension plans would not have to apply for an exemption from aggregation would be complex as compared to the notice filing that a pension plan could file to receive an exemption from aggregation.

6. Section 15(a) Considerations

As the Commission has long held, position limits are regulatory tools that are designed to prevent concentrated positions of sufficient size to manipulate or disrupt markets. The aggregation of accounts for purposes of applying position limits represents an integral component that impacts the effectiveness of those limits. The Commission believes the final rules will preserve the important protections of the existing aggregation policy, but at a lower cost for market participants.

a. Protection of Market Participants and the Public

The Commission believes these final rules will not materially affect the level of protection afforded market participants and the public that is provided by the aggregation policy reflected currently in regulation 150.4. Given that the aggregation standards are necessary to implement effective position limits, it is important that the final exemptions be sufficiently tailored to exempt from aggregation only those positions or accounts that pose a low risk of coordinated trading. The owned-entity exemption will maintain the Commission's historical presumption threshold of 10 percent ownership or equity interest and make that presumption rebuttable only where several conditions indicative of independence are met. This final exemption focuses on the conditions that impact trading independence. In addition, by providing an avenue to apply for relief when ownership is greater than 10 percent of the owned entity, the final rules will allow market participants greater flexibility in meeting the requirements of the position limits regulations, provided they are eligible to apply. The Commission believes that all of the exemptions will allow the Commission to direct its resources to monitoring those entities that pose a higher risk of coordinated trading and thus a higher risk of circumventing position limits. Furthermore, the exemptions will not significantly reduce the protection of market participants and the public that the Commission's aggregation policy affords.

b. Efficiency, Competition, and Financial Integrity of Markets

The Commission believes the final exemptions will reduce costs for market participants without compromising the integrity or effectiveness of the Commission's aggregation policy. An important rationale for providing aggregation exemptions is to avoid overly restricting commodity derivatives trading of affiliated entities not susceptible to coordinated trading. Such trading restrictions may potentially result in reduced liquidity in commodity derivatives markets, diminished investment by largely passive investors, or distortions of existing decentralized business structures. Thus, the final exemptions help promote efficiency and competition, and protect market integrity by helping to prevent these undesirable consequences.

c. Price Discovery

The Commission expects the final rules to further the Commission's mission to deter and prevent manipulative behavior while maintaining sufficient liquidity for hedging activity and protecting the price discovery process. By relaxing aggregation requirements in circumstances not conducive to coordinated trading, the final exemptions may help improve liquidity by encouraging more market participation. Specifically, the Commission believes that these exemptions will help to encourage market participation on registered exchanges so that price discovery will not move to other market platforms where similar transactions could be effected, such as foreign boards of trade.

d. Sound Risk Management Practices

The imposition of position limits helps to restrict market participants from amassing positions that are of sufficient size to disrupt the operation of commodity derivatives markets. The final exemptions will allow affiliated entities to disaggregate their positions in circumstances that the Commission believes present minimal risk of coordinated trading with potential to disrupt market operations. The Commission believes that the final exemptions will not materially inhibit the use of commodity derivatives for hedging, as bona fide hedging exemptions are available to any entity regardless of aggregation of positions and exemptions from aggregation. Where there is little possibility of coordinating trading, the final rules facilitate sound risk management by permitting an entity to manage its risks where risks are being generated.[340]

e. Other Public Interest Considerations

The Commission did not identify any other public interest considerations related to the costs and benefits in the proposed exemptive relief to aggregation. No commenter on the Proposed Rule or the Supplemental Notice identified any other public interest consideration, either.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[341] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[342] The requirements related to the proposed amendments fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.[343] While the requirements under the proposed rulemaking may impact non-financial end users, the Commission notes that position limits levels apply only to large traders.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the actions taken herein will not have a significant economic impact on a substantial number of small entities.

[340] *See* earlier discussion of the example involving Entity A in Section III.A.2., above.

[341] 44 U.S.C. 601 *et seq.*

[342] 5 U.S.C. 601(2), 603–05.

[343] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619 (Apr. 30, 1982) (DCMs, FCMs, and large traders); Opting Out of Segregation, 66 FR 20740, 20743 (Apr. 25, 2001) (eligible contract participants); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680 (Nov. 18, 2011) (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548 (June 4, 2013) (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001) (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613 (Jan. 19, 2012) (swap dealers and major swap participants); and Special Calls, 72 FR 50209 (Aug. 31, 2007) (foreign brokers).

The Chairman made the same certification in the Proposed Rule and the Supplemental Notice,[344] and the Commission did not receive any comments on the RFA.

C. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). Certain provisions of the final rules will result in amendments to previously-approved collection of information requirements within the meaning of the PRA. Therefore, the Commission submitted to OMB for review, in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, the information collection requirements in this rulemaking, as an amendment to the previously-approved collection associated with OMB control number 3038–0013.

Responses to this collection of information will be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, titled ''Commission Records and Information.'' In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.

On November 15, 2013, the Commission published in the **Federal Register** a notice of proposed modifications to part 150 of the Commission's regulations (*i.e.,* the Proposed Rule). The modifications addressed the policy for aggregation under the Commission's position limits regime for futures and option contracts on nine agricultural commodities set forth in part 150, and noted that the modifications would also apply to the position limits regimes for other exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts, if such regimes are finalized. On September 29, 2015, the Commission published in the **Federal Register** a revision to the Proposed Rule (*i.e.,* the Supplemental Notice).

The Commission final rule provides that all persons holding a greater than 10 percent ownership or equity interest in another entity could avail themselves of an exemption in rule 150.4(b)(2) to disaggregate the positions of the owned entity. To claim the exemption, a person needs to meet certain criteria and file a notice with the Commission in accordance with proposed rule 150.4(c). The notice filing needs to demonstrate compliance with certain conditions set forth in rule 150.4(b)(2)(i)(A)–(E). Similar to other exemptions from aggregation, the notice filing is effective upon submission to the Commission (or earlier, as provided in rule 150.4(c)(2)), but the Commission may call for additional information as well as reject, modify or otherwise condition such relief. Further, such person is obligated to amend the notice filing in the event of a material change to the filing.

2. Methodology and Assumptions

It is not possible at this time to precisely determine the number of respondents affected by the final rule. The final rule relates to exemptions that a market participant may elect to take advantage of, meaning that without intimate knowledge of the day-to-day business decisions of all its market participants, the Commission could not know which participants, or how many, may elect to obtain such an exemption. Further, the Commission is unsure of how many participants not currently in the market may be required to or may elect to incur the estimated burdens in the future.

These limitations notwithstanding, the Commission has made best-effort estimations regarding the likely number of affected entities for the purposes of calculating burdens under the PRA. The Commission used its proprietary data, collected from market participants, to estimate the number of respondents for each of the proposed obligations subject to the PRA by estimating the number of respondents who may be close to a position limit and thus may file for relief from aggregation requirements.

The Commission's estimates concerning wage rates are based on 2013 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using a figure of $160 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in through April 2016. This figure was then multiplied by 1.33 to account for benefits[345] and further by 1.5 to account for overhead and administrative expenses, and rounded to the nearest ten dollars.[346] The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); ''programmer (average of senior and non-senior)'' (15 percent weight), ''senior accountant'' (15 percent), ''compliance manager'' (30 percent), and ''assistant/associate general counsel'' (40 percent).

The Commission requested comment on its assumptions and estimates in the Proposed Rule and the Supplemental Notice,[347] but did not receive any comments.

3. Collections of Information

Rule 150.4(b)(2) requires qualified persons to file a notice in order to claim exemptive relief from aggregation. Further, rule 150.4(b)(2)(ii) states that the notice is to be filed in accordance with rule 150.4(c), which requires a description of the relevant circumstances that warrant disaggregation and a statement that certifies that the conditions set forth in the exemptive provision have been met. Persons claiming these exemptions would be required to submit to the

[344] *See* Proposed Rule, 78 FR at 68973, and Supplemental Notice, 80 FR at 58377.

[345] The Bureau of Labor Statistics reports that an average of 32.8 percent of all compensation in the financial services industry is related to benefits. This figure may be obtained on the Bureau of Labor Statistics Web site, at *http://www.bls.gov/news.release/ecec.t06.htm.* The Commission rounded this number to 33 percent to use in its calculations.

[346] Other estimates of this figure have varied dramatically depending on the categorization of the expense and the type of industry classification used (*see, e.g.,* BizStats at *http://www.bizstats.com/corporation-industry-financials/finance-insurance-52/securities-commodity-contracts-other-financial-investments-523/commodity-contracts-dealing-and-brokerage-523135/show* and Damodaran Online at *http://pages.stern.nyu.edu/~adamodar/pc/datasets/uValuedata.xls.* The Commission has chosen to use a figure of 50 percent for overhead and administrative expenses to attempt to conservatively estimate the average for the industry.

[347] *See* Proposed Rule, 78 FR at 68975 and Supplemental Notice, 80 FR at 58378.

Commission, as requested, such information as relates to the claim for exemption. An updated or amended notice must be filed with the Commission upon any material change.

The final rule also extends relief available under rule 150.4(b)(4) to additional entities; so the Commission expects that, as a result of the expanded exemptive relief available to these entities, a greater number of persons will file exemptive notices under 150.4(b)(4). The Commission also expects entities to file for relief under rule 150.4(b)(7), which allows for entities to file a notice, including a memorandum of law, in order to claim the exemption.

Given the expansion of the exemptions that market participants may claim, the Commission anticipates an increase in the number of notice filings. However, because of the relief for ''higher-tier'' entities under rule 150.4(b)(8) the Commission expects that increase to be offset partially by a reduction in the number of filings by ''higher-tier'' entities. Thus, the Commission anticipates a net increase in the number of filings under regulation 150.4 as a result of the adoption of these final rules. The Commission believes that this increase will create an increase in the annual labor burden. However, because entities have already incurred the capital, start-up, operating, and maintenance costs to file other exemptive notices—such as those currently allowed for independent account controllers and futures commission merchants under regulation 150.4—the Commission does not anticipate an increase in those costs.

In the Supplemental Notice, the Commission estimated that 100 entities will each file two notices annually, and 25 entities will each file one notice annually,[348] under proposed rule 150.4(b)(2), at an average of 20 hours per filing. Thus, the Commission approximated a total per entity average burden of 36 labor hours annually.[349] At an estimated labor cost of $120 per hour, the Commission estimated a cost of approximately $4,320 per entity on average for filings under rule 150.4(b)(2). For this final rule, while the Commission maintains its estimates of the number of entities and number of filings, its update of the estimated labor cost to $160 per hour, as noted above, increases the estimated cost to approximately $5,760 per entity on average for filings under rule 150.4(b)(2).

As in the Proposed Rule and the Supplemental Notice, the Commission estimates that 75 entities will each file one notice annually under rule 150.4(b)(4) (proposed paragraph (b)(5)), at an average of 10 hours per filing. Thus, the Commission approximates a total per entity burden of 10 labor hours annually. At an estimated labor cost of $160 per hour, the Commission estimates a cost of approximately $1,600 per entity for filings under rule 150.4(b)(4).

And, again as in the Proposed Rule and the Supplemental Notice, the Commission estimates that 40 entities will each file one notice annually under rule 150.4(b)(7) (proposed paragraph (b)(8)), including the requisite memorandum of law, at an average of 40 hours per filing. Thus, the Commission approximates a total per entity burden of 40 labor hours annually. At an estimated labor cost of $160 per hour, the Commission estimates a cost of approximately $6,400 per entity for filings under rule 150.4(b)(7).

In sum, the Commission estimates that 240 entities will submit a total of 340 responses per year and incur a total burden of 6,850 labor hours. At the updated cost of $160 per hour, this results in a cost of approximately $1,096,000 annually in order to claim exemptive relief under rule 150.4.

List of Subjects in 17 CFR Part 150

Position limits, Bona fide hedging, Referenced contracts.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 150 as follows:

PART 150—LIMITS ON POSITIONS

■ 1. The authority citation for part 150 is revised to read as follows:

Authority: 7 U.S.C. 6a, 6c, and 12a(5), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. In § 150.1, revise paragraphs (d), (e)(2), and (e)(5) to read as follows:

§ 150.1 Definitions.

* * * * *

(d) *Eligible entity* means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner, limited member or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

(e) * * *

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

* * * * *

(5) Who is:

(i) Registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or

(ii) A general partner, managing member or manager of a commodity pool the operator of which is excluded from registration under § 4.5(a)(4) of this chapter or § 4.13 of this chapter, provided that such general partner, managing member or manager complies with the requirements of § 150.4(c).

* * * * *

§ 150.3 [Amended]

■ 3. Amend § 150.3 as follows:

[348] The Commission's estimate that 25 entities will each file one notice annually reflected those entities which had been estimated to each file one notice annually under proposed rule 150.4(b)(3), which the Commission is not adopting. Therefore, the Commission estimated that each of these 25 entities would file one notice annually under rule 150.4(b)(2), in place of the assumed filing under proposed rule 150.4(b)(3). *See* Supplemental Notice, 80 FR at 58378.

[349] That is, the Commission estimated that a total of 225 filings would be made each year. At 20 hours per filing, the total burden would be 4,500 labor hours, which divided among the 125 entities results in an average burden of 36 labor hours per entity.

■ a. Remove the semicolon and the word ''or'' at the end of paragraph (a)(3) and add a period in their place; and

■ b. Remove paragraph (a)(4).

■ 4. Revise § 150.4 to read as follows:

§ 150.4 Aggregation of positions.

(a) *Positions to be aggregated*—(1) *Trading control or 10 percent or greater ownership or equity interest.* For the purpose of applying the position limits set forth in § 150.2, unless an exemption set forth in paragraph (b) of this section applies, all positions in accounts for which any person, by power of attorney or otherwise, directly or indirectly controls trading or holds a 10 percent or greater ownership or equity interest must be aggregated with the positions held and trading done by such person. For the purpose of determining the positions in accounts for which any person controls trading or holds a 10 percent or greater ownership or equity interest, positions or ownership or equity interests held by, and trading done or controlled by, two or more persons acting pursuant to an expressed or implied agreement or understanding shall be treated the same as if the positions or ownership or equity interests were held by, or the trading were done or controlled by, a single person.

(2) *Substantially identical trading.* Notwithstanding the provisions of paragraph (b) of this section, for the purpose of applying the position limits set forth in § 150.2, any person that, by power of attorney or otherwise, holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies, must aggregate all such positions (determined pro rata) with all other positions held and trading done by such person and the positions in accounts which the person must aggregate pursuant to paragraph (a)(1) of this section.

(b) *Exemptions from aggregation.* For the purpose of applying the position limits set forth in § 150.2, and notwithstanding the provisions of paragraph (a)(1) of this section, but subject to the provisions of paragraph (a)(2) of this section, the aggregation requirements of this section shall not apply in the circumstances set forth in this paragraph (b).

(1) *Exemption for ownership by limited partners, shareholders or other pool participants.* Any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions need not aggregate the accounts or positions of the pool with any other accounts or positions such person is required to aggregate, except that such person must aggregate the pooled account or positions with all other accounts or positions owned or controlled by such person if such person:

(i) Is the commodity pool operator of the pooled account;

(ii) Is a principal or affiliate of the operator of the pooled account, unless:

(A) The pool operator has, and enforces, written procedures to preclude the person from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(B) The person does not have direct, day-to-day supervisory authority or control over the pool's trading decisions;

(C) The person, if a principal of the operator of the pooled account, maintains only such minimum control over the commodity pool operator as is consistent with its responsibilities as a principal and necessary to fulfill its duty to supervise the trading activities of the commodity pool; and

(D) The pool operator has complied with the requirements of paragraph (c) of this section on behalf of the person or class of persons; or

(iii) Has, by power of attorney or otherwise directly or indirectly, a 25 percent or greater ownership or equity interest in a commodity pool, the operator of which is exempt from registration under § 4.13 of this chapter.

(2) *Exemption for certain ownership of greater than 10 percent in an owned entity.* Any person with an ownership or equity interest in an owned entity of 10 percent or greater (other than an interest in a pooled account subject to paragraph (b)(1) of this section), need not aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate, provided that:

(i) Such person, including any entity that such person must aggregate, and the owned entity (to the extent that such person is aware or should be aware of the activities and practices of the aggregated entity or the owned entity):

(A) Do not have knowledge of the trading decisions of the other;

(B) Trade pursuant to separately developed and independent trading systems;

(C) Have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include security arrangements, including separate physical locations, which would maintain the independence of their activities;

(D) Do not share employees that control the trading decisions of either; and

(E) Do not have risk management systems that permit the sharing of its trades or its trading strategy with employees that control the trading decisions of the other; and

(ii) Such person complies with the requirements of paragraph (c) of this section.

(3) *Exemption for accounts held by futures commission merchants.* A futures commission merchant or any affiliate of a futures commission merchant need not aggregate positions it holds in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or of its affiliates, if:

(i) A person other than the futures commission merchant or the affiliate directs trading in such an account;

(ii) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account;

(iii) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts which the futures commission merchant or the affiliate holds, has a financial interest of 10 percent or more in, or controls; and

(iv) The futures commission merchant or the affiliate has complied with the requirements of paragraph (c) of this section.

(4) *Exemption for accounts carried by an independent account controller.* An eligible entity need not aggregate its positions with the eligible entity's client positions or accounts carried by an authorized independent account controller, as defined in § 150.1(e), except for the spot month in physical-delivery commodity contracts, provided that the eligible entity has complied with the requirements of paragraph (c) of this section, and that the overall positions held or controlled by such independent account controller may not exceed the limits specified in § 150.2.

(i) *Additional requirements for exemption of affiliated entities.* If the independent account controller is affiliated with the eligible entity or

another independent account controller, each of the affiliated entities must:

(A) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include security arrangements, including separate physical locations, which would maintain the independence of their activities; provided, however, that such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities to the managed positions and accounts and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

(B) Trade such accounts pursuant to separately developed and independent trading systems;

(C) Market such trading systems separately; and

(D) Solicit funds for such trading by separate disclosure documents that meet the standards of § 4.24 or § 4.34 of this chapter, as applicable, where such disclosure documents are required under part 4 of this chapter.

(ii) [Reserved].

(5) *Exemption for underwriting.* A person need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(6) *Exemption for broker-dealer activity.* A broker-dealer registered with the Securities and Exchange Commission, or similarly registered with a foreign regulatory authority, need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities acquired in the normal course of business as a dealer, *provided that* such person does not have actual knowledge of the trading decisions of the owned entity.

(7) *Exemption for information sharing restriction.* A person need not aggregate the positions or accounts of an owned entity if the sharing of information associated with such aggregation (such as, only by way of example, information reflecting the transactions and positions of a such person and the owned entity) creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder, provided that such person does not have actual knowledge of information associated with such aggregation, and provided further that such person has filed a prior notice pursuant to paragraph (c) of this section and included with such notice a written memorandum of law explaining in detail the basis for the conclusion that the sharing of information creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. However, the exemption in this paragraph shall not apply where the law or regulation serves as a means to evade the aggregation of accounts or positions. All documents submitted pursuant to this paragraph shall be in English, or if not, accompanied by an official English translation.

(8) *Exemption for affiliated entities.* After a person has filed a notice under paragraph (c) of this section, another person need not file a separate notice identifying any position or account identified in such notice filing, provided that:

(i) Such other person has an ownership or equity interest of 10 percent or greater in the person that filed the notice, or the person that filed the notice has an ownership or equity interest of 10 percent or greater in such other person, or an ownership or equity interest of 10 percent or greater is held in such other person by a third person who holds an ownership or equity interest of 10 percent or greater in the person that has filed the notice (in any such case, the ownership or equity interest may be held directly or indirectly);

(ii) Such other person complies with the conditions applicable to the exemption specified in such notice filing, other than the filing requirements; and

(iii) Such other person does not otherwise control trading of any account or position identified in such notice filing.

(iv) Upon call by the Commission, any person relying on the exemption in this paragraph (b)(8) shall provide to the Commission such information concerning the person's claim for exemption. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

(c) *Notice filing for exemption.* (1) Persons seeking an aggregation exemption under paragraph (b)(1)(ii), (b)(2), (b)(3), (b)(4), or (b)(7) of this section shall file a notice with the Commission, which shall be effective upon submission of the notice (or earlier, as provided in paragraph (c)(2) of this section), and shall include:

(i) A description of the relevant circumstances that warrant disaggregation; and

(ii) A statement of a senior officer of the entity certifying that the conditions set forth in the applicable aggregation exemption provision have been met.

(2) If a person newly acquires an ownership or equity interest in an owned entity of 10 percent or greater and is eligible for the aggregation exemption under paragraph (b)(2) of this section, the person may elect that a notice filed under this paragraph (c) shall be effective as of the date of such acquisition if such notice is filed no later than 60 days after such acquisition.

(3) Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide such information demonstrating that the person meets the requirements of the exemption, as is requested by the Commission. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

(4) In the event of a material change to the information provided in any notice filed under this paragraph (c), an updated or amended notice shall promptly be filed detailing the material change.

(5) Any notice filed under this paragraph (c) shall be submitted in the form and manner provided for in paragraph (d) of this section.

(6) If a person is eligible for an aggregation exemption under paragraph (b)(1)(ii), (b)(2), (b)(3), (b)(4), or (b)(7) of this section, a failure to timely file a notice under this paragraph (c) shall not constitute a violation of paragraph (a)(1) of this section or any position limit set forth in § 150.2 if such notice is filed no later than five business days after the person is aware, or should be aware, that such notice has not been timely filed.

(d) *Form and manner of reporting and submitting information or filings.* Unless otherwise instructed by the Commission or its designees, any person submitting reports under this section shall submit the corresponding required filings and any other information required under this part to the Commission using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission. Unless otherwise provided in this section, the notice shall be effective upon filing.

When the reporting entity discovers errors or omissions to past reports, the entity shall so notify the Commission and file corrected information in a form and manner and at a time as may be instructed by the Commission or its designee.

(e) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (b)(8)(iv) of this section to call for additional information from a person claiming the exemption in paragraph (b)(8) of this section.

(ii) In paragraph (c)(3) of this section to call for additional information from a person claiming an aggregation exemption under this section.

(iii) In paragraph (d) of this section for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Issued in Washington, DC, on December 6, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

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

Appendix to Aggregation of Positions—Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2016–29582 Filed 12–15–16; 8:45 am]

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Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Parts 13 and 22

Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 22

[Docket No. FWS–R9–MB–2011–0094; FF09M20300–167–FXMB123109EAGLE]

RIN 1018–AY30

Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), are revising the regulations for eagle nonpurposeful take permits and eagle nest take permits. Revisions include changes to permit issuance criteria and duration, definitions, compensatory mitigation standards, criteria for eagle nest removal permits, permit application requirements, and fees. We intend the revisions to add clarity to the eagle permit regulations, improve their implementation, and increase compliance, while maintaining strong protection for eagles.

DATES: Effective January 17, 2017.

ADDRESSES: *Document Availability:* The Record of Decision, Final PEIS, and supplementary information used in the development of this rule, including the public comments received and the programmatic environmental impact statement, may be viewed online at *http://www.fws.gov/birds/management/managed-species/eagle-management.php* and also at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2011–0094.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, 703–358–2329 or *eliza_savage@fws.gov.*

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Fish and Wildlife Service is finalizing revisions to permit regulations for nonpurposeful (incidental) take of eagles and take of eagle nests in part 22 of title 50 of the Code of Federal Regulations. The revisions are intended to create a permitting framework that we can implement more efficiently and thus encourage greater public compliance while ensuring protection of bald and golden eagles. Our goal is to enhance protection of eagles throughout their ranges through implementation of mitigation measures that avoid and minimize, and compensate for, adverse impacts from otherwise lawful activities.

The Service is modifying the definition of the Bald and Golden Eagle Protection Act's ''preservation standard,'' which requires that permitted take be compatible with the preservation of eagles. We are also removing the distinction between standard and programmatic permits, codifying standardized mitigation requirements, and extending the maximum permit duration for eagle incidental take permits (50 CFR 22.26). The regulations also include a number of additional revisions to the eagle nest take regulations at 50 CFR 22.27, as well as revisions to the permit fee schedule at 50 CFR 13.11; new and revised definitions in 50 CFR 22.3; revisions to 50 CFR 22.25 (permits for golden eagle nest take for resource development and recovery operations) for consistency with the § 22.27 nest take permits; and two provisions that apply to all eagle permit types (50 CFR 22.4 and 22.11).

Background

The Bald and Golden Eagle Protection Act (Eagle Act or BGEPA) (16 U.S.C. 668–668d) prohibits take of bald eagles and golden eagles except pursuant to federal regulations. The Eagle Act authorizes the Secretary of the Interior to issue regulations to permit the ''taking'' of eagles for various purposes, including the protection of ''other interests in any particular locality'' (16 U.S.C. 668a), provided the taking is compatible with the preservation of eagles. In 2009, the Service promulgated regulations at 50 CFR part 22 that established two new permit types for take of eagles and eagle nests (74 FR 46836; Sept. 11, 2009) (Eagle Permit Rule). One permit authorizes, under limited circumstances, the take (removal, relocation, or destruction) of eagle nests (50 CFR 22.27). The other permit type authorizes nonpurposeful take (disturbance, injury, or killing) of eagles (50 CFR 22.26) where the take is incidental to an otherwise lawful activity. In these revised regulations, we refer to nonpurposeful take as incidental take, which has the same meaning as conveyed in the 2009 regulations: Take that is associated with but not the purpose of an activity.

The Eagle Act requires the Service to determine that any take of eagles the Service authorizes is ''compatible with the preservation of the bald eagle or the golden eagle'' (16 U.S.C. 668a). We refer to this clause as the Eagle Act preservation standard. The preservation standard underpins the Service's management objectives for eagles. In the preamble to the final 2009 regulations for eagle nonpurposeful take permits, and in the final environmental assessment (FEA) of the regulations, the Service defined the preservation standard to mean ''consistent with the goal of stable or increasing breeding populations'' (74 FR 46836, see p. 46837).

On April 13, 2012, the Service initiated two additional rulemakings: (1) A proposed rule to extend the maximum permit tenure for programmatic eagle nonpurposeful take permit regulations from 5 to 30 years, among other changes (''Duration Rule'') (77 FR 22267); and (2) an advance notice of proposed rulemaking (ANPR) soliciting input on all aspects of those eagle nonpurposeful take regulations (77 FR 22278). The Duration Rule was finalized on December 9, 2013 (78 FR 73704). However, it was the subject of a legal challenge, and on August 11, 2015, the U.S. District Court for the Northern District of California vacated the provisions that extended the maximum programmatic permit tenure to 30 years (*Shearwater* v. *Ashe,* No. CV02830–LHK (N.D. Cal., Aug. 11, 2015)). The court held that the Service should have prepared an environmental assessment (EA) or environmental impact statement (EIS) to accompany the rulemaking rather than apply a categorical exclusion under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321–4347). The effect of the ruling was to return the maximum programmatic permit tenure to 5 years.

The 2012 ANPR highlighted three main issues for public comment: Our overall eagle population management objectives; compensatory mitigation required under permits; and the nonpurposeful take programmatic permit issuance criteria. As a next step, the Service issued a notice of intent to prepare an EA or EIS pursuant to NEPA (79 FR 35564; June 23, 2014). The Service then held five public scoping meetings between July 22 and August 7, 2014. We received a total of 536 comments during that public comment period. Upon removal of duplicates, there were a total of 517 unique comments. We reviewed the comments and used them to develop proposed regulations and a draft programmatic environmental impact statement (DPEIS), which we released on May 6, 2016, for a 60-day public comment period (81 FR 27934). The draft PEIS and proposed regulations are available on the Internet at: *http://eagleruleprocess.org/* and at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2011–0094. We received 780 comments on the proposed rule and DPEIS from federal agencies, states,

tribes, nongovernmental organizations, industry associations, individual companies, and members of the public. These comments were the basis for several changes, discussed below, that we made to the proposed action in this rule.

In accordance with NEPA requirements (40 CFR 1506.6(b)), we announce the availability of the Record of Decision (ROD) for the Service's final PEIS for the eagle rule revisions and management objectives. The ROD is the final step in the NEPA process for the eagle rule revision process, which includes revisions to the regulations governing permits for incidental take of eagles and take of eagle nests. The ROD describes the Service's decision; identifies the other alternatives considered, including the environmentally preferable alternative; explains the Service's plans for mitigation; and states what factors, including considerations of national policy, we considered in making the decision. The ROD and final PEIS are available at *http://www.fws.gov/birds/management/managed-species/eagle-management.php* and also at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2011–0094.

Bald eagle populations have continued to increase throughout the United States, which effectively increases the potential need for permits for activities that may disturb, injure, or kill bald eagles. There has also been significant expansion within many sectors of the U.S. energy industry, particularly wind energy operations, and much more interest in permitting new long-term operations than was anticipated when the 2009 regulations were promulgated. At the same time, golden eagle populations are potentially declining, heightening the challenge of permitting incidental take of this species for otherwise lawful activities. The 2009 permit regulations have not provided an optimal framework for authorizing incidental take under these circumstances, particularly for incidental take resulting from long-term, ongoing activities. Difficulties in establishing new permit regulations are to be expected and the Service contemplated that changes to the permit regulations would be necessary based on experience gained through implementing the new permit framework. One of these challenges has been a general perception that the 2009 permitting framework did not provide enough flexibility to issue eagle take permits in a timely manner. Indeed, only one programmatic permit has been issued to date. When projects go forward without permit authorization, the opportunity to obtain benefits to eagles in the form of required conservation measures is lost and project operators put themselves at risk of violating the law.

Under the management approach established with the 2009 eagle permit regulations and final EA (FEA), permitted take of bald eagles has been capped at 5 percent of estimated annual productivity (*i.e.,* successful reproduction) of the population. Because the Service lacked data in 2009 to show that golden eagle populations could sustain any additional unmitigated mortality, the Service set take limits for that species at zero. This decision has meant that any new authorized take of golden eagles must be at least equally offset by compensatory mitigation (specific conservation actions to replace or offset project-induced mortality or disturbance by reducing take elsewhere).

In the FEA for the 2009 regulations and in the preamble to those regulations, the Service adopted a policy of not issuing take permits for golden eagles east of the 100th meridian. At the time, the Service determined there were not sufficient data to ensure that golden eagle populations were stable or increasing such that permitting take would not result in a decline in breeding pairs in this region. However, after further analysis, the Service has determined that some take can be permitted with implementation of compensatory mitigation. Rather than providing an increased level of protection for golden eagles, this policy has meant that activities that take golden eagles in the east continue to proliferate without implementation of conservation measures and mitigation to address impacts to golden eagles that would be required as the result of the permitting process.

Since 2009, Service and U.S. Geological Survey (USGS) scientists have undertaken considerable research and monitoring to improve the Service's ability to track compliance with eagle management objectives and reduce uncertainty. Of particular significance, the Service has updated population estimates for both species of eagle and quantified uncertainty in those estimates. For the bald eagle, the Service now estimates substantially higher populations than were estimated in 2009, and allowable take limits will likely increase considerably across most of the country as a result (see further discussion below under *Status of Eagle Populations*). For golden eagles, recent research indicates that the population in the coterminous western United States might be declining towards a lower equilibrium. Additionally, the Service now has a much better understanding of the seasonal, annual, and age-related movement patterns of golden eagles. These data are incorporated into the updated management framework.

Through implementing the 2009 permit regulations, the Service has identified several provisions that could be improved for the benefit of both eagles and people, including the regulated community. One issue that has hampered efficient permit administration (of both eagle nonpurposeful take permits and eagle nest take permits) is the difficulty inherent in applying the standard that take must be reduced to the point where it is unavoidable, which the current regulations require for programmatic permits. Additionally, a lack of specificity in the regulations as to when compensatory mitigation is required can lead to inconsistencies in what is required of permittees.

The 5-year maximum duration for programmatic permits appears to have been a primary factor discouraging many project proponents from seeking eagle take permits. Many activities that incidentally take eagles due to ongoing operations have lifetimes that far exceed 5 years. We need to issue permits that align better, both in duration and the scale of conservation measures, with the longer-term duration of industrial activities, such as electricity distribution and energy production. Extending the maximum permit duration is consistent with other Federal permitting for development and infrastructure projects.

Encouraging more proponents of activities that incidentally take eagles to apply for permits is a critically important means of reducing incidental take. The intent of these regulations is not to encourage construction and operation of projects that take eagles (an eagle incidental take permit only authorizes take of eagles; it is not a prerequisite or an authorization to construct and operate projects that will result in eagles being taken). Instead, we are strongly encouraging such projects to seek authorization for eagle take and thereby implement conservation measures that reduce incidental take and benefit eagles. Unpermitted activities have taken and will continue to take eagles with or without this permit program. In fact, the Service's recent analysis of causes of death of golden eagles shows that, 56 years after enactment of the Eagle Act, unpermitted human-caused mortality is still the leading cause of death of golden eagles in the United States, and risks causing

population declines for this species. Our goal is to reduce the number of unauthorized activities through enforcement where appropriate and by implementing an efficient regulatory framework that encourages proponents of activities that incidentally take eagles to seek and obtain legal authorization.

The Service has successfully pursued enforcement actions against project proponents that incidentally take eagles and will continue to do so, but enforcement alone is an inefficient means to manage and conserve eagles nationwide and is constrained by our limited law enforcement resources. Therefore, our primary means of conserving and protecting eagles is to ensure that our incidental take permit regulations encourage more proponents to seek and obtain permits for activities that otherwise would continue to take eagles without implementing the conservation measures that are critical to eagle conservation nationally, regionally, and locally.

Status of Eagle Populations

The Service is updating its management objectives for eagles established by the 2009 eagle permit regulations and FEA. Management objectives direct strategic management and monitoring actions and ultimately determine what level of permitted eagle take we can allow. The Service recently completed a status report on bald and golden eagles: ''Bald and Golden Eagles: Status, trends, and estimation of sustainable take rates in the United States'' (''Status Report'') (USFWS, 2016). The Status Report, which is available at *http://eagleruleprocess.org,* estimates population sizes, productivity, and survival rates for both species; analyzes the effects of unauthorized take of golden eagles; provides recommended take limits for both species and metrics for converting take in the form of disturbance to debits from the take limits; analyzes the cumulative effects of permitting take of up to 5% of local area populations (the population in the vicinity of a particular project or activity); and recommends a schedule of population surveys to regularly update population size estimates for both species. The Status Report is essentially a compilation of the most current research on the population status and trends of bald and golden eagles and serves as the biological basis for the revised regulatory management framework in these regulation revisions and the preferred alternative in the programmatic EIS (PEIS). The following discussion pertaining to the status of bald and golden eagle populations summarizes some of the information provided and explained in more detail in the Status Report, available at *http://eagleruleprocess.org.*

The Service has estimated the population size for the bald eagle in the coterminous United States using a population model in conjunction with estimates of the number of occupied nesting territories in 2009. That population size estimate is 72,434, and, when combined with a previous estimate of population size for Alaska (70,544), is 143,000. We derive our conservative estimate for the population size by using the 20th quantile of the population size estimate distribution (the 20th quantile is the point on the probability distribution where there is only a 20% chance of the estimate being lower than the true population size). The 20th quantile represented 126,000 bald eagles for the United States in 2009. This number represents an increase from our population size estimate for the coterminous United States in 2007 (the year data were gathered to support delisting under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*)), which was 69,000. We attribute the difference to improved monitoring and estimation efforts, as well as increases in bald eagle numbers. Both the population model and Breeding Bird Survey (BBS) estimates indicate bald eagle populations are continuing to increase throughout the coterminous United States.

We estimated future bald eagle populations using a conservative assumption that the number of suitable bald eagle nesting territories will not increase above the 2009 estimate. Given limitations of the data on Alaskan eagles and evidence from the BBS that bald eagle populations are growing more slowly there, we did not model projections for Alaska and assumed that Alaska's bald eagle population will remain stable (though demographic rates suggested continued growth is possible). With these constraints, our model forecasts that the number of bald eagles in the coterminous United States outside the Southwest will continue to increase until populations reach an equilibrium at about 228,000 (20th quantile = 197,000) individuals. The model predicts that bald eagles in the Southwest will also continue to increase from the 2009 population estimate of 650 until reaching an equilibrium at about 1,800 (20th quantile = 1,400) individuals. Again, these numbers are based on assumptions that underlying demographic rates and other environmental factors remain unchanged, and the predictions do not take into account forecasted changes in climate nor how such changes may affect bald eagle population vital rates and population size. These projections also assume food and other factors will not become limiting.

We estimated the total population size for the golden eagle in the coterminous United States and Alaska was 39,000 (20th quantile = 34,000) in 2009, and 41,500 (20th quantile = 35,000) in 2014, updated from 40,000 in the draft PEIS based on comments we received from the Alaska Department of Fish and Game. However, although the golden eagle population trend estimate based on current surveys is stable, an estimate from a population model similar to that used for the bald eagle suggests the population in the western United States might be declining toward a lower equilibrium size of about 26,000 individuals.

Using unbiased cause-of-mortality data for a sample of 386 satellite-tagged golden eagles in the period 1997–2013, the Service estimated contemporary age-specific survival rates with and without current levels of anthropogenic mortality. Anthropogenic factors were responsible for about 56% of satellite-tagged golden eagle mortality, with the highest rates of anthropogenic mortality among adults (63%). We estimated the maximum rate of population growth for the golden eagle in the coterminous United States in the absence of existing anthropogenic mortality was 10.9% (20th quantile = 9.7%). Sustainable take (the number of eagles that can be removed from the population while still achieving a stable population compared to the 2009 baseline) of golden eagles under those conditions would be 2,000 individuals (20th quantile = 1,600). The available information suggests ongoing levels of human-caused mortality likely exceed this value, perhaps considerably. This information supports the finding from the population model that golden eagle populations may be declining to a new, lower level.

For much more detailed information about the current population status and trends, see the Status Report available at: *http://eagleruleprocess.org.*

Description of the Rulemaking

Preservation Standard

The Eagle Act requires that any authorized take of eagles be ''compatible with the preservation'' of bald eagles and golden eagles. The Service defined this preservation standard in the preamble to the 2009 regulations to mean ''consistent with the goal of stable or increasing breeding populations.'' We are incorporating a modified definition of that standard into the regulations. We

now define the preservation standard to mean ''consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species.'' The timeframe the Service used for modeling and assessing eagle population demographics is 100 years (at least eight generations) for both eagle species relative to the 2009 baseline. ''Eagle management unit'' is defined as ''a geographically bounded region within which permitted take is regulated to meet the management goal of maintaining stable or increasing breeding populations of bald or golden eagles.''

The eagle management objective embodied in the revised definition of the preservation standard is consistent with Presidential, Department of the Interior, and Fish and Wildlife Service mitigation policies that aim to achieve a net benefit, or at a minimum, no net loss, of natural resources. (*See* the Service's mitigation policy (501 FW 2); Secretary's Order 3330, entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013); the Departmental Manual Chapter on Implementing Mitigation at the Landscape-scale (600 DM 6 (October 23, 2015)); and the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015)).

During the scoping period for the PEIS, the Service sought and received public comment on how the preservation standard should be defined and applied. We considered adoption of a purely qualitative preservation standard such as ''to not meaningfully impair the bald or golden eagle's continued existence.'' However, a qualitative approach alone contains no standards for assessment, which could lead to inconsistent implementation between Service regions. Inconsistent implementation across Regions is a bigger concern with eagles than for many ESA-listed species because the range of both bald and golden eagles extends throughout the continental United States. Additional drawbacks to adopting a qualitative approach are that it is less compatible with formal adaptive management and does not provide a mechanism to assess cumulative impacts. Also, considerable quantitative information is available on eagle populations unlike many ESA-listed species, and to ignore these data or to independently reassess them for each permit is inconsistent with the Service's commitment to use the best available information and practice the best science. For these reasons, the Service has elected not to adopt a qualitative preservation standard.

We elected to retain the quantitative approach because it is explicit, allows less room for subjective interpretation, and can be consistently implemented throughout the country and across the types of activities that require permits. Our approach, including the underlying population model, is consistent with other wildlife management programs, including the North American Waterfowl Management Plan and management of marine mammals under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*).

The revised preservation standard—''consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of both species''—seeks to ensure the persistence of bald and golden eagle populations over the long term with sufficient distribution to be resilient and adaptable to environmental conditions, stressors, and likely future altered environments, and to better align with State and tribal interests in local eagle population management. To meet this objective in a scientifically rigorous manner, the Service manages eagles at two scales: (1) Eagle management units (EMUs), which are regional populations of eagles over which the Service strives to meet the objective of population stability or growth, relative to population size in the baseline year of 2009, over 100 years; and (2) local area populations, which are finer-scale areas defined by eagle dispersal criteria that are specific to each permitted action and over which the Service seeks to ensure take does not cause the extirpation of either eagle species. The Service used modern scientific methods to estimate the take rate (the proportion of the population that can be removed annually) that can be authorized for each species of eagle in each EMU while meeting our management objectives. These estimates are in the form of probability distributions that account for scientific uncertainty in both the modeling process and in the biological data used in the models. For the liberal PEIS alternatives, the Service used the median of model estimates for important parameters (*e.g.,* population size, take rate) to calculate take limits (the number of eagles that can be removed annually at the EMU- and, separately, the LAP-scale and still meet the management objective); this approach shares the risk posed by uncertainty equally between being under-protective of eagles and being unnecessarily over-restrictive on activities that might take eagles. For the conservative PEIS alternatives, the Service used values that allocated risk in an 80:20 ratio in favor of being over-protective of eagles. By defining the eagle preservation standard in this way, and analyzing the effects of take within those take limits in the PEIS, the analytical burden for each permit decision is greatly reduced, allowing the Service to make informed permitting decisions at an expedited rate.

The regulatory revisions in this final rule are based on the amended definition of the preservation standard and the adoption of a relatively conservative approach to estimating population values and sustainable take rates based on the best available data and the Service's level of risk tolerance in the face of uncertainty. This relatively conservative approach is described below, and also in much more detail, along with alternative approaches and the scientific and technical information that underpins their analyses, in the Status Report and the PEIS.

We estimate there are about 143,000 bald eagles in the United States (including Alaska), and that populations continue to increase. Given their continued population growth above the 2009 baseline, and considering the updated demographic data compiled by the Service and presented in the Status Report, we have determined there is considerable capacity for sustainable take of bald eagles. Under the management approach we are adopting, the sustainable annual take limit (without compensatory mitigation) would be 3,742 bald eagles in the coterminous United States. Initially, the Service proposed to set unmitigated take limits of only 500 bald eagles annually in Alaska because our population data there are less rigorous than elsewhere in the United States. However, in response to compelling comments from the Alaska Department of Fish and Game (see Response to Public Comments, below, for more details), we have revised the sustainable take rate for Alaska to 3,776, based on the sustainable take rate of 6% under the preferred alternative in the PEIS. The Service does not expect authorized take under the revised sustainable take limits to approach the new take limit in Alaska or nationwide. In fact, there is nothing in the revised regulations that will increase take, though we hope more ongoing unpermitted take will be captured under permits in the future.

We estimate golden eagles currently number about 40,000 individuals in the United States (including Alaska), and populations have been relatively stable around that size since the mid-1960s. We estimate the carrying capacity of golden eagles nationwide to be 73,000. We also have data indicating that population size is limited by high levels of anthropogenic mortality (*i.e.,* populations could be larger were it not for ongoing high levels of unpermitted take), and that adding additional mortality will likely cause populations to decline to a lower level. As a consequence, there is no opportunity for authorizing additional unmitigated take of this species without changing the population objective to a level lower than the 2009 baseline. Under our proposed management framework, we would operate under the conservative assumption that there is no sustainable take, and take limits would be zero, without compensatory mitigation to offset the take. However, even using the median values, rather than the 20th quantile used in our preferred, conservative approach, take of golden eagles nationwide would still be set at zero, requiring that all authorized take be offset by compensatory mitigation.

We are realigning EMUs to better reflect regional populations and migration patterns of both species. The Service and its partner agencies manage for migratory birds based on specific migratory route paths within North America (Atlantic, Mississippi, Central, and Pacific). Based on those route paths, State and Federal agencies developed the four administrative flyways that are used to administer migratory bird resources. Both bald and golden eagles move over great distances seasonally and across years. There is a well-described annual seasonal migration of both species of eagles from northern regions southward in winter. An annual northward migration of bald eagles from southern regions in spring is well-documented, and a similar northward migration of golden eagles that winter in southern regions has been recently discovered. The adoption of the administrative flyways as EMUs better aligns with seasonal movement patterns of both species and better addresses geographic patterns of risk given those seasonal movement patterns.

We are aware of preliminary data on golden eagles tracked with satellite telemetry that indicate a flyway configuration for EMUs may not capture movement patterns of resident golden eagles as well as finer-scale landscape mapping systems. The results of that study were intended to be completed and included in the Status Report, but the work was not completed in time. In its place the Service conducted an analysis of banding data, and those results are reported in the Status Report. Neither analysis is ideal because the distribution of deployed bands and satellite tags has not been random. While the banding data have the advantage of much larger sample sizes, the satellite-tag data have the advantage of much more precise tracking of a smaller number of individuals. The Service will consider the information from the satellite telemetry study in future re-assessments of eagle status and management objectives.

In the approach we are now adopting, we will use the flyways as the EMUs for both species—with some modifications. The banding data recovery records indicate that banded eagles of both species were recovered more frequently in the same flyway EMU than in the same 2009 EMU. Given the relatively small size of the eastern golden eagle population and uncertainty about the distribution of that population across the two eastern flyways, we are combining the Mississippi and Atlantic Flyways into one management unit for golden eagles. For bald eagles, data indicate the Pacific Flyway should be split into three management units: Alaska, Pacific flyway north of 40 degrees N latitude to the Canadian border, and Pacific flyway south of 40 degrees N latitude to the Mexican border. See the PEIS for maps of the current and proposed EMUs. To monitor eagle populations in the future and assess whether different take thresholds are appropriate, our plan, assuming we have sufficient appropriated funding, is to conduct surveys on a 6-year rotation: One set of paired summer–winter golden eagle surveys in the first and second and fourth and fifth years of each assessment period, and to conduct bald eagle surveys in years three and six.

EMU take limits are increased accordingly because the flyway management units are fewer and larger than the EMUs currently in use (for bald eagles; golden eagle take limits would be zero in all management units, unless offset). Each flyway unit covers several current EMUs. In some ways, increasing the EMU size could be less protective of eagle populations at more local scales. However, any potential decreased protection of local eagle populations caused by increasing the size of the EMUs is more than compensated for by two provisions designed to increase protection of eagles at more local scales. First, as noted earlier, we modify the preservation standard of the Eagle Act to include the goal of maintaining the persistence of local populations throughout the geographic range of both species, and codify the new definition in the regulations at 50 CFR 22.3. The definition reads: ''*Compatible with the preservation of the bald eagle or the golden eagle* means consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species.''

These revised regulations also enhance protection of eagles at the local scale by incorporating a local area population (LAP) cumulative effects analysis into the permit issuance criteria. The LAP analysis, which is detailed in Appendix F of the Eagle Conservation Plan Guidance, Module 1—Land-based Wind Energy (ECPG) (USFWS 2013), involves compiling information on permitted anthropogenic mortality of eagles within a specified distance (derived from each eagle species' natal dispersal distance) of the permitted activities' boundary. If permitted eagle take exceeds 1% of the estimated population size of either species within the LAP area, additional take is a concern. If take exceeds 5% of the estimated population size within the LAP area, additional take is considered inadvisable unless the permitted activity will actually result in a lowering of take levels (*e.g.,* permitting a repowered wind project that, in its repowered form, will take fewer eagles than before repowering).

We derive the size of the LAP by multiplying the estimated eagle density at the eagle management unit scale, as set in the 2009 Final Environmental Assessment on the Eagle Take Rule, by the size of the LAP area. We acknowledge that this approach is somewhat simplistic for at least two reasons. First, as described previously, the eagle density estimates come from nesting or late-summer population surveys and do not account for seasonal movements of eagles that occur through migration and dispersal. Second, this approach assumes that eagle density is uniform across the EMU, which is not the case. In most cases, the first simplification leads to an underestimate of true density, particularly in core wintering areas during the non-breeding months, and as such serves as an added buffer against overharvest of local nesting eagles. Assuming uniform density leads to greater relative protection of areas with higher than average eagle density within an EMU, and less relative protection in areas of lower density. Ideally, over time and with better information on resource selection and factors accounting for

variation in density, as well as improved knowledge of seasonal changes in eagle density and population-specific movement patterns, the LAP analysis can be improved to more realistically account for the true LAP impacted by projects under consideration. For now, however, LAP take thresholds allow the Service to authorize limited take of eagles while favoring eagle conservation in the face of the uncertainty.

Since publication of the ECPG, the Service has updated natal dispersal distances (the linear distance between a bird's location of origin and its first breeding or potential breeding location) for both eagle species that are used to calculate LAPs. Those distances are currently 86 miles for bald eagles and 109 miles for golden eagles. These could change in the future if additional data indicate the need for adjustment. The LAP cumulative effects analysis is described in more detail in the Status Report.

Prior to this rulemaking, the LAP cumulative effects analysis has been used as guidance. Under these revised regulations, the LAP analysis is required as part of our review of each permit application. In order to issue a permit, we must find that cumulative authorized take does not exceed 5% of the LAP, or we must demonstrate why allowing take to exceed that limit is still compatible with the preservation of eagles. One situation where we may issue a permit that would result in authorized take above 5% of the LAP is if a project is already in operation and the permit conditions would result in a reduction of take, or if compensatory mitigation offsets impacts to eagles within the LAP. Unpermitted levels of eagle take within the LAP, if known, would also be considered in assessing the potential effects of the permit on the LAP.

Incorporation of the LAP 5% limit on authorized take into the regulations will facilitate individual permit decisions; instead of needing to evaluate under an independent NEPA analysis each project in the context of other authorized take within the LAP, along with the level of unauthorized take—which is difficult or impossible to precisely determine—we have already analyzed the effects of authorizing take of up to 5% of the LAP in the PEIS for these regulations, along with a qualitative analysis of unauthorized take, and determined that it is compatible with the preservation of eagles.

The primary aim of requiring this LAP analysis is to prevent significant declines in, or extirpation of, local nesting populations. However, there is also increasing evidence of a strong tendency in both species of eagle to return to non-breeding areas (wintering areas, migration routes, and staging areas) (McIntyre et al. 2008; Mojica et al. 2008). The LAP take limits also provide protection from permitting cumulatively high levels of take of eagles that winter or migrate through the LAP area.

The take authorized within the LAP take limits is in addition to an average background rate of anthropogenic mortality (ongoing human-caused eagle mortality, most of which is not currently permitted.) For golden eagles, background anthropogenic mortality is about 10% (see the Status Report). Thus, total anthropogenic mortality for a LAP experiencing the maximum permitted take rate of 5% averages about 15%. We do not have similar mortality information for bald eagles. While we do not know exactly what level of unauthorized anthropogenic take of bald eagles is occurring, we are reasonably certain that the take we authorize for bald eagles will also be over and above a level of preexisting ongoing unpermitted take. The level of ongoing unauthorized take of bald eagles may be similar to that of golden eagles; however, bald eagles have a maximum potential growth rate about twice that of golden eagles and thus are more resilient to take. As part of the LAP analysis for both species, Service biologists would consider any available information on unpermitted take occurring within the LAP area. While evidence of excessive unpermitted take does not necessarily preclude the Service from issuing a permit, it would be taken into consideration in evaluating whether to issue the permit and is likely to entail additional environmental analysis to determine whether issuance of the permit is compatible with the preservation of eagles.

The Service considered developing specific eagle population size goals (other than the 2009 baseline) for each EMU and then using those targets to inform permit decisions within the EMUs. However, that approach is not feasible at this time given the technical and logistical complexities of working with state agencies and tribes to set population objectives at this scale within the timeframe of this action, and the lack of fine-scale information on eagle populations that would be necessary.

For disturbance to have the potential of a population effect, it has to result in a loss of potential productivity. In 2009, the Service used the EMU-specific mean number of young fledged per occupied nesting territory for each species per year as the expected loss under nest disturbance permits for each instance of nest disturbance. We use the same approach in this revision, but with updated take values based on the new productivity information for each eagle species (see the Status Report).

Nonpurposeful (Incidental) Take Permits (50 CFR 22.26)

We are changing the name of what we have been calling ''nonpurposeful take permits'' to ''incidental take permits.'' Incidental take is what § 22.26 permits authorize. We originally called them ''nonpurposeful take'' permits in order to avoid confusion with incidental take permits issued under the ESA for endangered and threatened species. However, the term ''nonpurposeful'' also caused confusion because it is not a commonly used word. The meaning of ''incidental'' is better understood. Moreover, now that this permit system is relatively well established, the potential for confusion with the ESA incidental take permit system is much reduced. Because ''nonpurposeful take'' and ''incidental take'' mean the same thing, the change in nomenclature does not in any way affect the circumstances and manner in which these permits will be issued.

In these revised regulations, the types of incidental take permits we can issue under § 22.26 are reduced from two to one. There will no longer be separate categories for standard and programmatic permits. Having two separate categories has sometimes led to confusion because it is not always possible to distinguish between what should be authorized under a programmatic versus a standard permit. Also, the term ''programmatic'' in the sense we have been using it was sometimes misunderstood because it differs from how ''programmatic'' has been typically used in the regulatory arena. ''Programmatic'' in the more traditional sense means ''following or relating to a plan or program.'' While we anticipate sometimes issuing permits to cover the effects of multiple activities within a given program (such as a military installation), our experience so far is that the more complex requests for permits we have had to date have been for single, long-term activities that have the potential to periodically take one or more eagles over the life of the project. To reduce confusion, we eliminate the distinction between standard and programmatic permits. All § 22.26 permits are now simply ''eagle incidental take permits'' or ''incidental take permits.''

Under the 2009 regulations, programmatic permits were contingent on implementation of advanced conservation practices (ACPs) developed in coordination with the Service. ACPs are defined as ''scientifically supportable measures approved by the Service that represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.'' In contrast, we have required that applicants for standard permits under the current regulations reduce potential take to a level where it is ''*practicably* unavoidable'' [emphasis added]. Thus, programmatic permit applicants were subject to a higher standard, at least theoretically. In reality, the term ''unavoidable'' is more ambiguous than it seems in theory; there is no clear distinction in practice between ''practicably unavoidable'' and ''unavoidable.'' Thus the revised regulations apply the ''practicability standard'' to all § 22.26 permits.

We are revising the definition of ''practicable'' by adopting the definition from the Service's proposed mitigation policy (*see* 81 FR 12380; Mar. 8, 2016), slightly modified for specific application to eagle permits. The new definition reads: ''*Practicable* means available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value to eagles and the activity's overall purpose, scope, and scale.'' The revised definition captures the essential elements of the old definition, while promoting a consistent approach to how the Service applies compensatory mitigation requirements across all programs.

Because the concept of ACPs is based on reducing take to the point where it is unavoidable—versus ''practicably unavoidable''—and applied to the category of programmatic permits, the requirement for ACPs is removed from the regulations. As discussed above, all permittees would be required to avoid and minimize impacts to eagles to the maximum degree practicable. Although the ACP requirement no longer applies, the Service will require potential permittees to implement all practicable best management practices and other measures that are reasonably likely to reduce eagle take. Permit applicants that cannot reduce or compensate for take to levels that are compatible with eagle preservation will not qualify for a permit.

We believe a 5-year maximum permit term for permits is unnecessarily burdensome for entities engaged in long-term actions that have the potential to incidentally take bald or golden eagles over the lifetime of the activity. The 5-year maximum permit duration has had the unintended effect of discouraging proponents of long-term activities from applying for permits, despite the risk of violating the statute. With longer-term permits, the Service has the ability to build more effective adaptive management measures into the permit conditions. This approach will provide a degree of certainty to project proponents because they will have a greater understanding of what measures may be required to remain compliant with the terms and conditions of their permits in the future. This increased level of certainty allows companies to plan accordingly by allocating resources so they are available if needed to implement additional conservation measures to benefit eagles and maintain their permit coverage.

Although killing, injuring, and other forms of take of eagles are illegal without a permit, the Service cannot require any entity to apply for an eagle take permit (except under legal settlement agreements). Some project proponents build and operate without eagle take permits even in areas where they are likely to take eagles. When that occurs, the opportunity to apply avoidance, minimization, and other mitigation measures is lost. We believe that permitting long-term activities that are likely to incidentally take eagles, including working with project proponents to minimize the impacts and secure compensatory mitigation, will enhance eagle conservation in contrast to project proponents avoiding the permitting process altogether because they perceive the process as overly onerous.

Under the revised regulations, the Service will evaluate each long-term permit at no more than 5-year intervals. These evaluations will reassess fatality rates, effectiveness of measures to reduce take, the appropriate level of compensatory mitigation, and eagle population status. Long-term permits are required to include adaptive management provisions that provide for additional or changed mitigation measures under specified conditions, for example, under increasing levels of eagle take. Provided permittees are in compliance with their permit, including adaptive management measures and take levels, 5-year reviews will primarily consist of updating take estimates and related compensatory mitigation for the next 5 years. Conversely, the 5-year review provides an opportunity for the Service to amend the permit to reduce or eliminate conservation measures or other permit conditions that prove to be ineffective or unnecessary.

Under the proposed regulations, a long-term permittee may also have been required to undertake additional, practicable conservation measures not spelled out in the adaptive management permit conditions, even if the permittee is in compliance with the terms of the permit, if such measures were reasonably likely to reduce risk to eagles based on the best scientific information available. However, these final regulations limit such additional conservation measures to when authorized take levels are exceeded in a manner or to a degree not addressed in the adaptive management conditions of the permit. Based on public comment, the proposed provision appeared likely to disincentivize project proponents from seeking permits. Rather, for a permittee in compliance with permit terms and conditions, conservation and mitigation measures beyond the terms of a permit are voluntary. Take estimates and compensatory mitigation requirements would be adjusted if such measures were implemented. Permit suspension and revocation procedures will remain available for extreme cases if new measures sufficient to meet the preservation standard cannot be negotiated with the permit holder.

The revised regulations require applicants and permittees to use Service-approved protocols for conducting pre-application surveys, fatality predictions, and monitoring under permits, unless waived by the Service. The regulations provide that, if the Service has, through rulemaking procedures, officially issued or endorsed survey, modeling, or other data quality standards for the activity, those are the standards and protocols that must be used (unless the Service waives the requirement for that applicant). Applicants engaged in other activities for which the Service has not adopted official protocols must coordinate with the Service to develop project-specific monitoring and survey protocols. The requirement to use Service-approved protocols will result in more efficient permitting decisions by the Service. Submission of inadequate data, or data gathered using methods the Service cannot verify to be sound, has resulted in significant extra work and time from our staff to assess wind energy project impacts. Specific application of these requirements to wind energy facilities is described below under Survey Requirements for Incidental Take Permits for Wind Energy Facilities.

While we have not officially issued fatality prediction models or pre-application monitoring protocols for activities other than wind energy generation, or finalized post-permitting monitoring protocols for any single activity, the Service has enough information about eagle behaviors and movements to recommend and approve monitoring protocols for activities other than wind energy generation on a project-specific basis during the permit application process. We encourage project proponents to coordinate with the Service as early as possible in the project planning process to ensure they are aware of any protocols we have recommended and that they use them appropriately. Our goal is to establish additional formalized monitoring protocols for industries other than wind energy in the future.

Survey Requirements for Incidental Take Permits for Wind Energy Facilities

Many of the comments on the proposed rule focused on the subset of prospective incidental take permits that relate to wind energy. These comments were helpful, yet indicated a general lack of understanding of how the Service's proposed approach to manage incidental take at wind facilities under an adaptive management framework is intended to work. For this reason, and because the permitting approach developed for wind facilities provides an example of how the Service intends to implement incidental take permitting for other activities, we have expanded our description of the overall approach here in the preamble to the rule. The Service's emphasis on eagle incidental take permits for wind facilities reflects Administration priorities for expanded wind energy development and a desire to minimize the impacts of that growth on eagles; it does not reflect a belief that wind development poses a disproportionate risk compared to other activities that may incidentally take eagles, nor does it reflect any greater availability of permits to wind companies versus other types of industries that may need eagle incidental take permits.

Preconstruction Survey Standards for Wind Energy Facilities

In the proposed rule, the Service proposed to incorporate by reference Appendices C and D of the ECPG as standards for collection and analysis of data to support eagle incidental take permit applications for wind facilities, and we indicated our intent to develop similar standards for other activities in the future. This proposal was not supported by many commenters for a range of reasons, but primarily because of a perceived lack of demonstrated scientific credibility in the methods and tools. However, the Service does not agree that abandoning the concept of standardized data collection for permits is a tenable way forward. First, one major objective of this rulemaking is to expedite the permitting process, and our experience has been that the negotiation over and use of disparate methods for initial data collection contribute greatly to the time required to develop and process a permit application. Second, as we explain below, the Service intends to use formal adaptive management to improve the scientific rigor and the performance of the impact-prediction tools used in the eagle permitting program. The Service's adaptive management process requires a minimum level of standardization in the initial input data where those standards exist, and this will result in each permit contributing to and improving the scientific credibility of the permitting process.

For now, the only activity for which we have such standards is wind energy generation. Those standards have been through two rounds of notice and public comment, as well as two rounds of scientific peer review. Rather than incorporate the relevant appendices from the ECPG into the rule by reference, in response to the comments received the Service has instead decided to include minimal pre-construction survey standards for eagle incidental take permits for wind facilities directly in the rule itself. The rule language was developed from the specific recommendations in Appendix C of the ECPG, and represents the minimum level of information and the least sophistication in sampling design that will be acceptable for the Service to evaluate and decide whether to issue an eagle take permit for a wind facility. These standards will ensure that representative eagle exposure data are available with which to predict eagle fatalities consistent with the Service's adaptive management program. The rule allows for deviations from the minimum standards, but only if the applicant consults with the Service early in the project-development process. In most cases both the Service and permit applicant will benefit by using this exception to design surveys that are designed to accommodate variation in eagle abundance over both space and time.

The precision, consistency, and utility of data from point count surveys for eagles can be much improved by incorporating some basic, common-sense sideboards into the survey design as discussed in the ECPG (Appendix C). These include: (1) Conducting eagle surveys and small bird surveys separately, to avoid overlooking large birds while searching at a much smaller scale for small songbirds; (2) using trained observers that are capable of accurate bird identification and distance estimation; (3) distributing surveys across daylight hours (*e.g.,* morning: Sunrise to 1100 hours; midday: 1101–1600 hours; evening: 1601 hours to sunset), and by designing surveys to more intensively cover the midday period in areas where eagle flight is more likely at that time of day; and (4) conducting surveys under all weather conditions except when visibility is less than 800 meters (m) horizontally and 200 m vertically.

Adaptive Management and Wind Energy Collision Risk Modeling

An overarching issue with eagle incidental take permits is uncertainty. For wind facilities, there is considerable uncertainty regarding the risk of turbines to eagles, factors associated with that risk, and whether there are tangible ways to reduce the risk. Moreover, in 2009, when the Service established the incidental eagle take regulations, there was no scientifically accepted approach for quantitatively estimating the probability of eagle take at individual wind facilities. This quantitative probability estimation is necessary for the Service to establish a take limit for each permit and to ensure that EMU take limits are not exceeded, or if they are exceeded, that appropriate compensatory mitigation is accomplished. The Service has adopted two key principles for eagle incidental take permitting at wind facilities to address this uncertainty: (1) Use of formal adaptive management; and (2) being risk-averse at the outset with respect to estimating impacts on eagles.

The Department of the Interior has a long history of approaching decisions in situations fraught with uncertainty using adaptive management (Williams et al. 2009). Adaptive management is a process of adaptive learning, whereby: (1) Predictions are made regarding anticipated effects of an activity; (2) data regarding the outcomes of the activity are collected; (3) the predictions are updated to reflect the actual outcomes of the activity; and (4) the updated predictions are used to change the activity, either in the future at the same site or at other places where the same activity is being contemplated. The Service has described its adaptive management framework for eagle incidental take permits for wind energy facilities in the ECPG (Appendix A)

(U.S. Fish and Wildlife Service 2013), and the overall framework is intended to account for uncertainty in the effects of wind facility siting, design, and operations on eagles. More broadly than for just wind energy, the adaptive management process is also intended to address uncertainty in compensatory mitigation and the effects of take rates on eagles. With regard to managing risk, the survey, monitoring, and information collection standards for eagle incidental take permits are all designed to provide data that allow for the quantification of uncertainty, primarily by providing estimates in the form of probability distributions. This allows the Service to explicitly describe its risk tolerance (*i.e.,* being protective of eagles or protective of interests that might take eagles) for each aspect of the permitting process. Together, the adaptive management and risk management processes function as a means for describing how the risk, in the form of uncertainty, is shared between the protected resource and the regulated community.

The part of the Service's adaptive management process for eagle incidental take permits that has generated the greatest debate is the approach and model used to predict eagle fatalities at wind facilities. For that reason, and because this is an excellent example of the Service's philosophy regarding the application of adaptive management to eagle permitting, we describe the fatality prediction process here in some detail. The Service's baseline fatality prediction model, also referred to as a collision risk model (CRM), is thoroughly described in Appendix D of the ECPG and in New, *et al.* (2015). The key points are that the CRM uses: (1) A project-specific estimate of eagle exposure; (2) a project-specific estimate of the amount of hazardous area and time that will be created by the project; and (3) an estimate of the probability that an exposed eagle that enters the hazardous area will be struck and injured or killed by a turbine blade; to generate (4) an annual eagle fatality estimate in the form of a probability distribution. The model assumes a predictable relationship between eagle exposure, hazardous area, and the risk of fatalities—a relationship that existing literature, some commenters, and the Service agree is not straightforward. The ECPG identifies 11 general categories of covariates (variables that help explain variation in the parameter of interest) that the Service believes may affect eagle collision probability to some degree. However, these are not presently incorporated into the CRM because, as pointed out by peer reviewers of the draft ECPG, scientific support for the role of these factors in collision risk is speculative and not quantifiable at this time. Furthermore, the effects of these factors may be varied across locations.

The CRM uses Bayesian statistics to formally combine existing (prior) data with project-specific data to determine eagle exposure and collision probability (assuming the number and size of turbines to be built, and thus hazardous area, are known). The Service requires eagle incidental take permit applicants to conduct pre-construction eagle use surveys within the footprint of the planned wind facility to generate project-specific data on pre-construction eagle exposure. These pre-construction survey data are formally combined with prior information on eagle exposure nationally to generate a probability distribution for eagle use for the specific project area. In the case of collision probability, however, there are no project-specific data to combine with the prior data until after the project has operated for several years; thus only the prior information is available to be used for the initial collision probability estimate. The Service uses prior information on collision probability from the only wind facilities that had publicly available data on eagle use and post-construction fatalities at the time the ECPG was written in 2013. These post-construction data came from four facilities, did not include information for bald eagles, and some data were from older-style wind turbines that might have different collision probabilities than modern turbines. However, these potential data deficiencies only affect the initial eagle fatality estimates at permitted wind facilities. This is because the Service's adaptive management approach calls for formally combining the prior information with standardized data collected on actual eagle fatalities after the facility becomes operational. These updates would occur no less frequently than once every 5 years at each facility. Such updates will naturally correct for any bias in the initial ''collision-prior-based'' fatality estimate, so that the fatality estimates over most of the life of a wind facility will be heavily weighted towards actual fatality data from the site. Moreover, because the post-construction fatality information will be collected under standardized protocols required by the terms and conditions of each permit, the data can be combined with data from other permitted wind facilities to update and improve the collision probability prior for the national CRM. Thus, the Service intends to improve the predictive accuracy of the CRM both at the individual project level and nationally through standardized use as a formal part of its adaptive management process. We could not achieve improved accuracy of the CRM without standardized use of these protocols.

Uncertainty in the project-specific fatality estimates comes from both the prior and project-specific data for eagle exposure, and, initially, from the prior information on collision probability. The Service has made the decision to manage the quantified uncertainty in the CRM estimates in a manner that reduces the risk of underestimating eagle fatalities at wind facilities. The Service views this as important both to ensure the risk to eagles is not underrated, but also to minimize the chance that a permittee will illegally exceed his or her authorized eagle take limit. The median (50th quantile) fatality rate of the CRM-generated probability distribution is the point on the distribution at which there is an equal risk of under- and overestimating eagle fatalities. The Service uses the 80th quantile of the CRM fatality probability distribution to determine the take limit for incidental take permits, which shifts the risk to a 20% chance of underestimating eagle take. Improvements in the precision of the CRM estimates through adaptive management, both at the project level and nationally, should decrease uncertainty and thus shrink the magnitude of the difference between the median fatality rate and the permitted take limit over time. For now, however, the Service acknowledges that its fatality estimates for wind facilities are both higher than what is expected and higher than what is likely to be observed, and that this bias is intentional.

The Service's adaptive management approach for the incidental eagle take permits necessitates the collection of standardized pre- and post-construction data and the use of the CRM, or a model much like it, to generate and update fatality estimates. For this reason, in the proposed rule the Service contemplated codifying its current guidance regarding data collection and fatality predictions in the regulations. There was considerable opposition to this among commenters, with most opponents citing the need to remain flexible so that new information could be incorporated rapidly into the permitting process. In response to these comments, the Service has modified its proposal for the final rule in two substantive ways. First, the final regulations do not incorporate by reference Appendices C and D of the ECPG. However, because the adaptive

management process cannot function credibly without standardized pre-construction site-specific eagle exposure data, the Service has instead incorporated minimum standards for such data directly into the final rule, subject to waiver under exceptional circumstances (see above discussion on pre-construction survey protocols for wind energy facilities). Second, the Service will not require permit applicants to use the CRM to estimate eagle fatalities for their permit applications. Instead, project proponents can use any credible, scientifically peer-reviewed model to generate eagle fatality and associated uncertainty estimates for their permit applications. The Service will then use the standardized project data supplied by the permit applicant and the Service's CRM to generate a predicted number of fatalities for each incidental eagle take permit for a wind facility, and the 80th quantile of the CRM estimate will be the take limit for the permit except under exceptional circumstance. The Service will treat any alternative models used by the permit applicant as candidate models whose performance may be compared formally to that of the CRM as part of the adaptive management process. Any alternative models that, over time, demonstrate better or comparable predictive performance to the CRM could eventually be formally incorporated into the adaptive management process for estimating permit take limits.

The Service intends the adaptive management process to eventually provide: (1) A better understanding of, and ability to quantify, factors associated with eagle collision risk; (2) a more accurate estimate of collision probability for bald eagles, and (3) data suitable for updating the original golden eagle collision and exposure priors (the exposure prior is the average eagle exposure value based on all available previously existing information) for the CRM. However, to date, so few incidental take permits have been issued at wind facilities that no progress has been made in these areas. In particular, the lack of progress towards updating the collision probability prior has generated opposition to the entire eagle incidental take permit adaptive management process. Wind facility operators and their consultants believe the CRM with the original collision prior (the estimated probability, based on all available previously existing information, that an eagle that flies into the hazardous area around wind turbine will collide with a blade) produces fatality estimates that are too large, and in cases where compensatory mitigation is required (*e.g.,* for take of golden eagles), the mitigation requirements exceed what is necessary. This concern is offset somewhat by the Service's policy that excess mitigation accomplished in the first 5 years of a wind project's operations will be credited towards future year obligations (which, as described briefly above and in more detail below, will be based on CRM estimates that are adjusted after no more than 5 years of operation to include a site-specific collision probability). However, this policy has not appreciably reduced concern about use of the CRM, as expressed by many commenters on the proposed rule. To address this particular concern, within 18 months the Service intends to update the collision prior for the CRM using publicly available data collected at wind facilities operating without incidental eagle take permits. The Service believes that these types of data can be appropriate for such an update, provided the data and protocols under which they were collected can be verified and shown to be appropriate, and that the wind facilities that make their data available are sufficiently representative of a cross section of wind facilities in operation today. The Service is already engaged in a process to update priors and other data for modeling eagle take and plans to revise the CRM and Appendix D of the ECPG through a public process. As part of this process the Service will also consider ways of expediting improvements in the CRM relative to incorporating other covariates associated with eagle risk and a species-specific prior collision probability for bald eagles.

As stated above, the Service intends to maintain its policy of disproportionately sharing risk to avoid underestimating eagle take at individual wind facilities. We believe this is appropriate because the consequences of underestimating eagle take are far greater than the consequences of overestimating take, and not just because of unintended consequences on eagle populations. Avoiding underestimating eagle take significantly reduces uncertainty for permittees. For example, if eagle take at the individual permit level was consistently underestimated, many permittees would exceed their permitted take limits, necessitating permit amendments, additional costly and unplanned after-the-fact compensatory mitigation actions, and possible enforcement with associated fines. For bald eagles with positive EMU take thresholds, consistently underestimating take could lead to permitted take exceeding the EMU take limit, which would necessitate retroactively requiring permittees that initially had no compensatory mitigation requirements to implement mitigation after the fact. Further, if LAP take limits were unexpectedly exceeded, NEPA compliance for permits overlapping the affected LAP would have to be reviewed. Although these consequences are most likely if there is a systematic bias in the fatality estimates themselves, even with an unbiased estimator, some of these consequences could be expected with 50% of permits if the Service were to use the median fatality rate as the take limit for individual permits. In contrast, if permitted take is set at a higher percentile of the fatality prediction, the primary consequences are that the permittee is likely to exceed actual compensatory mitigation requirements over the first 5 years of operation (if compensatory mitigation is required). Additionally, the Service would likely routinely debit some take from the EMU and LAP take limits unnecessarily, thereby underestimating available take when considering new permit requests. Both of these issues are at least partially remedied when initial take estimates for projects are adjusted with project-specific fatality data after the first 5 years of operation. At that time, permittees receive credit for any excess compensatory mitigation they have achieved, as described above, and the debits from the EMU and LAP take limits are recalibrated to reflect the updated expectations for future take. These actions are comparatively simple to implement, and do not have the same kind of far-reaching consequences as with underestimates.

Monitoring and Mitigation

Most permittees will be required to monitor eagle take to assess whether and how much take occurs under the permit. Reported take will be based on surveying and monitoring protocols required by the permit. For permits for disturbance, such monitoring is likely to consist of regular visits to the proximity of the nest site or other important eagle-use area where disturbance is likely to occur to observe whether eagles are using the area.

We agree with the large number of commenters that urged the Service to require third-party monitoring for some permits. As we stated in the preamble to the proposed regulations, we were considering that option. These final regulations require that, for all permits with durations longer than 5 years, monitoring must be conducted by qualified, independent entities report

directly to the Service. In the case of permits of 5-year durations or shorter, such third-party monitoring may be required on a case-by-case basis. We do not believe there will be significant additional costs imposed by the requirement for third-party monitoring. Most companies already rely on and pay for consultants to conduct project monitoring, presumably because it is more cost-effective than supporting those activities ''in-house.''

We expect that most long-term permits will authorize incidental lethal take rather than disturbance. Those conducting monitoring for permits that authorize eagle mortalities will be required to search for injured and killed eagles and to estimate total take using methods approved by the Service. Permittees will be required to document and report all eagles that are found, the methodologies employed to search for them (including whether or not they were detected as part of a formal survey methodology), and the methods used to estimate the probability of detection.

The Service defines ''mitigation'' to sequentially include: Avoidance, minimization, rectification, reduction over time, and compensation for negative impacts. Under Departmental policy (600 DM 6), ''compensatory mitigation'' means ''to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (*see* 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions.'' The 2009 eagle regulations lack specificity with regard to when compensatory mitigation will be required, and the preamble discussion of compensatory mitigation was somewhat inconsistent. In reference to nonpurposeful take permits, the preamble to the 2009 regulations contained the following language: ''additional compensatory mitigation will be required only (1) for programmatic take and other multiple take authorizations; (2) for disturbance associated with the permanent loss of a breeding territory or important traditional communal roost site; or (3) as necessary to offset impacts to the local area population. Because permitted take limits are population-based, we have already determined before issuing each individual take permit that the population can withstand that level of take. Therefore, compensatory mitigation for one-time, individual take permits will not typically be necessary for the preservation of eagles'' (74 FR 46836, p. 46844). Regarding the § 22.27 nest take permits, we indicated in the preamble that we would require compensatory mitigation for all permits except those issued for safety emergencies (74 FR 46836, p. 46845).

The Service also addressed compensatory mitigation in the 2009 FEA, which contained the following language: ''For most individual take permits resulting in short-term disturbance, the Service will not require compensatory mitigation. The population-based permitting the Service will propose is based on the level of take that a population can withstand. Therefore, compensatory mitigation for individual permits is not necessary for the preservation of eagles. However, the Service will advocate compensatory mitigation in the cases of nest removal, disturbance or [take resulting in mortality] that will likely incur take over several seasons, result in permanent abandonment of more than a single breeding territory, have large-scale impacts, occur at multiple locations, or otherwise contribute to cumulative negative effects'' (USFWS, 2009).

Because the 2009 regulations did not incorporate specific compensatory mitigation provisions, the Service has required compensatory mitigation on a case-by-case basis somewhat inconsistently, particularly for bald eagles, which has at times resulted in differing treatment of, and uncertainty for, permit applicants. Accordingly, this rule includes standardized requirements for compensatory mitigation. In addition to the mitigation requirements set out in this rule, the Service will implement these regulations in a manner consistent with Service, Departmental, and Presidential mitigation policies.

These regulations require compensatory mitigation for any permit authorizing take that would exceed authorized take limits. Compensatory mitigation for this purpose must demonstrate it offsets authorized take by reducing another ongoing form of mortality by an equal or greater amount than the unavoidable mortality, or increasing the eagle population by an equal or greater amount.

Since 2009, take limits for golden eagles have been set at zero throughout the United States. Accordingly, all permits for golden eagle take would exceed the take limits, and so must incorporate compensatory mitigation in order to authorize that take. A permittee would have to compensate for authorized take within the same EMU (except that we would allow for compensatory mitigation of take of Alaskan golden eagles throughout the migration and wintering range in the interior western United States and northern Mexico).

The best available information indicates that ongoing levels of human-caused mortality of golden eagles likely exceed sustainable take rates, potentially significantly. This means that the golden eagle population is likely in decline and not meeting the Service's preservation goal of a stable or increasing breeding population. As a result, compensatory mitigation for any authorized take of golden eagles that exceeds take thresholds will be designed to offset the authorized take at a 1.2 to 1 mitigation ratio to further an outcome consistent with the preservation of golden eagles as the result of the permit. We believe this baseline mitigation ratio appropriately balances meeting our obligations under the Eagle Act with what is reasonable, fair, and practicable to permittees. Based on the uncertainty in the effectiveness of a particular compensatory mitigation practice and other factors common to mitigation programs, we may require further adjustments to mitigation ratios.

To be compatible with the preservation of eagles, take that would compromise the persistence of local populations of eagles may also require compensatory mitigation. The regulations account for this by generally requiring compensatory mitigation for cumulative authorized take exceeding 5% of the LAP to ensure our eagle preservation standard is being met. An exception would be when the EMU take limit is not exceeded (*i.e.,* currently the case for bald eagles in all EMUs), the permitted take is already occurring, and the permit conditions would result in a reduction of take.

We may also require compensatory mitigation when there is an unusually high level of unauthorized eagle mortality in the LAP (for example, when the Service has information indicating that unauthorized take exceeds 10% of the LAP). We have no data to indicate that ongoing unauthorized take of bald eagles is less than that of golden eagles, and intend to apply the LAP analysis and assessment of any known ongoing unauthorized take to bald eagles as well as golden eagles, as we have been doing while the LAP analysis remains guidance. Although exceeding 5% permitted take of the LAP will have significantly less dramatic effects to local bald eagle populations because of the improved status of bald eagles, states, tribes, and localities have communicated their interest in seeing regulatory safeguards to protect local bald eagles as well as golden eagles. In

the near future, it is unlikely that cumulative authorized take of local area populations of bald eagles will exceed 5% anywhere in the country. The Service will continue to collect data to refine our understanding of cumulative mortality on both eagle species and may adjust take rates in the future. We received comments asserting that it is unfair for the Service to impose a greater than one to one compensatory mitigation ratio for golden eagle take permits because people seeking to comply with the regulations should not be required to address impacts caused by other human activities for which no one is being held accountable. Similar concerns were expressed regarding the consideration of unauthorized take within the LAP when making permitting decisions. Additional commenters asserted that the Service does not adequately enforce the Eagle Act. In response to all of those comments, we wish to clarify that, outside of its permitting programs, the Service is addressing unauthorized take of bald eagles and golden eagles through a variety of means. The Service's Office of Law Enforcement expends considerable time and resources protecting both species. Because golden eagles in particular are experiencing significant amounts of human caused mortality, they are receiving high levels of investigative effort throughout the western United States. These investigations have covered the unlawful killing and trafficking of eagles and their parts, electrocutions of eagles from electrical distribution infrastructure, intentional or incidental poisoning of eagles, eagle mortality due to wind turbine strikes, eagle nest destruction, and a host of other human activities that result in eagle deaths. Investigation and prosecution of these crimes can be very time intensive, with some investigations requiring many hundreds of hours to complete.

Many of these investigations require thorough review of historical information on the activity causing the mortality, investigation of the responsible party's efforts to avoid the eagle deaths, and presentation of investigative results to the Department of Justice (DOJ) for potential prosecution. This is often accomplished through subpoenas, search warrants, field inspections (often in remote areas), evidence collection, interviews, and report writing. For activities involving the intentional killing and trafficking of eagles, the investigative techniques can also include the use of undercover operations to gain evidence and better document the extent of the unlawful activity. In short, the Service's Office of Law Enforcement places a high priority on protecting bald and golden eagles, and expends considerable effort on education, outreach, and investigations to fulfill this responsibility.

This final rule establishes standards applicable to all compensatory mitigation in accordance with principles and standards set forth in Service and Departmental and Executive Branch policy. Compensatory mitigation is to be used to offset remaining impacts after the application of all practicable avoidance and minimization measures. Compensatory mitigation must be sited within the same eagle management unit where the permitted take will occur unless the Service has reliable data showing that the population affected by the take includes individuals that are reasonably likely to use another EMU during part of their seasonal migration. Compensatory mitigation must be based on the best available science and must use rigorous compliance and effectiveness monitoring and evaluation to make certain that mitigation measures achieve their intended outcomes or that necessary changes are implemented to achieve them.

Compensatory mitigation must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through other legal authorities or contractual agreements. A compensatory mitigation measure is ''additional'' when the benefits of the measure improve upon the baseline conditions of the impacted eagle species in a manner that is demonstrably new and would not have occurred without the required compensatory mitigation measure. Voluntary actions taken to benefit eagles in anticipation of and prior to issuance of an eagle take permit may be credited towards compensatory mitigation requirements. Such actions must meet all mitigation standards set forth in the rule for compensatory mitigation. Applicants must provide clear evidence that the voluntary action was undertaken to fulfill compensatory mitigation requirements under this rule. The Service will determine whether and how much to credit such actions. Potential applicants intending to take voluntary conservation actions prior to permit application are encouraged to seek technical assistance from the Service.

Compensatory mitigation must be durable and, at a minimum, maintain its intended purpose for as long as the impacts of the authorized take persist. The Service will require that implementation assurances, including legal, contractual, and financial assurances, be in place when necessary to assure the development, maintenance, and long-term viability of the mitigation measure. Compensatory mitigation must also include mechanisms to account for and address uncertainty and risk of failure of a compensatory mitigation measure. This could be in the form of greater mitigation ratios, the establishment of buffers or reserve accounts, or other mechanisms.

Compensatory mitigation may include conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements. In approving compensatory mitigation mechanisms and actions, the Service will ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms. The Service prefers that compensatory mitigation is conducted prior to when the impacts of the action occur. Where compensatory mitigation is required, the applicant must commit to the funding and method that will be used prior to or upon permit issuance. For long-term permits, permittees will be required to provide compensatory mitigation to offset predicted take over each 5-year period. If reliable reported data demonstrate that a given permit holder/project is causing fewer impacts to eagles than originally permitted (*e.g.,* actual take of eagles is lower than predicted), permittees can carry forward ''unused'' compensatory mitigation credits to the next 5-year review period.

The Service will develop guidance for different types of compensatory mitigation projects for eagles, for example power pole retrofits to reduce eagle electrocution. Guidance will include methods and standards for determining credits (*i.e.,* how much of the type of mitigation is needed to offset one eagle), mitigation ratios based on uncertainty, temporal loss and related factors, durability assurance requirements, compliance and effectiveness monitoring requirements, and other important implementation considerations. When practical, we will involve stakeholders in the development of such guidance.

Additional Revisions

These regulations include several minor revisions to the prioritization criteria that govern the order in which the Service will prioritize authorization of take if EMU take limits are approached. The priority after safety emergencies for Native American take for religious purposes that depends on take of wild eagles (and as such cannot

be met with eagle parts and/or feathers from another source, such as the National Eagle Repository) is amended so that it applies to *increased* need for take for religious purposes. Historical tribal take for religious use requiring take of eagles from the wild that has been ongoing, but not authorized, generally does not need to be prioritized because it is part of the environmental baseline set in the 2009 FEA. However, increases in historical take levels would not be part of the current baseline. We also are removing the reference to rites and ceremonies because traditional take for religious and cultural purposes may not be limited to, or properly characterized as being part of, specific rites and ceremonies. In addition, we are changing the prioritization order by removing the priority for renewal of programmatic permits, since the regulations would no longer contain a separate category for programmatic permits.

Unauthorized eagle take is prohibited by law. The options available for addressing future eagle take differ from those for addressing past take. Future take may be addressed proactively through a nonpurposeful (incidental) take permit issued under the Eagle Act and the 50 CFR part 22 permit regulations. If such a permit is sought by an applicant and issued by the Service, it will protect the permittee from criminal prosecution or civil law enforcement for any eagle take authorized by the permit.

If enforcement action has been taken to address past eagle take by an applicant, then the Service will consider any pending or completed resolution of that enforcement when evaluating an application and determining whether to issue an eagle incidental take permit. The Service will do so in order to be consistent with the general responsibility criteria set out in 50 CFR part 13 for all permits (whether or not eagle permits) issued under 50 CFR Subchapter B. A permit can be issued without resolving unauthorized past eagle take; however, the applicant continues to be subject to an enforcement action at any time for unpermitted prior take of eagles. Depending on the circumstances of a past take, the U.S. Department of Justice or the Service's Office of Law Enforcement may determine that enforcement is warranted using appropriate enforcement authorities. The Service will take into consideration the nature, circumstances, extent, and gravity of the prohibited acts committed in the violation and with respect to the violator the degree of culpability and cooperation, history of noncompliance, levels of past take, and efforts to reduce take. The statute of limitations for criminal and civil enforcement actions is five years.

These revised regulations include a provision at § 22.26(f)(7) that requires the Service to determine, before issuing a permit, that issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle take at the project. One element of civil and criminal cases is establishing that take of eagles is not permitted, requiring coordination between the Service law enforcement and migratory bird programs early in an investigation. Later in the process, court judgments may include a sentencing or probation condition that an eagle take permit be sought, or where settlement negotiations have been successful, the settlement agreement often includes a requirement that a company apply for an eagle take permit. Without such a determination, issuance of a permit might in some cases disrupt the ongoing investigation, prosecution, or negotiation process.

To recoup the cost of processing longer-term permits, which are generally complex due to the need to develop robust adaptive management measures, we will assess a $36,000 permit application processing fee for eagle incidental take permits of 5 years duration or longer. This fee is the same as the fee we currently require to process programmatic permits. A commercial applicant for an incidental take permit of a duration less than 5 years will pay a $2,500 permit application processing fee, an increase from the current fee of $1,000 for programmatic permits and $500 for standard permits. The amendment fee for those permits would increase from $150 to $500. The proposed higher fees for commercial entities would recover a larger portion of the actual cost to the Service, including technical assistance provided to the potential applicant by the Service prior to receiving the actual permit application package. Commercial entities have the opportunity to recoup the costs of doing business by passing those costs on to their customers. The incidental take permit application processing fee for homeowners and other non-commercial entities remains $500, and the amendment fee for those permits is unchanged at $150.

We will assess a user fee called an ''administration fee'' every 5 years for long-term permits to cover the cost to the Service of conducting the 5-year evaluation and developing any appropriate modifications to the permit. The proposed rule would have implemented a $15,000 administration fee but, based on changes to the rule, and upon subsequent analysis, we have determined that an $8,000 administration fee more accurately accounts for costs the Service is likely to incur during a ''typical'' 5-year permit review. We will adjust the fee amount in future rulemakings if experience shows that $8,000 is either too high or too low to accurately account for costs.

We are removing the provisions for transfer of a programmatic permit from a permittee to another entity that were codified at § 22.26(i). Those provisions were unnecessary because § 13.25(b) already provides for transfer of § 22.26 eagle incidental take permits. The Service is reviewing permit applications from, and continuing to provide technical assistance to, applicants with complex projects who are in the process of applying for eagle take permits. To prevent many of them from having to effectively restart the application process due to these revisions to the regulations, we are incorporating a 6-month ''grandfathering'' period wherein applicants (persons and entities who have already submitted applications) and project proponents who are in the process of developing permit applications can choose to apply (or re-apply) either under all the provisions of the 2009 regulations or all the provisions of these final regulations.

The 2013 Duration Rule established a definition of ''low-risk'' projects that was subsequently vacated by a federal district court decision (*Shearwater* v. *Ashe,* No. 5:14–cv–02830 LHK (N.D. Cal. Aug. 11, 2015)). After subsequent consideration, we found this definition to be counter-productive. In the Duration Rule, the Service defined ''low-risk'' in a footnote to 50 CFR 13.11(d)(4) as a project or activity that is unlikely to take an eagle over a 30-year period and the applicant for a permit for the project or activity has provided the Service with sufficient data obtained through Service-approved models and/or predictive tools to verify that the take is likely to be less than 0.03 eagles per year (or less than 1 eagle over a 30-year period). In retrospect, that definition would not have proved useful because it would have covered only those projects where take is essentially negligible, and, therefore, the project would likely not require a permit in the first place. We see utility in redefining ''low-risk'' to include projects with a slightly higher probability of taking eagles, but which cumulatively will still be compatible with eagle management objectives. However, despite seeking input from the public and considerable staff effort, we were unable to develop

a definition of ''low-risk'' that could be consistently applied throughout the United States while achieving our desired goals for a ''low-risk'' category. The Service considered basing the low-risk category on (1) a flat number of eagles predicted to be taken, (2) a percentage of the local area population (LAP), (3) a hybrid of those two, and (4) the geographic and physical features of the area where the project will be located. Each of these approaches produced conflicting results due to the significant discrepancies that exist between eagle population densities and resilience, habitat variability, and project scales.

Accordingly, we did not propose a revised definition for low-risk projects in the proposed rule. Instead, we again sought comment on how to define ''low-risk'' or ''low-impact'' take of eagles, and on other approaches for authorizing take, such as a general permit authorization. The proposed rule stated that while comments would be outside the scope of this rulemaking action, we would keep them on file for later consideration in a future rulemaking. Several commenters provided input on this topic, and we will retain those comments to help inform future guidance or rulemaking. We intend to continue the public process to further develop criteria and an approach that minimizes the costs of compliance for the public and the demand for agency resources for projects that will result in no more than minimal individual and cumulative adverse effects on eagles.

Eagle Nest Take Permits (50 CFR 22.27)

Under the 2009 eagle nest take regulations (50 CFR 22.27), the Service can issue permits for removal, relocation, or destruction of eagle nests where (1) necessary to alleviate a safety emergency to people or eagles, (2) necessary to ensure public health and safety, (3) the nest prevents the use of a human-engineered structure, or (4) the activity or mitigation for the activity will provide a net benefit to eagles. Only inactive nests may be taken except in the case of safety emergencies. Inactive nests are defined by the continuous absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days leading up to the time of take.

As with § 22.26 incidental take permits, these rule revisions eliminate the distinction between programmatic and standard permits for § 22.27 nest take permits. The permit fee for removal or destruction of a single nest will remain at $500. For the same reasons as described above for § 22.26 permits, a commercial applicant for a nest take permit for a single nest will pay a $2,500 permit application processing fee, an increase from the current fee of $500 for standard permits and $1,000 for programmatic permits. The amendment fee for those permits will increase from $150 to $500. For permits to take multiple nests, the fee is $5,000 versus $1,000 for programmatic permits, currently. For homeowners and other non-commercial entities, the nest take permit application processing fee and amendment fee will not change.

These revised regulations also revise several definitions applicable to nest take permits to better comport with terms used in scientific literature. Nests that are not currently being used for reproductive purposes are defined as ''alternate nests,'' while nests that are being used are ''in-use nests.'' Some commenters suggested the latter be called ''occupied nests,'' but we believe that term would cause confusion because nests are in use for breeding purposes prior to being physically ''occupied'' by nestlings or an incubating adult. An ''in-use nest'' is defined as ''a bald or golden eagle nest characterized by the presence of one or more eggs, dependent young, or adult eagles on the nest in the past 10 days during the breeding season.'' This definition includes the period when adults are displaying courtship behaviors and are building or adding to the nest in preparation for egg-laying. We define ''alternate nest'' as ''one of potentially several nests within a nesting territory that is not an in-use nest at the current time.'' When there is no in-use nest, all nests in the territory are ''alternate nests.''

We are revising the definition of ''eagle nest'' from ''any readily identifiable structure built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction'' to ''any assemblage of materials built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction.'' The words ''readily identifiable'' were not helpful for clarifying when a structure was or was not a nest since a structure might appear to be just a pile of sticks to one person, or an osprey nest to a second person, but clearly an eagle nest to someone familiar with eagle nests. The confusion caused by the words ''readily identifiable'' sometimes put in jeopardy nests in the early stages of being built, or nests that are used from year to year but are substantially damaged during the non-breeding season by wind or weather.

The revised provision at § 22.27(a)(1)(i) enables us to issue a permit to remove an in-use nest to prevent a rapidly developing safety emergency situation, instead of waiting until the emergency is exigent. Without this addition, the Service has been faced with having to wait until the fully developed state of emergency had arrived, and the delay has sometimes been to the detriment of the eagles because, while the safety emergency developed, the breeding pair had the opportunity to lay eggs.

The 2009 regulations provide that the Service can issue a nest take permit for an inactive (''alternate'') nest that is built on a human-engineered structure and creates a functional hazard that renders the structure inoperable for its intended use. We are revising this provision to also allow for removal of an in-use nest prior to egg-laying in order to prevent the foreseeable functional hazard from coming to fruition. The revised regulatory language allows nest removal at an earlier stage that may provide eagles an opportunity to re-nest elsewhere while also preventing the nesting eagles from rendering the human-made structure inoperable.

We are removing the requirement that suitable nesting habitat be available in the area nesting population to accommodate displaced eagles for non-emergency nest take. The provision has been problematic because, in many healthy populations of bald eagles, suitable nest sites are all occupied. As part of the permit application review process, the regulations retain consideration of whether alternate nest sites are available to the displaced eagles, but an affirmative finding is not a requirement for issuing a permit.

The Service will consider whether other nests are available in the ''nesting territory,'' rather than in the ''area nesting population.'' We defined ''area nesting population'' in 1982 as ''the number of pairs of golden eagles known to have a resting [sic] attempt during the preceding 12 months within a 10-mile radius of a golden eagle nest.'' In addition to the typo (*i.e.,* ''resting'' instead of ''nesting''), the definition is problematic for bald eagles, not only because it omits reference to bald eagles, but also because a 10-mile radius around a bald eagle nest has no particular biological significance. For both species of eagles, consideration of whether the nesting pair may be able to use a different nest should focus primarily on the pair's nesting territory. In some cases, that determination may require looking beyond any known alternate nests in order to verify that those nests are not actually part of a different pair's nesting territory. However, it will not always require surveys of the area within the 10-mile

radius of the nest. We define ''nesting territory'' as ''the area that contains one or more eagle nests within the home range of a mated pair of eagles, regardless of whether such nests were built by the current resident pair.'' This definition replaces the current definition of ''territory.'' The two definitions are functionally similar, but the new definition of ''nesting territory'' is more in line with terminology used in the biological community.

Under the 2009 regulations, if a nest containing viable eggs or nestlings must be removed, transfer of the nestlings or eggs to a permitted rehabilitator or placement in a foster nest was required. However, there are circumstances when such placement is simply not possible; for example, in Alaska, the closest permitted rehabilitator may be a day's drive or more away. Nests with viable eggs or nestlings can be removed only in safety emergencies, and the requirement for transfer of eggs and nestlings has sometimes meant that the Service could not legally issue a permit necessary to alleviate the safety emergency. To address this problem, we are adding a provision allowing the Service to waive the requirement if such transfer is not feasible or humane. The Service will determine the disposition of the nestlings or eggs on a case-by-case basis in that scenario.

As with the prioritization criteria in § 22.26, these regulations amend the prioritization criteria for nest take permits to remove any priority for allocation of take to renewal of programmatic permits since that permit category is being removed. Also, the prioritization for Native American religious take is amended in the same manner as for § 22.26 incidental take permits (see earlier discussion).

These revised regulations adopt mitigation standards for taking eagles nests under § 22.27 that are similar to those we are adopting for § 22.26. The exception is that permits issued under paragraph (a)(1)(iv) must apply appropriate and practicable compensatory mitigation measures as specified in the permit to provide a net benefit to eagles if the permitted activity itself does not provide a net benefit to eagles. Permits issued under paragraph (a)(1)(iv) are not limited to situations involving a safety or health issue or an obstruction to a manmade structure; they can be issued to take alternate (currently called ''inactive'') nests for any reason as long as there will be a net benefit to eagles scaled to the effects of the nest removal. If the activity itself has a net benefit, compensatory mitigation would not be required. For example, a nest might be flooded during a riparian restoration project undertaken to provide improved habitat for eagles. Where the activity itself does not benefit eagles, the net benefit must be through compensatory mitigation.

Several commenters suggested we eliminate the requirement for a ''net benefit'' for permits issued under paragraph (a)(1)(iv). In general, we believe the requirement to provide a net benefit is appropriate, particularly now that we will promote the use of conservation banks, in-lieu fee programs, and other third-party arrangements to carry out the necessary measures to benefit eagles. These types of programs can leverage relatively small amounts of funding to provide significant benefits on the ground. Also, many nests for which permits are sought for removal are lower quality nests, not having been used in some time and degraded, or some new nests in areas of high eagle density. In those cases, the amount of compensatory mitigation may be relatively low. Data show that productivity in highly saturated eagle populations decreases due to nests being built in less than ideal locations in relation to food sources and/or increased competition and fighting among nesting pairs. In such situations, the required net benefit would reflect that lower biological value.

Permit Application Fees (50 CFR 13.11)

The regulations include minor revisions to the permit application processing fee table in 50 CFR 13.11. We are removing the column for Administration Fees because those fees apply only to eagle incidental take permits and not to any other type of Service permit listed in the table. The requirement for administration fees is instead incorporated into § 22.26. The table at § 13.11 also includes the updated fees for incidental take permits for commercial entities, long-term incidental take permits, nest take permits for commercial entities, and nest take permits for multiple nests.

Scope of Eagle Regulations (50 CFR 22.11)

Paragraph § 22.11(c) is revised by replacing ''[Y]ou must obtain a permit under part 21 of this subchapter for any activity that also involves migratory birds other than bald and golden eagles, and a permit under part 17 of this subchapter for any activity that also involves threatened or endangered species other than the bald eagle'' with ''[A] permit under this part authorizes take, possession, and/or transport only under the Bald and Golden Eagle Protection Act and does not provide authorization under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712) or the Endangered Species Act for the take, possession, and/or transport of migratory birds or endangered or threatened species other than bald or golden eagles.'' The original language was promulgated prior to the bald eagle being removed from the ESA List of Endangered and Threatened Wildlife as part of a final rule authorizing transport of eagle parts. The original intent of § 22.11(c), as explained in the final rule published in the **Federal Register**, was that a permit holder transporting items that contained not only eagle parts, but also parts of other species protected by the Endangered Species Act or the MBTA, into or out of the country would need to ensure he or she possessed the applicable permits for those protected, non-eagle species in order to legally transport the item (*see* 64 FR 50467; Sept. 17, 1999). However, this provision could be read to limit the Service's discretion to decide the appropriate manner of authorization for activities that affect other protected species outside the context of transportation of items containing eagle parts. For example, § 22.11(c) could be read to preclude the Service from using intra-Service section 7 consultation to analyze and exempt non-jeopardizing ESA take that may result from the Service's issuance of an Eagle Act permit to a project proponent. Thus, we are amending § 22.11(c) to ensure it does not limit our discretion to apply the appropriate authorization under the ESA or the MBTA for activities that involve other species protected by those statutes.

Golden Eagle Nest Take Permits for Resource Development and Recovery (50 CFR 22.25)

The regulations include several revisions to the regulations for permits for take of inactive golden eagle nests for resource development and recovery operations. The purpose of these revisions is to incorporate terminology consistent with the § 22.27 eagle nest take permit regulations. Changes to § 22.25 in this rulemaking are limited to those necessary for consistency with § 22.27, with a few additional minor revisions, as explained below.

A new definition, ''alternate nest'' refers to a nest that is not currently being attended by eagles for breeding purposes. Under the 2009 regulations, such a nest was an ''inactive nest,'' the definition for which is removed from the regulations. We are also removing references to the ''area nesting population.'' As with § 22.27 nest take permits (discussed above), the relevant area of consideration is the nesting

territory. Rather than needing to evaluate whether there is suitable nesting habitat available within the area nesting population, the Service will consider whether alternate nests are available within the nesting territory. It may be appropriate in some cases to survey golden eagle nests within the 10-mile radius to determine whether nests assumed to be in the same territory as the one being removed are not actually in a different breeding pair's nesting territory. Loss of a nesting territory does not preclude the Service from issuing a permit, but such loss will be part of our consideration of whether the take is compatible with the preservation standard and what amount of mitigation is necessary.

We add the phrase ''and monitoring'' to paragraph (b)(4) of the § 22.25 permit regulations. We do, as a matter of course, require monitoring as a condition of these permits, so the regulation should be clear that we may require the permittee to monitor effects to eagles from the permitted activity and mitigation measures. Lastly, we replace the word ''feasible'' with ''practicable'' in reference to the mitigation that we will require, consistent with § 22.26, § 22.27, and agency mitigation policy.

Response to Public Comments

The following section contains the substantive public comments we received on the proposed regulation revisions and our responses that explain why we do or do not incorporate the changes suggested by each commenter into this final rule. Comments that pertain to the biological framework and eagle management objectives described in the Status Report and PEIS are not included below, and are instead addressed in Appendix A to the final PEIS. Also not included below are the many comments supporting various provisions of the rulemaking. We also received numerous comments recommending regulatory actions pertaining to permits for eagle depredation, eagle falconry, and eagle propagation. We do not respond to those comments here because they are outside the scope of this rulemaking, but we will consider them if and when we initiate a rulemaking process for those permit types.

Rulemaking Process

Comment: Because the proposed rule will have cumulative effects on endangered and threatened species that share habitats with eagles, the Service must engage in section 7 consultation on the entire rule. The Service's assertion that the issuance of an eagle act permit is not the ''direct cause of habitat degradation,'' and hence such degradation need not be addressed as part of the NEPA process or in section 7 consultation, is legally unsupportable. Since the Eagle Act categorically prohibits the ''take'' of eagles without the Service's permission, a Service authorization of eagle takes that could not otherwise lawfully occur surely is the legal ''cause'' of not only the deaths of eagles and other wildlife from turbine operation, but also the associated habitat degradation due to road and associated infrastructure construction.

Response: Section 7 of the ESA requires Federal agencies to consult to ''insure that any action authorized, funded, or carried out'' by them ''is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.'' 16 U.S.C. 1536(a)(2). Intra-Service consultations and conferences consider the effects of the Service's actions on listed, proposed, and candidate species. Our proposed action of issuing regulations regarding take of non-ESA-listed eagles does not authorize, fund, or carry out any activity that may affect—directly or indirectly—any ESA-listed species or their critical habitat. *See, e.g., Sierra Club* v. *Bureau of Land Mgmt.,* 786 F.3d 1219 (9th Cir. 2015). Indeed, the Eagle Act does not empower us to authorize, fund or carry out project activities by third parties. The BGEPA empowers us to authorize take of bald and golden eagles. Thus, we have determined that these revisions have no effect on any listed, proposed, or candidate species or their critical habitat. As a result, section 7 consultation is not required on this proposed action. As appropriate, we will conduct project-specific section 7 consultations in the future if our proposed act of issuing a permit for take of eagles may, in and of itself, affect ESA-listed species or critical habitat. Regarding NEPA, we have analyzed the environmental effects of this rulemaking and our eagle permit framework in general in the PEIS associated with this rulemaking.

Comment: The Service should have extended or should re-open the public comment period prior to finalization of the regulations to ensure a fully vetted and transparent process as required by NEPA. The 60-day comment period was unreasonably short given the importance of the issue and the magnitude of information provided in the documents.

Response: NEPA does not address the public comment periods required for rulemaking. Whether a comment period is long enough to allow for sufficient opportunity for public input is governed by the Administrative Procedure Act (APA; 5 U.S.C. subchapter II). However, the APA also does not require specific durations for public comment periods or establish a minimum time period for public comment; rather it provides that ''the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation'' (5 U.S.C. 553(c)). For example, in *Fleming Cos.* v. *U.S. Dept. of Agric.,* 322 F. Supp. 2d 744, 764 (E.D. Tex. 2004), the court held that a 30-day notice and comment period is sufficient. We believe that 60 days was sufficient to allow for public input by interested parties on these regulations, and the quantity and quality of the substantive comments the Service received bear this out.

Comment: Failure to meaningfully consult with Indian tribes on issues affecting their interests can affect the tribes' ability to effectively comment on policy changes. Consultation is still needed to provide the tribes with particularized information about how the rule revisions would affect them and the eagles around their lands. Due to the failure on the part of the Service to consult with tribes prior to proposing the regulations, issuance of the final rule should be delayed until government-to-government consultation is conducted and the tribes have an opportunity to comment following consultation.

Response: In September of 2013, the Service sent all federally recognized tribes throughout the United States a letter inviting them to consult with the Service on development of these regulations. The Service then held meetings with all tribes that requested such meetings. We also held a number of regional informational webinars for tribes. In response to tribal comments on the proposed regulations asking for consultation, we reached out to each tribe that asked and met with them to gather their input and hear their concerns. Individual tribes will also have an opportunity to consult on individual permitted projects that may affect tribal interests.

Comment: We ask that outstanding items that the Service is unable to address in this revision be acknowledged with a firm commitment by the Service to address the problematic elements of the program under a clearly defined schedule.

Response: There are some ''outstanding items'' that the Service is likely to address through future guidance and, where necessary and

appropriate, future rulemakings. Issuing a schedule for when most of these items will be addressed would be an exercise in futility for a number of reasons, including the Service's inability to predict the size of its' future budget and work force, what the priorities under a new Administration might be, and what new information the Service will have that may bear on how we would prioritize the outstanding items to be addressed.

Preservation Standard

Comment: The Service should adopt a stepwise approach to analyzing preservation under the modified preservation standard. A stepwise approach would first look at the LAP. If the LAP is healthy, then a project should be deemed to have satisfied the preservation standard and not be required to undertake compensatory mitigation. If the LAP is stressed or undeterminable, then a project could be required to consider populations at the EMU and/or throughout the geographic range of the species, in that order, to determine if and where mitigation is required. A stepwise approach would help ensure a rational relationship between a project's impacts, if any and the required mitigation to offset for those impacts.

Response: Eagles move over much larger areas than LAPs, and simply looking at the effects of a project at the local area scale would ignore impacts to migratory and dispersing eagles from outside the LAP area. Moreover, it is not feasible to collect eagle population data at the scale of the local population everywhere permits are sought, meaning the kind of analysis described here would be infeasible over much of the United States. Finally, shifting the focus of compensatory mitigation to the LAP will greatly complicate and artificially constrain implementation of mitigation efforts. Given the current challenges with implementing effective mitigation, we will not further constrain options at this time.

Comment: The Service should apply the Eagle Act's preservation standard to only the national and EMU levels for each eagle species. As long as the national and EMU populations stay stable or increase, which they currently are in the absence of [programmatic] eagle permits being issued, the Service's goals for eagles have been met and there should be no need to look at a smaller geographical area.

Response: The Service's goals would not be met by allowing local eagle populations to significantly decline or disappear. There is no reason to believe that Congress's intent in enacting the Eagle Act and including the preservation standard was to preserve bald eagles only in pockets of their range. Moreover, current data, as presented in the Status Report, indicate that golden eagle populations at the national and EMU levels are likely not currently stable or increasing.

Comment: Before proceeding with a take permit process using EMUs, the Service should strengthen the biological foundation of eagle demographic organization as a basis for assessing wind energy impacts, or take another approach altogether.

Response: There is already an eagle take permitting process in place that has used both the LAP and EMU-based analyses, as described in the final environmental assessment conducted for that rulemaking action and the 2013 Eagle Conservation Plan Guidance. The proposal to shift to use of Flyways rather than Bird Conservation Regions (BCRs) for EMUs (background for which is provided in the Status Report) is based on our experience implementing the 2009 eagle regulations. Data collected under incidental take permits will allow the Service and partners to better assess the performance of the Flyway EMUs in capturing connectivity of eagle-use areas from a risk management perspective, or to determine if another configuration would be preferable.

Comment: We are concerned that the preservation standard will result in the mere persistence of the two species without accounting for demographic sustainability. The mere presence of birds alone may not be ecologically sustainable unless there is a demographic preservation standard, the lack of which will potentially create population sinks. It is not apparent within the population models how the cumulative take of eagles affects their demographic preservation. The definition of ''persist'' is ''stable with 2009 as the baseline.'' We think there is room for misinterpretation of this definition. Persistence is related to local populations, and, thus, it may be difficult to link persistence to the 2009 baseline, given that this baseline was calculated at a different spatial scale (*i.e.,* not at the level of local populations). We request further assessment or a better explanation that clarifies how this concept would apply at local populations.

Response: The Service's population objective is to maintain stable or increasing populations of both species of eagle at the EMU-scale, while at the same time ensuring the persistence of local populations. It is the EMU component of the objective that has been analyzed demographically and determined to be consistent with maintaining viable populations; we show in the Status Report that take at the maximum level allowed at the LAP-scale will have negative effects on local populations, though our analysis suggests local populations should still persist. Taken together, the two-tiered population objective means that across an EMU, we might well have areas where eagle take is high and local populations decline to lower equilibriums, whereas elsewhere in the EMU eagle populations are not affected substantially by authorized take to the same degree (or are increasing as a result of the application of compensatory mitigation), such that across the whole of the EMU the population, on average, is stable or increasing.

Comment: The preservation standard proposed for two species not listed under the ESA generally exceeds federal ESA standards. There was an expectation that the Service would revise the preservation standard used for the two eagles as the standard provides greater protection than is required and contributes to a number of management actions (calibrating population estimates, estimating take, monitoring efforts) that detract from management needs related to numerous other species for which there are legitimate and often urgent conservation concerns.

Response: The Service is charged with upholding the Eagle Act by protecting and conserving the two species it covers. In the case of bald eagles, we recognize that there are many other species experiencing significantly greater threats to their populations. However, the Eagle Act requires that we allocate resources to protect bald eagles consistent with congressional purpose stated in the enacting clause of the 1940 Eagle Protection Act: ''by tradition and custom during the life of this Nation, the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom.'' And, of course, bald eagles, as well as golden eagles, have special cultural significance to Native American tribes.

Golden eagle populations appear to be well below what their carrying capacity would be were it not for high levels of anthropogenic mortality. We acknowledge that attempting to maintain current numbers of golden eagles is in part a policy choice: The Service could have chosen any reasonable interpretation of Congressional intent, as long as it was consistent with the statutory language and the legislative history behind it. For

example, we could have argued that the preservation standard allows for golden eagle populations to further decline to some new lower level and then preserve golden eagles at that lower population level. We also could have argued that recovery to a much higher population is warranted. However, the policy choice we made is based on what we consider, in our best scientific judgment, to be the most appropriate interpretation of the preservation standard and the overall statutory mandate to conserve and protect both eagle species, which factors in science, legislative history, and the value of golden eagles culturally, symbolically, and ecologically. We considered all these factors in defining ''preservation'' under the Eagle Act so as to protect the golden eagle populations that we have. In short, we believe that is our responsibility and our mandate.

This legislative mandate to protect eagles under the Eagle Act is separate and apart from our mandate to conserve, protect, and recover species under the Endangered Species Act. The purposes and policy goals of both statutes overlap to some extent, but are also different in many ways. As such, it is not appropriate to create parallel species conservation, protection, and recovery standards under each statute or to establish an equivalent standard under the Eagle Act that provides less protection than the Endangered Species Act. Instead, our regulations under each statute protect covered species in different ways, consistent with legislative intent.

Comment: The proposed rule inaccurately cites the current definition of the preservation standard as ''consistent with the goal of maintaining stable or increasing breeding populations'' (81 FR 27934, May 6, 2016, p. 27937). But the 2009 rule expressly rejected use of the word ''maintaining,'' which was in the proposed rule, explaining that it could be misapplied to constrain any authorization of take because any take of a bald or golden eagle by some degree results in a population decrease, even if short-term and inconsequential for the long-term preservation of the species. Thus, the word ''maintaining'' would render the Service unable to authorize any take (74 FR 46836, September 11, 2009, pp. 74 FR 46838–46839). Now, the Service proposes to revive the very same word it found would improperly restrict issuance of take permits in 2009.

Response: We appreciate this comment, which is accurate. The wording in the 2009 regulations did not contain the word ''maintaining,'' and we are correcting it with reference to the 2009 regulations While we concede that ''maintaining'' could be misinterpreted as noted in the preamble to 2009 regulations, we have built enough of a record by now that our intent should be clear: That the goal is to maintain populations over the long term. For the definition we are codifying in this final rule, we are retaining the word ''maintaining'' because it serves a constructive role in relating the two goals of the revised definition together.

Comment: The addition of the term ''persistence'' to the preservation standard is confusing, as it adds another layer of definitions, with the Service stating that ''persist'' is defined as ''stable with 2009 as a baseline.'' At worst, this seems to decrease the current standard and at best, it adds unneeded complexity and confusion. We recommend that the preservation standard keep ''stable or increasing'' as the standard for both EMUs and LAPs, by deleting ''persistence of'' in the proposed definition. The revised preservation standard would read, ''consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and local populations throughout the geographic range of both species.''

Response: We have clarified in the preamble discussion of the preservation standard that we intend the 2009 baseline to apply to regional EMU populations, but not local populations. For one, the LAP analysis requirement helps us ensure the persistence of local populations, but does not measure a fixed local population. The LAP analysis calculates the authorized take within the area of an activity that may take eagles, and uses the average density of eagles in the EMU as an estimate of the number of eagles within a certain distance of the project. Therefore, there are no specific local populations that we could track as increasing or decreasing, even if we had the capacity to obtain data at that fine a scale, which we do not. Because there would be no means of measuring whether theoretically discrete local populations were stable, decreasing, or increasing, we are not adopting the commenter's suggested modification of the standard. Retaining ''persistence'' in the definition helps to clarify our intent in that regard.

Comment: The inclusion of a management goal for populations on a more localized scale is appropriate. However, the Service should use consistent terms when referring to this scale by using the term local area population (LAP) in the preservation standard: ''. . . in all eagle management units and persistence of LAPs throughout the geographic range of both species.''

Response: We appreciate the intent behind this recommendation, but a ''LAP'' is not a discrete population, but rather a calculation of the number of eagles within the area of a given project or activity, specifically, the number of eagles estimated to be within the area bounded by the natal dispersal distance for the respective species. See our response to the previous comment for more explanation.

Comment: Despite extensive discussion of management objectives in the preamble to the proposed rule, it is unclear how the Service intends to establish its take ''baseline,'' from which permissible future take in any given EMU will be calculated. The Service fails to provide a defensible rationale for establishing a take baseline based on eagle populations as they existed in 2009, or any other point in history.

Response: The approach used by the Service to establish the baseline and subsequent take limits is covered extensively in the first 35 pages of the Status Report and in the chapters of the programmatic environmental impact statement (PEIS) on bald and golden eagles. Please refer to these documents.

With respect to the assertion that the Service failed to provide a rationale for its population objective, we disagree and point out that the current management objective is directly derived from and consistent with the determination made with the adoption of the initial nonpurposeful take permit regulations in 2009. We do not doubt that continental populations of both species were at times larger or smaller than they are today, but that is not a compelling reason to set a different and likely unattainable population objective. The Status Report indicates there is a high probability that meeting the objectives the Service proposed for both species will ensure healthy populations at the EMU level for the foreseeable future. Moreover, the commitment to collect and consider new population information regularly as part of the adaptive management process ensures that there will be opportunities to adjust the objectives, take rates, and take limits on a recurring basis.

Comment: In the proposed rule, there is no consideration of age and sex of eagles taken under incidental take permits, nor is there regard for the time of year when the impacts will occur or of the status of the population affected. There is no consideration of carrying capacity or of how the loss of specific individuals might have affected other eagles. The proposed rule largely

ignores the context in which the impacts of incidental take will occur.

Response: The Service agrees with this commenter that the population status, age, and (in some circumstances) the sex of eagles killed matters in terms of the scale of population impact; however, we disagree that we have ignored these factors in setting up the permitting program. With regard to spatial variation in status, the Service examined existing demographic data for regional differences in vital rates, and established EMUs and population estimates for EMUs accordingly. With regard to other factors, how or whether the probability of take under various activities varies according to eagle age and sex has not been quantified broadly for either species of eagle. Thus, the Service's models assume that take under incidental take permits will be in proportion to the abundance of exposed age classes and sexes. The Service has established a policy to determine the age and sex of eagles taken under permits, and over time as part of the adaptive management process, and as this information accrues we will evaluate whether risk is disproportionate for any of these groups across the various activities that incidentally take eagles. The Eagle Conservation Plan Guidance (ECPG; U. S. Fish and Wildlife Service 2013) identifies age, in particular, as a factor the Service suspects influences collision risk at wind facilities. The implications of the data collected on the age and sex of eagles taken under permits will be considered by the Service in future updates to the Status Report, and, if warranted, these assessments could lead to other changes in the permit program.

Comment: Proposed § 22.3 articulates the preservation standard as ''consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and persistence of local populations throughout the geographic range of both [eagle] species.'' It is unclear what ''persistence of local populations'' means, and the basis for including local management in a standard intended to manage the take of eagles at a national level is puzzling. At a minimum, the preservation standard articulates a management scale that is internally contradictory.

Response: With respect to the relevancy of the LAP scale of eagle management, recent data from satellite tracking studies show that while both bald and golden eagles range widely, there is high philopatry (the tendency of an organism to stay in or return to a particular area) to natal, wintering, and migration stopover areas. Thus, local impacts can have far-reaching effects on eagle populations. Local populations of eagles also are of great cultural and social importance. The Service received many comments from states, tribes, local governments, and environmental organizations in support of including the persistence of local eagle populations in the management objective for eagles. The Service disagrees that including this scale of management is contradictory. The LAP population size estimate is based on the eagle densities estimates in the surrounding region, and those density estimates are biologically based and derived from actual eagle count data at the finest scale available. As to the LAP area, it is based on the natal dispersal distance of each eagle species, and as such represents the most applicable area over which the effect of an individual incidental take permit should be measured. The Service believes that preservation of local eagle populations accomplishes both important biological and cultural objectives, and that the EMU-scale analysis alone is not sufficient to evaluate and account for local and cumulative effects of an incidental eagle take permit.

Comment: Congress intended the Secretary to treat take authorized for scientific and religious purposes differently than take authorized for the protection of wildlife or agricultural or ''other'' purposes. Specifically, while Congress expressly conditioned the Secretary's ability to authorize scientific/religious take to take that is ''compatible with the preservation of the species,'' Congress's subsequent text imposes no similar condition on the Secretary's ability to authorize take for the protection of wildlife, agricultural, or ''other'' interests, except that such take is ''necessary'' to protect the interest at issue. Accordingly, Congress did not intend to limit the Secretary's ability to issue permits for non-scientific, non-religious take only to situations where doing so would be ''compatible with the preservation of the species.'' This conclusion is supported by the legislative history of the Eagle Act, which nowhere suggests that each take authorized for agricultural or ''other'' interests should be conditioned on compatibility with the preservation of the species. To the contrary, one of the express purposes of amending the Eagle Act in 1960 was to provide the Secretary with the authority necessary to issue eagle take permits to accommodate overriding local or commercial interests (see, *e.g.,* Senate Report No. 87–1986, at 85,007–008, 85,011, 85,013 (1960) (explaining Congressional intent to carve out an exception from the preservation standard where necessary to protect important commercial interests); House Report No. 87–1450, at 72,007, 72,010–011 (same)). Because the Service proposes to condition all eagle take on the preservation standard that Congress intended to apply only to scientific and religious take, the proposal is inconsistent with law and vulnerable under the APA.

Response: The legislative history does not support the commenter's position. The referenced Senate Report states that ''it is expected that thus the conservation purposes of the bill will be preserved, while at the same time any potential economic hardship to limited areas can be obviated.'' Although the Committee was referring to the proposed new authority to allow a state Governor to request a depredation control order, this language supports interpreting the preservation standard to apply to the whole of 16 U.S.C. 668a, or at least to a clause other than the religious and scientific or exhibition purposes clause. The testimony also refers to both religious take and control to protect agricultural interests. In neither context does the testimony reference the preservation standard as limiting that authorization, and as such it provides no indication Congress intended that the two exceptions be treated differently. As noted by the commenter, the House Report is similar.

The crux of the issue is that the statutory language authorizes the Secretary to permit the take of eagles for the protection of ''other interests in any particular locality''; it does not provide a blanket exception to the take prohibition or the Eagle Act's civil or criminal penalties for those interests. This means the Secretary has discretion to apply reasonable conditions to that authorization. Thus, even if the commenter were correct that the preservation standard does not apply on the face of the statute, the Secretary may place restrictions on take necessary to protect the species consistent with the purposes of the statute (which references a preservation standard in at least some contexts).

Comment: The Service's population management objectives should be focused on the continued growth of all eagle populations in every extent of their current and historical geographic ranges, and any management strategy should support this tenet or be amended to meet that objective.

Comment: The preservation standard should be re-phrased to make the goal of this permitting program to increase eagle populations. The Service should clarify that the relatively arbitrary 2009

baseline represents a minimum ''floor'' for population management. This floor does not represent the Service's aspirational goal but rather a threshold that will trigger additional action should populations fall below it. To this end, we recommend that the Service rephrase the preservation standard under 50 CFR 22.3 as follows: ''Consistent with the goals of increasing breeding populations, or at a minimum maintain stable breeding populations.''

Response: We are confident that the management approach we are adopting will allow bald eagle populations to continue to grow for some time in most EMUs. As we describe in the Status Report, we expect bald eagle numbers to eventually stabilize at approximately 228,000 eagles by about 2030. We believe that maintaining current numbers of golden eagles is a worthy and achievable goal for the near term. It is our hope that our management approach may also provide for eventual, modest growth in golden eagle populations to better approximate what carrying capacity would be in the absence of high levels of human-caused sources of mortality. The 1.2 to 1 compensatory mitigation ratio and the reduction of unauthorized take as it comes under the permit requirements to avoid and minimize impacts to eagles are the primary regulatory mechanisms by which these regulations could provide that outcome in the long term.

As the second commenter states, the 2009 baseline does indeed represent a minimum ''floor'' for population management. It is not the Service's aspirational goal. It is a threshold below which our management goal for eagles would not be met. With regard to the specific recommendation that the standard should read ''consistent with the goals of increasing breeding populations, or at a minimum maintain stable breeding populations . . . ,'' we do not agree that it would be good public policy to stipulate a goal of increasing a species' population size without also being specific as to why, by how much, and where, all factors for which the Service lacks any specific objective criteria. The Status Report indicates there is a high probability that meeting the objectives the Service proposed for both species will ensure healthy populations at the EMU level for the foreseeable future. As noted above, we believe bald eagle populations will continue to increase despite some additional authorized take. At present, the Service has not been presented with evidence that suggests stable populations of golden eagles would not satisfy both reasonable biological and societal needs.

Comment: The Service proposes to add the clause ''and the persistence of local populations, throughout the geographic range of both species'' to the definition of the preservation standard. This contradicts and undermines the assumptions of the Service's biological opinions issued in support of habitat conservation plans (HCPs) and ESA incidental take permits that cover golden eagles. In approving those HCPs, the Service issued multiple biological opinions concluding that local populations of golden eagles were not critical for the long-term survival of the species.

Response: The ESA and the Eagle Act have different conservation standards and purposes. While the ESA has as its bottom line that permitted take must not more than negligibly contribute to the extirpation of a species, the Service interprets the Eagle Act's preservation standard, even prior to the amendments to our regulations being made by this final rule, as intended to maintain sustainable population levels throughout the range of each species. We note that at the time that the HCPs and ESA take permits covering golden eagles were developed, the permits conferred no authorization to take golden eagles under the Eagle Act, but rather included statements that the Service would exercise its enforcement discretion so long as the permittees remained in compliance with the incidental take permits' terms and conditions specific to eagles. Since then, because of revisions we made to our regulations in 2008, ESA incidental take permits that cover eagles, if conditioned in accordance with Eagle Act standards, also convey take authorization under the Eagle Act. In that regulation, we stated the following with respect to existing incidental take permits that included golden eagles as a covered species: ''The statutory and regulatory criteria for issuing those ESA authorizations included minimization, mitigation, or other conservation measures that also satisfied the statutory mandate under [the] Eagle Act that authorized take must be compatible with the preservation of the bald or golden eagle.'' 73 FR 29,075 (May 20, 2008). This means the existing ESA golden eagle incidental take permits are ''grandfathered'' by the 2008 regulation revision and as such are not contradicted or undermined by these final regulations.

Avoidance and Minimization

Comment: The proposed removal of the ''unavoidable standard'' and replacement with a standard of practicability is too lenient and leaves unacceptable room for subjective interpretation.

Response: The Service views the requirement that programmatic permittees reduce take to the point where any take that occurs is completely unavoidable as just as subjective in practice as a standard requiring reduction of take to the maximum degree practicable. In addition, the practicability standard is clearer, more reasonable, and realistic.

Comment: The Service should provide more details regarding how the various considerations in the definition of ''practicable'' will be accounted for, weighted, and implemented in an objective manner.

Response: The Service's definition of ''practicable'' in this rule mirrors the definition of that term in Service mitigation policy, as well as other federal agency mitigation policies and regulations. The Service also intends to implement the consideration of practicability with regard to mitigation measures in a manner consistent with these mitigation policies and regulations. The consideration of what is practicable is complex and context-dependent and is described in more detail in the preamble to this rulemaking above. Further details about how practicable considerations are implemented may be detailed in future guidance.

Comment: Under the proposed rule, the Service may require additional avoidance and minimization measures if such measures are likely to reduce take and are practicable for the permittee to implement. The Service should not impose such measures on projects unless outlined in the permit conditions, or if take has exceeded anticipated levels. Instead, the Service should include a ''No Surprises'' concept in the final rule that would protect permittees from unforeseen circumstances beyond a permittee's control.

Response: We modified the language covering 5-year reviews for this final rule such that additional conservation measures to be implemented based on the review will be limited to those described in the adaptive management plan for the permit, unless the take exceeds the authorized take levels or the permittee is otherwise out of compliance with the permit conditions. The final rule also includes the following language: ''However, with consent of the permittee, the Service may make additional changes to a permit, including additional or modified appropriate and practicable avoidance and/or minimization measures shown to be effective in

reducing risk to eagles'' (50 CFR 22.26(c)(7)(iv)(D)).

Comment: It is inappropriate to consider cost in the definition of ''practicable.'' The Service has the legal authority to require permittees who take eagles to comply with the best available scientifically defensible measures to limit take regardless of cost.

Response: The previous definition of practicable included considering cost, as do most definitions of the term in federal policy. If an applicant cannot afford a mitigation measure, or if the cost of a mitigation measure renders a commercial project financially infeasible, then the mitigation measure is not capable of being done by that applicant, and is not practicable. However, the burden of proof is on the applicant to demonstrate a mitigation measure is not practicable.

Comment: The Service proposes to revise the definition of the term ''practicable.'' However, the new definition seems to provide ample room for debate and interpretation with project proponents. The Service should define mechanisms to ensure that projects meet this definition and that proponents truly are avoiding take to the greatest extent practicable.

Response: We hope to develop future guidance to ensure a consistent, objective approach is taken when evaluating the practicability of mitigation measures. In any case, the previous definition of the term practicable has already provided plenty of room for debate and interpretation. We do not expect our new definition to change that dynamic and that was not our intent.

Comment: The Service's proposed definition of practicable is inconsistent with the Service's obligation and authority to permit eagle take only when it is ''compatible with the preservation of the bald eagle or the golden eagle.''

Response: Both standards apply. If there are no practicable measures or compensatory mitigation actions that a project proponent can undertake to ensure compatibility with the preservation of eagles, the Service will not issue an incidental eagle take permit.

Comment: The Service should add ''project economics and location'' to the definition of ''practicable'' at proposed 50 CFR 22.3 to harmonize the language of the regulations with the intended purpose to establish a workable ''practicability'' standard.

Response: We do not agree that the addition of ''project economics and location'' is appropriate. Project economics implies that permits are always issued for commercial activities, but many eagle incidental take permits are issued to homeowners and government agencies. The addition of location is not appropriate because whether a project can be sited elsewhere may be part of the consideration of what is practicable.

Comment: Courts have noted that the Service's definition of practicable ''looks to whether the mitigation is rationally related to the level of take under the plan.'' Key language from the existing regulations recognized this rational relationship requirement: ''Practicable means capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles, the following three things: The cost of remedy compared to proponent resources; existing technology; and logistics in light of overall project purposes.'' The Service should ensure that this rational relationship requirement carries over into the new definition of practicable.

Response: We agree that the determination of what is practicable must include consideration of the magnitude of the impacts of the activity on eagles. The regulations capture this consideration at 50 CFR 22.26(e)(5) addressing the factors the Service must consider in determining whether to issue a permit, which reads: ''Whether the applicant has proposed all avoidance and minimization measures to reduce the take to the maximum degree practicable relative to the magnitude of the impacts to eagles.''

Comment: In the final rule, the Service should provide a more detailed description of elements of an adaptive management program suitable for protection of eagles, to include: Details on the process for development of the plan; opportunities for regulated entities to participate in discussions about adding or removing mitigation measures; mitigation measures that the Service identifies as suitable for the objective of reduced eagle disturbance or mortality; and at 5-year reviews, the process for determining which mitigation measures will be included for a subsequent 5-year period.

Response: The elements cited by the commenter as needing more detailed description (*e.g.,* suitable mitigation measures, the process for determining when mitigation measures will be applied) will vary significantly depending on the type of activity that is being permitted and how it affects eagles. For example, mitigation measures and the trigger points for implementing them are likely to be very different for mining operations versus wind energy facilities. The ECPG contains a detailed description of the process the Service is using for adaptive management under incidental take permits at wind facilities, and we refer this commenter to that document for an example of how adaptive management will be implemented under permits for wind energy facilities.

Comment: The Service has apparently not heeded any of the elements of the precautionary principle or the advice of the National Research Council when making decisions about rare or precious resources in the face of high uncertainty.

Response: The entire eagle incidental take program has been built around explicitly accounting for uncertainty and then being clear about how that uncertainty is addressed in decisions. Adaptive management is a process of adaptive learning, whereby: (1) Predictions are made regarding anticipated effects of an activity; (2) data regarding the outcomes of the activity are collected; (3) the predictions are updated to reflect the actual outcomes of the activity; and (4) the updated predictions are used to change the activity, either in the future at the same site or at other places where the same activity is being contemplated. The Service has described its adaptive management framework for eagle incidental take permits in the ECPG (Appendix A), and in the preamble to this final rule. The overall framework is intended to account for, and over time to reduce, uncertainty in the effects of wind facility siting, design, and operations on eagles. More broadly than for just wind energy, the adaptive management process is also intended to address uncertainty in compensatory mitigation and the effects of established take rates on eagles. This uncertainty is reduced over time by using information collect on the actual outcomes of the activity to update the predictive models used initially to estimate those effects; over time, the accuracy and precision of the predictive models is improved through these updates. We describe how the risk posed by uncertainty is addressed in the response to other comments, but we reiterate here that in all cases the Service has adopted approaches that are protective of eagles.

Comment: Permittees should also be required to conduct research and analysis to test methods to reduce lethal take during their permit life. There should be an expectation that all projects will be required to reduce their lethal takes over time.

Response: The adaptive management framework outlined by the Service includes a requirement that permittees monitor eagle take and, on a case-by-case basis, other factors associated with

that take under their permits. The Service will use this information as part of the adaptive management process outlined in the ECPG to determine or add to existing knowledge of factors associated with eagle mortality under different activities and to evaluate the effectiveness of different avoidance and minimization measures. Through monitoring, 5-year reviews, and the adaptive management process, our goal is to reduce take over time.

Comment: A coordinated research program should be instituted to develop new and effective mitigation measures for wind energy facilities.

Response: We agree additional research would benefit eagle conservation and the Service's permitting program. The permit program is designed to collect relevant data that can be used to evaluate the effectiveness of minimization, avoidance, and mitigation measures. This adaptive management approach allows for the incorporation of new information and practices over time. This approach is described in detail for eagle take permits for wind facilities in the ECPG.

Comment: The Service should retain the requirement for applying advance conservation measures (ACPs) to mitigate eagle take. Experimental ACPs are appropriate where established ACPs are not available.

Response: The Service eliminated ACPs from the regulations due to confusion about the standards by which ACPs were to be developed and what it means to reduce take to the point where it is unavoidable. We believe the new language is more consistent with Service policy and is clearer. Applicants must still implement all practicable avoidance and minimization strategies for their activities, and, conditioned on terms and conditions set in the initial permit, testing of experimental measures to reduce eagle take as, for example, described for wind energy facilities in the ECPG as part of the adaptive management process.

Comment: Application of minimization strategies should be on a project-by-project basis to determine whether the measure is practicable for that project.

Response: All practicable avoidance and minimization measures demonstrated to reduce take levels will be required. There are many considerations in determining whether mitigation measures are practicable for a particular project, including the magnitude of the impact to eagles. For example, if a project poses a relatively low risk of eagle take, imposing expensive monitoring and curtailment measures is not commensurate with the risk, whereas this strategy may be appropriate at a high risk site.

Duration and 5-Year Reviews

Comment: The proposed change from 5-year permits to 30-year permits has the potential to decrease golden eagle population numbers in the Southwest, making it more difficult for tribes who rely on the ceremonial and religious take of golden eagles (as they have for centuries), to secure their own permits for take under the Eagle Act. Even with the prioritization given to tribal take permits, a tribe's ability to engage in longstanding religious and traditional take of golden eagles may nevertheless be constrained if golden eagles are so impacted by wind energy on a local or regional basis as to become unavailable for this purpose.

Response: The regulations are designed not only to protect eagles but, in the case of golden eagles, to improve their condition. The management approach we are adopting through this rulemaking is risk-averse with respect to estimating impacts on eagles. Population sizes, sustainable take rates, and, for wind facility permits, eagle fatality estimates for individual projects are all based on scientifically peer-reviewed models that are designed to provide data that allow the Service to explicitly select the level of risk with respect to being more versus less protective of eagles. For each aspect of the management and permitting process, we are using values for decision-making that shift the risk in an 80:20 ratio towards being protective of eagles. Thus, the actual eagle population size in each EMU and the true sustainable take rate are both highly likely (80% likely) to be larger than the values used by the Service, so that when they are multiplied together to get the take limit, that value is even more unlikely to exceed the actual sustainable take limit for the EMU. Similarly, the eagle fatality estimates for individual wind projects are unlikely to underestimate the actual take rates, and as a result, authorized take over all wind projects is very unlikely to exceed the EMU take limits. While improvements in the precision of all of these estimates through adaptive management should decrease uncertainty and thus shrink the magnitude of the difference between the expected fatality rate and the permitted take limit over time, as a matter of policy, the difference will always be in favor of protection of eagles. Furthermore, all golden eagle take authorized under this permit regulation will require compensatory mitigation at a 1.2 to 1 ratio, meaning that for every five incidental takes of golden eagles, six golden eagles will be protected that otherwise would have been lost.

Comment: The final rule should clarify that its increased take limits and permit durations apply to all industries. The Service should clarify that permits will be issued to all applicants on an equal basis and that the number of eagle takes authorized and the term of the permit will not depend on the applicant's industry.

Response: The increased take limits apply equally to all industry types. The increased permit duration also applies to all types of entities. We will issue permits to all applicants on an equal basis. The number of eagle takes authorized and the term of the permit will depend on the specifics of the individual project and not the applicant's industry.

Comment: While the short duration may be a deterrent to industries to applying for permits and participating in a regulation scheme, a 600% increase in duration is too large of a leap. The Service should consider a 15-year initial permit duration, with a renewal option every 5 years. This approach balances the need for a longer, more realistic permitting procedure with the need to closely regulate the potential for loss of life and nests of these eagles, which remain protected species.

Comment: Given the rapid changes due to climate change in the region, especially related to water regimens and their impact on habitat and eagle prey populations, it would seem prudent to limit the maximum permit duration to 5 years in order to more rapidly respond to changes in local eagle populations and productivity wrought by climate change. A more conservative, shorter-duration permit than 30 years provides opportunities for real-time incorporation of rapidly evolving scientific knowledge, especially regarding population estimates, take thresholds and caps, and evaluation of unforeseen impacts and changes in the population dynamics of eagles.

Comment: The rule should be clear that permit duration will be tiered to certainty of risk and expected impacts to eagles, both of which remain extremely uncertain.

Response: These final regulations establish a maximum permit duration of 30 years. Permits valid for longer than 5 years can be of any duration between 5 years and 30 years. The Service will consider the degree of uncertainty as to the effects of the permitted activity, site-specific factors, and other information to determine appropriate durations for individual permits.

Comment: The 5-year reviews of long-term permits are unnecessary, especially for projects for which the adaptive management strategy can respond to actual events. Every project that receives a permit under this rule will provide annual reports to the Service, providing the Service the opportunity to regularly review the specific eagle mortality, avoidance, minimization, adaptive management, and mitigation measures addressed in a permit. Formal review periods short of the permit term would invalidate the protections and intent of the 30-year permit.

Comment: While the 5-year review periods are appropriate, they would not be necessary for all projects, particularly if a fatality prediction is low. Any in-depth review should be reserved for extreme cases where data prove continued operation under current permit conditions would result in population-level impacts.

Comment: A wind project 20- to 30-year eagle permit with substantive reviews every 5 years is very difficult to finance and operate commercially. Opening up the eagle permit for substantive reviews every 5 years is a significant financial uncertainty, burdensome to already overly committed Service staff, and a cost for applicants that presents a significant disincentive to seek a permit.

Response: The 5-year review is a reasonable and justified provision that appropriately balances the Service's responsibility to ensure the preservation of bald and golden eagles, while also creating benefits to industries seeking long-term permits. In response to the comment that the reviews are unnecessary, particularly for projects for which the adaptive management strategy can respond to actual events, the 5-year review is the mechanism by which we determine whether the adaptive management strategy is able to respond to actual events. Annual reports are important, but eagle presence and exposure to permitted activities varies from year to year, such that it would be imprudent (not to mention impractical) for the Service to react annually to those variable events.

We anticipate that the 5-year reviews will typically benefit permittees because, under the conservative management approach we are taking, the authorized take will usually be higher than the actual take. For golden eagles, this means that excess compensatory mitigation can be credited to the permittee at that point and the excess ''rolled'' into the next 5-year period. Without the 5-year review, most long-term permittees will contribute more compensatory mitigation than is needed to meet the compensatory mitigation ratio of 1.2 to 1. The typically lower take rate will also mean the Service can adjust the authorized take to a lower amount for permits for both species of eagles, and adjust debits to the EMU and LAP take limits appropriately. Additionally, the 5-year review may demonstrate that some conservation measures or other permit conditions may not be effective or necessary, allowing the Service to reduce or eliminate those requirements.

Even for permits with low fatality predictions, we believe it would be remiss not to review whether eagle take is within the authorized level, and whether there are elements of the adaptive management strategy that should be implemented. That a long-term permit with substantive reviews every 5 years might in some cases be ''very difficult to finance and operate commercially'' is a factor that project proponents will need to consider when siting projects in eagle habitat.

In response to concerns that shorter-term permits are necessary to protect eagles from effects of climate change or other factors that could affect eagle populations, we agree that under the most ideal circumstances for eagles, owners and operators of projects in eagle habitat could be persuaded or, if necessary, be required to revisit and modify any aspect of their operations to benefit eagles. That ideal is simply not realistic, whether the activity is permitted under a 5-, 10-, or 30-year permit. For good or for worse, much of the physical infrastructure that humans establish on the landscape is semi-permanent in nature, and projects are as unlikely to be significantly altered at the end of a 5-year eagle take permit term as they are at the 5-year point of a 30-year permit. The situation up until the time of this final rule being issued is that the Service has issued only four permits for ongoing take that may occur over decades. We expect many more projects to seek permits with longer durations because the longer duration is the single biggest change project proponents and operators have attested they need for this permit program to be workable for longer-term activities. Compared to a scenario where activities that take eagles do so with little to no avoidance and minimization measures to protect eagles, and no compensatory mitigation, we anticipate that long-term permits with adaptive management strategies and 5-year reviews will be beneficial to eagle populations.

Comment: It may be justifiable for projects that exceed the take authorization specified in the permit to be required to implement additional measures and seek a permit amendment. However, the permit cannot be re-opened for reasons unrelated to the project or outside the permittee's control. These reasons may include unanticipated detrimental changes in the status of the local population due to factors such as non-permitted take (*e.g.,* shooting, poisoning); disease; or shifting/declining ranges due to climate change, fire, or other environmental factors. The rule must be clear that permittees would not be responsible for implementing additional mitigation or minimization measures due to these circumstances. At a minimum, the rule should establish long-term adaptive management cost caps that can be relied on to ensure project viability.

Comment: Given that eagle populations can change significantly over 30 years, the final rule should detail an adaptive management approach that ensures the Service retains the ability to reduce take if eagle populations are negatively influenced during the life of the permit.

Comment: The final rule should incorporate clarifying language indicating that the Service retains the ability to revoke a permit for continued excessive take, and it should more clearly define a process by which permits may be revoked.

Response: This final rule incorporates modified language to address the adaptive management provisions and the types of actions the Service may take in 5-year reviews. Specifically, more emphasis will be placed on building in a robust suite of adaptive management measures upfront in the permit. If a permittee is in compliance with permit terms and the authorized take under the permit is not exceeded, no other actions will be required. With consent of the permittee, the Service may make additional changes to a permit, including additional or modified, appropriate and practicable avoidance and/or minimization measures that are likely to reduce risk to eagles. If the permittee agrees to undertake such additional measures, appropriate adjustments will be made in fatality predictions, take estimates, and compensatory mitigation.

If authorized take is exceeded, that will generally trigger modifications by the Service. However, whether modifications to permit terms are required will depend on the circumstances. Because the Service will set take authorizations conservatively, we expect actual take to be lower than what was authorized 80% of the time and higher than what was authorized only 20% of the time, at least during the first 5 years, prior to predicted take

being adjusted based on the observed levels of take in the first 5 years. Because 20% of permitted projects are expected to exceed the authorized take levels, the appropriate response when that occurs depends on the circumstances, including how much actual take exceeded authorized take, and what other factors, if any, may have affected the take level.

Permit revocation criteria that apply to all Service permits are found at 50 CFR 13.28. Section 13.28(a)(5) provides that a permit may be revoked if ''the population(s) of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population.'' Prior to any permit revocation under such conditions, the Service is likely to request that the permittee adopt additional measures to avoid and minimize take of eagles rather than be subject to permit revocation.

Comment: The idea of a periodic review of a permit for effectiveness has merit, but is a 5-year period for the 30-year permit the best timeframe? If in the first year or two the actual documented take significantly exceeds the predicted take, should action not be initiated sooner? Or, if actual take is at predicted levels, or lower than predicted, would that create the basis for the permit to move to a 10-year mandatory review period? The use of an arbitrary timeframe versus actual impacts as the trigger for a review raises questions.

Comment: If the final rule retains the provision for long-term permits, they should be evaluated at shorter intervals than 5 years. Permits should be automatically reviewed if the number of take exceeds the average annual ''take'' (*e.g.,* a 3-year permit that allots a total take of 10 ''units'' should be reviewed if there are more than 4 ''units'' of take in that year).

Comment: The statement that the Service will evaluate each long-term permit at no more than 5-year intervals presents ambiguity that may result in inconsistent administration of the program. The statement implies that the evaluation interval could be conducted at less than 5 years. If a definitive timeframe cannot be established, the final rule should describe when evaluations would occur at less than a 5-year interval.

Response: The rationale for the 5-year timeframe for the periodic review is as follows. The observed level of take is likely to vary from year to year. For example, in the first 2 years, there may be no take, but in the third year, perhaps due to environmental factors, estimated take (based on observed levels of take using approved protocols for monitoring, searching, and estimating take) is three eagles. If no take occurs in years four and five, then take over the 5-year period totals three eagles, which gives the Service and the permittee a reasonable idea of what the average level of take is likely to be. If it happened that three eagles were taken the first year, but none in the next 4 years, the average would be the same: Three eagles over a 5-year period, but it might have appeared after the first year that annual take would be higher because year one had a much higher level of take than the four subsequent years. For that reason, we are unlikely to revisit the permit terms within the 5-year period unless the level of take exceeds anticipated and authorized take levels for the 5-year period.

Comment: The final rule should describe, at a minimum: (1) The consequences to, and expectations for, the applicant of unexpected take; (2) the specific additional mitigation measures that may be required; and (3) any relevant ''triggers,'' such as when permits will be reviewed.

Response: In general, as noted in our response to the previous comments, the Service will conduct permit reviews for long-term permits every 5 years. As noted above, if authorized take levels for the 5-year period are exceeded, we may need to revisit the permit terms and conditions sooner than in year 5. Individual permits will have different adaptive management measures tailored for the type of activity and site-specific factors spelled out, including when the permittee would need to implement them.

Comment: The Service must adopt a process by which the public and concerned conservation organizations will be routinely involved in the ''internal'' 5-year reviews if a 30-year permit is approved. Otherwise, to adhere to the NEPA provisions for public involvement in the permitting process, the Service will need to continue with a 5-year permitting system.

Response: There is not a requirement under NEPA to involve the public in a permit renewal process or a 5-year review process unless there is a need to supplement the associated NEPA analysis underpinning the original permit decision. Public involvement would be limited to reviewing a draft supplemental EA/EIS and would not be part of Service's regulatory review procedure set out for the permit itself, whether the action is permit renewal for a 5-year permit or a permit evaluation conducted every 5 years. Accordingly, there is no difference in public involvement through NEPA between a 5-year review and a 5-year renewal.

Comment: The internal review process could eliminate or significantly curtail public and state agency participation, input, and oversight after the permit is initially granted. Language should be included in the rule that expressly allows for public/state agency mortality and other data sharing, input, and review at each 5-year interval.

Response: We will coordinate with states and other government agencies (*e.g.,* federal and tribal) that have regulatory oversight over the permitted activity and which could be affected by changes to the federal authorization, when conducting the 5-year reviews. Involving the public would entail public hearings or notice and comment in the **Federal Register**, greatly increasing Service workload and costs, resulting in delays, and generally making the 5-year review unworkable.

Comment: The Service should notify all affected tribes when it is conducting a 5-year review of a permit. Upon notice, affected tribes should be invited to consult or provide input on the permit, including a consideration of whether eagle takes under the permit necessitate permit modification.

Response: The same factors would trigger consultation at 5-year reviews as for the initial permit issuance, *i.e.,* whether the action (permit issuance or 5-year review) may affect particular tribes. If, at the beginning of the 5-year review based on information supplied by the permittee, we determine it is not likely any changes will need to be made to the permit, or that any required changes are unlikely to affect particular tribes, then consultation would not be warranted. There may be unusual circumstances when consultation would be appropriate on a 5-year review for a project when changes may affect tribal interests, even when the activity did not need consultation in the first place when initially permitted.

Comment: The Service should commit to conduct NEPA reviews at the time it considers issuance of an eagle permit, not at additional 5-year intervals over the life of the permit.

Response: Some level of NEPA review (EIS, EA, or categorical exclusion) is always required when a federal agency issues a permit to authorize any otherwise-prohibited activity. We would only need to conduct additional NEPA analysis at the 5-year review stage if the scope or conditions of the authorization substantially change to the point where supplemental NEPA analysis would be required.

Comment: The Service has failed to outline how the results of its 5-year review process will be shared with the public at large or interested tribes or how the review process will trigger additional obligations to engage in informed and meaningful tribal consultation about the project under existing laws and policy, including section 106 of the National Historic Preservation Act (NHPA).

Response: The Service will continue to make mortality information from the annual reports that each permittee is required to submit under § 22.26(c)(3) available to the public. Neither the 5-year review process nor the original permit-issuance process contains a public-notice requirement. Public participation in the initial permit issuance process is currently, and will remain, limited to any NEPA analysis that is required to accompany permit issuance, if appropriate (for example, public participation would be required for an EIS and is discretionary, consistent with Council on Environmental Quality (CEQ) and Department of the Interior (DOI) NEPA regulations, for an EA; see 40 CFR parts 1500–1508 and 43 CFR part 46, respectively). Similarly, public participation in the 5-year-review process will be limited to any NEPA compliance necessary at that time, which would most likely take the form of supplementation of the original NEPA analysis accompanying permit issuance. NHPA compliance is unlikely to be triggered at the 5-year-review stage unless the Service determines it is necessary to supplement the original permit-issuance NEPA analysis. The Service will continue to engage and consult with federally recognized tribes if the 5-year-review process reveals significant changes in the effects of the permitted activity on eagles or leads to any changes to the permit that may affect those tribes.

Comment: A 5-year permit term does not pose any unreasonable hardship to permittees or to the Service. The permittee has the opportunity to renew the permit at the end of the 5-year term, and there is no reason to believe that a permittee who is compliant with applicable law and the permit conditions will be denied renewal. For permittees whose projects are not in compliance with their permit or applicable law, the Service will retain its leverage in ensuring compliance if it has the opportunity to not renew the permit. Once a permit is issued, a permittee will vigorously resist any new measures being imposed on its permit, will argue that additional measures are not worth the cost, and will likely challenge imposition of costly new measures in court rather than complying with them at the outset. At minimum, the permittee will have significantly more (and the Service less) leverage if the Service is in the position of adding new conditions to an existing permit as opposed to a permit renewal context.

Response: We agree that a 5-year permit was not ''an unreasonable hardship'' to permittees and also that there is no reason to believe that a permittee who is compliant with applicable law and the permit conditions will be denied renewal. However, many potential applicants had a different perspective that appears to have dissuaded them from obtaining permit coverage. And, we do not agree with the commenter that we lose leverage under longer-term permits to ensure compliance with permit terms. We also do not agree that long-term permittees are more likely to resist new measures than permittees needing to renew permits for ongoing operations. If anything, long-term permittees would be less likely to resist changes imposed at the 5-year stage because the additional measures will, in many cases, already be part of the adaptive management terms and conditions of long-term permits.

Comment: The Service's commitment to engage in a 5-year review process offers little comfort, since little can be done to avoid any unanticipated level of take of eagles after the facility is developed. The Service's assertion that it will ''always retain the ability to suspend and/or revoke the permit'' (presumably should it find that the activity is not compatible with the preservation of the eagle) is not convincing. Practical, financial, and political constraints will make it virtually impossible for the Service to live up to this assertion.

Response: The statement that ''little can be done to avoid any unanticipated level of take of eagles after the facility is developed'' is not a good argument for a 5-year permit over a permit of longer duration. How would the Service's failure to renew a 5-year permit for a long-term project have greater effect than our ability to continue to work with longer-term permittees to adapt avoidance and minimization measures and ensure appropriate compensatory mitigation is carried out? The statement that practical, financial, and political constraints will make it virtually impossible for the Service to suspend or revoke long-term permits is purely speculative. We acknowledge that suspension and revocation are options of last resort and that we would prefer, and intend, to work with permittees to rectify compliance issues prior to taking those steps. Such an approach is not less protective of eagles.

Comment: The proposal to extend permit terms to 30 years fails to recognize that subsequent administrations of federal or state governments might pass new laws or regulations within the next 30 years that strengthen protections applicable to eagles or wildlife. In such case, permittees will likely try to resist compliance with new protections by arguing that they have ''grandfathered'' rights under their permits.

Response: We cannot predict future laws or regulations that may strengthen (or reduce) protections for bald and golden eagles, and we do not have the resources to monitor every new change in laws and regulations at the state, tribal, and local level. We will continue to rely on our working relationships with state, tribal, and local wildlife agencies to coordinate management and protection of bald and golden eagle populations. We do not enforce or interpret non-federal laws and will continue to rely on state, tribal, and local government entities to notify us of any potential violations for projects authorized under eagle incidental take permits. If we receive notice of a potential violation, we will work with the permittee and the relevant state, tribal, or local government entity with authority to enforce the applicable law or regulation to ensure the authorized project complies with the relevant law or regulation. This may require modification of permit conditions.

Comment: The Service continues to rely on the notion that the 5-year maximum permit duration is the ''primary factor'' discouraging permit applications, which is based on anecdotal information. Other science-based factors, such as lack of mitigation options and effective risk analysis, have significantly precluded eagle permit issuance.

Response: We agree that the 5-year maximum permit duration has not been the only factor discouraging applications from the industrial sector. The lack of compensatory mitigation options has also been the subject of criticism from industry, and we are working with partners to develop metrics that would allow us to be confident that methods other than power line retrofits can be relied on to appropriately offset authorized take of eagles. We are also taking steps to establish third-party mitigation funds and/or banks to facilitate compensatory mitigation requirements. Some potential applicants may be dissatisfied by the requirement for compensatory

mitigation for every authorized take of a golden eagle, but that requirement is ''science-based.'' It also stems from the statutory mandate that authorized take be compatible with the preservation of eagles.

Comment: During the 5-year reviews, the Service should consider using the ''evidence of absence'' model, which is designed to tell how likely it is that take has not exceeded a certain number (with a certain degree of confidence). The model can be used to predict take and then a check-in may occur every few years to ensure a permittee does not go over its take limit.

Response: The Service agrees with the commenter that robust estimators such as the ''evidence of absence estimator'' (Huso et al. 2015) should be used to obtain unbiased estimates of mortality from systematic searches for animal remains. Such estimators should account for the proportion of animals killed that fall into the search area (which should also consider the spatial distribution of killed animal remains), the likelihood animal remains that fall into the search area will persist long enough to have an opportunity to be detected during a scheduled search, and the probability that a searcher will detect the remains during a search, and should include measures of uncertainty. However, there are a variety of robust estimators in the literature (see Korner-Nievergelt et al. 2015 for discussion of several), and the appropriate estimator for a particular site or survey may vary depending on details specific to the objectives and survey design; therefore, estimators should include the elements discussed above and should be considered on a case-by-case basis. The Service uses a Bayesian model to predict potential take of eagles at proposed land-based wind facilities based on information collected before a facility is constructed and then incorporates data from systematic searches for eagle remains to update the model and predictions and evaluate take relative to what is authorized by a permit (see the ECPG, Appendix D, for additional details).

Comment: Rather than issuing permits for up to 30 years, the Service should consider automatic renewal of 5-year permits in limited situations; for example, if impacts are less than expected; if eagle take has not occurred; or if eagle minutes are less than expected, the LAP is increasing, and eagle populations are stable.

Response: Automatic or automated renewal under the described circumstances would be challenging, since some review would always be needed to ascertain whether these conditions are met. We agree that permit renewal should be relatively straightforward under these circumstances and we anticipate that being the case.

Definitions

Comment: It seems pointless to try to make a distinction between ''purposeful'' and ''incidental'' take.

Response: While the impacts on eagles may be the same, we disagree that it is pointless to distinguish between purposeful and incidental take of eagles for the purposes of regulations. Purposeful take is generally very limited and different in practice than incidental take and requires different regulations to properly and efficiently regulate the various activities that fall within those categories.

Eagle Permit Fees

Comment: The proposed fee is very high, including the proposed administration fee for long-term permits. High fee structures may discourage take permit applications. To the extent that the Service maintains this fee structure in the final rule, permit fees should be committed exclusively to the processing and administration of eagle take permits to expedite review of applications and permit processing.

Response: The purpose of establishing such a fee structure is to provide capacity to process permits. Office of Management and Budget (OMB) Circular No. A–25 requires federal agencies to recoup the costs of ''special services'' that provide benefits to identifiable recipients. Permits are special services that authorize recipients to engage in activities that are otherwise prohibited. Our ability to provide effectively these special services is dependent upon either general appropriations, which are needed for other agency functions, or on user fees. Accordingly, the permit fees associated with eagles permits are intended to cover the costs the Service incurs processing the average permit. Nonetheless, in response to comments on the proposed rule, these final regulations adopt an $8,000 administration fee for long-term permits, rather than the proposed $15,000 fee.

Comment: For small independent energy producers to enter the market, permit cost should be scaled properly, based, for example, on number of turbines, electric output, or risk to the local eagle population.

Response: It is not practicable for the Service to assess and charge a unique fee per project seeking take authorization. As described in the fee section of this rule, the application fee for long-term permits was derived from average costs associated with processing these complex permits. Monitoring and mitigation costs, however, are scaled to the project, and would be expected to be lower for smaller-scale projects. The Service intends to involve the public in developing additional guidance for projects that pose a low risk of eagle take, which may be particularly relevant for small projects. Finally, in response to comments on the proposed rule, this final regulation adopts an $8,000 administration fee for long-term permits, rather than the proposed $15,000 fee.

Comment: Increased fees will likely address some of the required costs to implement a revised program, but the Service is already greatly understaffed. The preferred alternative will be no more efficient or effective, nor will wait times for permits be improved, in the absence of sufficient and appropriate funding.

Response: We cannot collect fees from the public to cover the costs of agency functions that are covered through funds appropriated by Congress. We can and do assess fees to cover the costs of special services that accrue only to certain members of the public, such as permit applicants and permittees.

Comment: The proposed rule is not clear whether the fee structure changes for non-purposeful/incidental take (§ 22.26) and nest removal (§ 22.27) permit applications will apply to government entities, including municipalities, tribes, and state and federal agencies, or if these entities will remain exempt.

Response: Regulations at 50 CFR 13.11(d)(3), which apply to these permits, waive the permit application fee for any federal, tribal, state, or local government agency or to any individual or institution acting on behalf of such agency.

Comment: The application fee of $500 for a residential incidental take permit, plus a second $500 fee for an eagle nest take permit, seems prohibitively high for the average homeowner.

Response: The $500 application processing fees for the incidental take permit and the eagle nest take permit have been in place since 2009, and are not changing for homeowner applications. Also, we note that it is very rare that anyone needs both permits. Permits to remove nests cover associated disturbance to the eagles, and even the need for that is rare, since most nest take permits are for removal of alternate nests.

Comment: The proposed permit fees and other costs associated with implementing required elements of an eagle permit drive up costs and provide little benefit to eagles.

Response: We disagree that these regulations provide little benefit to eagles. These regulations require permittees to avoid and minimize impacts to eagles to the maximum extent practicable. Such measures will greatly benefit eagles.

Fatality Prediction Model

Comment: The proposed rule implies that survey protocols the Service has developed for the wind industry will be applied to all activities that may require incidental take permits. This is inefficient and ignores that other protocols might be more suited to other activities.

Response: The Service's proposal would only require use of industry- or activity-specific protocols when they exist. At this point, the only such standards are those included in this final rule for estimating eagle take at wind facilities. The Service plans to develop standards for other industries in the future, and will seek industry input in the development of those protocols.

Comment: The collision risk model (CRM) recommended by the Service for eagle fatality estimation at wind projects relies on a sample size that is too small and data that are too outdated to provide reliable predictions for either golden or bald eagles. Research recently published in a peer-reviewed scientific journal provides new collision probability rate estimates that are based on more recent data and a larger data set collected from modern wind facilities. The Service should revise its model inputs to reflect this new information.

Comment: Codifying the Service's CRM to estimate eagle fatalities at wind facilities is not appropriate because the model has changed four times since it was introduced in 2013. Incorporation into the regulations would inhibit further necessary improvements.

Response: The Service has always intended to revise the collision probability component of the CRM using data collected under eagle incidental take permits at wind facilities. However, to date, so few incidental take permits have been issued at wind facilities that no progress has been made in this area. As an alternative for the immediate future, the Service believes that publicly available data collected at wind facilities operating without incidental eagle take permits can be appropriate for such an update, provided the data and protocols under which the data were collected can be verified and shown to be appropriate, and that the wind facilities that make their data available constitute a representative cross section of wind facilities in operation today. The Service is working with the authors of the referenced paper to conduct an evaluation of their data to determine if it meets the above criteria for use in updating the CRM. As to the CRM having changed rapidly since it was introduced, that is not the case. The CRM described in Appendix D of the ECPG is still the version being used by the Service. The CRM has had to be adapted on occasion to accommodate data collected by prospective permittees that did not follow Service guidance in Appendix C of the ECPG, but the CRM remains unchanged. As noted above, we do expect model inputs to change, and as noted in response to other comments, over time we may incorporate other scientifically supported covariates (variables that are possibly predictive of the outcome under study) associated with eagle collision risk into the CRM. In response to this and other comments, the Service has decided not to incorporate any parts of the ECPG into the rule so that future updates can be implemented without going through formal rulemaking.

Comment: The rule should not restrict monitoring and survey options for wind projects to Service-approved ECPG protocols. The best available science should be applied to risk assessment and fatality monitoring.

Response: The Service's eagle non-purposeful take permits program follows DOI policy by using a formal adaptive management framework to quantify and reduce scientific uncertainty. A major area of uncertainty is the mortality risk posed to eagles by individual wind facilities. When the Service created the non-purposeful take rule in 2009, there was no scientifically accepted way to estimate such risk. However, the Service must authorize a specific eagle take limit for each permit in order to ensure cumulative take from all permitted projects does not exceed regional take limits, or that appropriate compensatory mitigation is carried out if the take limits are exceeded. Service and U. S. Geological Survey scientists developed the CRM to estimate eagle fatalities at individual wind facilities using adaptive management; this approach necessitates the collection of standardized pre- and post-construction data and the use of the CRM, or a model much like it, to generate and update fatality estimates. For this reason, in the proposed rule, the Service contemplated codifying its current guidance regarding data collection and fatality predictions in the regulations. As this comment reflects, there was considerable opposition to this among commenters. In response, the Service has modified its proposal for this final rule by omitting the proposal to codify parts of the ECPG in the regulations. However, the adaptive management process cannot function credibly without standardized pre-construction site-specific eagle exposure data, so the Service has instead incorporated minimum standards for such data for incidental take permits at wind facilities directly into this final rule, subject to waiver under exceptional circumstances. The Service also will not require permit applicants to use the CRM to estimate eagle fatalities for their permit applications; permit applicants can use any credible, scientifically peer-reviewed model to generate eagle fatality and associated uncertainty estimates for their applications. However, the Service will use the CRM and applicant-provided data to predict fatalities for each incidental eagle take permit for a wind facility. The Service will treat any alternative models used by the permit applicant as candidate models whose performance may be compared formally to that of the CRM as part of the adaptive management process.

Comment: The Service's CRM is flawed and should not be required for use to estimate fatalities at wind facilities.

Response: The Service's CRM was designed as an integral part of the adaptive management process, with model complexity and performance improving over time with use and formal updating. The CRM uses a Bayesian framework that allows for the formal combination of existing (prior) data with project-specific data for eagle exposure and collision probability. The Service requires eagle incidental take permit applicants to conduct pre-construction eagle-use surveys within the footprint of the planned wind facility to generate project-specific data on pre-construction eagle exposure. In the case of collision probability, however, there are no project-specific data to combine with the prior data until after the project has operated for several years. The Service uses prior information on collision probability from the only wind facilities that had publicly available data on eagle use and post-construction fatalities in 2013; these data came from four facilities; did not include information for bald eagles; and, for some, were from older-style wind turbines that might have different collision probabilities than modern

turbines. However, these deficiencies only affect the initial eagle fatality estimates at permitted wind facilities. The adaptive management approach calls for formally combining the prior information with standardized data collected on actual eagle fatalities after each facility becomes operational. These updates would occur no less frequently than once every 5 years at each facility. Such updates will naturally correct for any bias in the initial ''collision-prior-based'' fatality estimate, so that the fatality estimates over most of the life of a wind facility will be heavily weighted towards actual fatality data from the site. Moreover, the post-construction fatality information can be combined with data from other permitted wind facilities to update and improve the collision probability prior for the national CRM. Thus, the Service intends to improve the predictive accuracy of the CRM both at the individual project level and nationally through standardized use as a formal part of its adaptive management process.

Comment: Eagle use, the main predictor variable in the CRM, is a poor predictor of eagle fatality risk. Use rates certainly failed to predict the golden eagle fatality rate at several wind facilities in Wyoming. Other factors besides eagle use are more important in determining eagle collision risk.

Comment: The Service's current CRM assumes that modern wind turbines have the same risk profile as wind turbines installed many decades ago despite evidence to the contrary.

Response: The Service disagrees that use rates cannot be used to predict eagle fatality risk. For example, the Service has demonstrated that use rates actually performed very well as predictors of golden eagle fatality risk at the same Wyoming wind facilities referenced in this comment. In fact, those facilities were used to demonstrate the effectiveness of the Service's CRM and adaptive management updating process for a scientific peer-reviewed journal article (New et al. 2015). However, the Service agrees that other factors besides eagle use likely affect collision risk. The ECPG identifies 11 general categories of covariates that we believe may affect eagle collision probability to some degree, including three that relate to turbine design. However, these are not presently incorporated into the CRM because, as pointed out by peer reviewers of the draft ECPG, scientific support for the role of these factors in collision risk is speculative and not quantifiable at this time. Furthermore, the effects of these factors may vary across locations. The Service believes that over time, though application of the adaptive management process, scientific support will accrue for inclusion of some of these covariates in the CRM.

Comment: Our Project Eagle Conservation Plan uses the Service's CRM estimated eagle take of one eagle per year. However, no eagle carcasses have been found in 3½ years of professional biologists monitoring.

Response: The fact that no eagle mortalities have been discovered does not mean that no eagles have been killed. Detection rates for eagle carcasses on surveys are less than perfect, and scavengers can remove carcasses before they are detected. The Service relies on estimates that account for these factors that affect detection probability to estimate the actual eagle fatality rate. Also, as discussed in other responses, under the adaptive management framework, estimates of the numbers of eagles killed that account for search effort, detection, and scavenging based on the monitoring data would be used to update the CRM for the project and improve future predictions of fatalities based on site specific data.

Comment: The Service's CRM vastly overestimates golden eagle mortality on the wind projects we have analyzed.

Response: The Service has made the explicit decision to manage the quantified uncertainty in the CRM estimates in a manner that reduces the risk of underestimating eagle fatalities at wind facilities. The median (50th quantile) fatality rate estimate is the point at which there is an equal risk of underestimating and overestimating eagle fatalities. The Service uses the 80th quantile of the CRM estimate as the take limit for incidental take permits, which shifts the risk in an 80:20 ratio away from underestimating eagle take. The Service believes this is appropriate because the consequences of underestimating eagle take are far greater than the consequences of overestimating take, and not just because of unintended consequences on eagle populations. For example, if eagle take at the individual permit level was consistently underestimated, many permittees would exceed their permitted take limits, necessitating permit amendments, additional costly and unplanned after-the-fact compensatory mitigation actions, and possible enforcement action with associated fines. For bald eagles with positive EMU take thresholds, consistently underestimating take could lead to permitted take exceeding the EMU take limit, which would necessitate retroactively requiring permittees that initially had no compensatory mitigation requirements to implement mitigation after the fact. Finally, if LAP take limits were unexpectedly exceeded, NEPA compliance for permits overlapping the affected LAP would have to be reviewed, possibly resulting in the need to develop supplemental NEPA documents or new EAs or EISs for operating wind projects. Although these consequences are most likely if there is a systematic bias in the fatality estimates themselves, even with an unbiased estimator some of these consequences could be expected with 50% of permits if the Service were to use the median fatality rate as the take limit for individual permits. In contrast, if permitted take is set at a higher percentile of the fatality prediction, the primary consequences are that the permittee is likely to exceed actual compensatory mitigation requirements over the first 5 years of operation (if compensatory mitigation is required). Additionally, the Service would likely routinely debit some take from the EMU and LAP take limits unnecessarily, thereby underestimating available take when considering new permit requests. Both of these issues are at least partially remedied when initial take estimates for projects are adjusted with project-specific fatality data after the first 5 years of operation.

Comment: The Service should adopt an approach that only requires mitigation for actual, not predicted, eagle take under permits. Otherwise, permittees unfairly have to overcompensate for the true effect of their projects.

Response: The Service must authorize a specific eagle take limit for each permit in order to ensure cumulative take from all permitted projects does not exceed regional take limits, or that appropriate compensatory mitigation is carried out if take limits are exceeded. As discussed in the previous response, the Service purposefully uses an estimator for wind projects that is unlikely to underestimate take to avoid the severe negative consequences that brings. However, over-mitigation can be confirmed and rectified when the initial take estimates for projects are adjusted with project-specific fatality data after the first 5 years of operation. At that time, permittees receive credit for any excess compensatory mitigation they have achieved, and those credits can be carried forward to offset future eagle take for that project.

Comment: The Service's CRM predicts unrealistically high rates of bald eagle fatalities at wind projects given the low number that have actually been reported. The Service needs to develop and use a separate fatality

prediction model for bald eagles based on new species-specific data collected per the recommendations in the ECPG.

Comment: The Service recently released a draft Midwest Wind Multi-Species Habitat Conservation Plan (HCP) for public comment. The draft HCP uses a version of the CRM to predict bald eagle impacts based on actual bald eagle data at wind energy facilities rather than solely relying on data from golden eagles and applying those data to bald eagles. The result is substantially different than the use of the Bayesian model based on golden eagle data and presents an assessment of bald eagle take that is both more realistic and more scientific than the proposed method. The Service should similarly here use data that are known to be specifically applicable to bald eagles. To that end, there are a number of ongoing studies and/or recently completed studies that could be used to provide a much better assessment of bald eagle risk and wind farms once they are made public.

Response: We are aware of arguments that the CRM predicts unreasonably high rates of bald eagle fatalities at wind facilities; however, we have not received and had the opportunity to carefully review data that are publicly available that actually confirms this. The Service does not disagree that bald eagles may prove to be less at risk from blade-strike mortality than golden eagles, but there are plausible reasons to expect that bald eagle fatality rates may be more variable than those for golden eagles, and under some conditions bald eagle collision probabilities may actually be higher. The reasons are: (1) Bald eagles congregate in larger numbers than golden eagles, and while in those concentrations they engage in social behaviors that may increase their risk to blade strikes at a project sited in such an area; (2) in some of the areas where bald eagles congregate, there are multiple fatalities each year of bald eagles that fly into static power distribution lines and vehicles, suggesting that as a species they do not possess a superior ability to avoid collisions; and (3) a thorough study in Norway documented a substantial population-level negative effect of a wind facility there on a population of the closely related white-tailed eagle as a result of blade-strike mortality (Nygaard 2010). Also, as noted in response to other comments, possible overestimates of risk are likely to be a problem only for the first 5 years of operation, as the initial fatality estimates for permits at wind facilities are intended to be updated with project-specific, post-construction fatality data within that time. As noted in response to other comments that expressed frustration with perceived frequent updating of the Service's CRM, this is an area of active research and investigation, and changes are to be expected as new information becomes available. The Service will make every effort, using the tools at its disposal, to disseminate information on changes or updates to the CRM when they occur.

Comment: A process should be developed by which data and reports associated with pre- and post-construction surveys can be made readily available and the prior distributions can be updated in a streamlined manner for real time application to inform management decisions.

Response: The proposed and this final rule state that monitoring reports required under incidental eagle take permits will be available for public inspection. The Service will use the data to perform formal Bayesian updates of the CRM and to generate updated fatality predictions for each individual project at no less than 5-year intervals, and we will update the prior data for collision probability and eagle exposure in the national model a regular interval, dependent on the amount of new data that is available.

Comment: Eagle mortality related to electric transmission and distribution is vastly different than other forms of eagle mortality. These utility systems are complex, are located in varied landscapes, and can extend hundreds of thousands of miles. Bald and golden eagles interact with transmission and distribution facilities in different ways. Performing surveys across the country and by utility would be challenging and would provide varied results that may not be meaningful to the Service or the utility. Utilities have provided eagle and migratory bird mortality data to the Service for over a decade. Additional monitoring and mortality data seem redundant and problematic when this information has already been provided to the Service. The resources required for monitoring efforts could be better utilized by retrofitting high-risk poles.

Response: In general, the Service agrees with this comment and will take these factors into consideration when developing pre-permitting data standards and permit terms and conditions for monitoring incidental take of eagles at electric transmission and distribution facilities and structures.

Comment: While permittee monitoring of the permitted activity is reasonable, the regulations should not place a burden on permittees to monitor ''unpermitted take.''

Response: The regulations do not ask permittees to monitor unpermitted take (except for take caused by the permitted activity that exceeds the take authorization). The Service compiles such information and uses the data in its LAP assessment, but this assessment does not require any information on unpermitted take be provided by the applicant.

Comment: The Service does not provide sufficient evidence that monitoring is an effective use of resources that actually confers conservation benefits to eagles. The high cost of monitoring is especially concerning given that the Service has not indicated that such a burden would actually further the purposes of the permit. Overly burdensome monitoring requirements discourage permit applications.

Response: Monitoring is among the most important and essential elements of the Service's eagle permitting program. The Service has acknowledged in these responses to comments and elsewhere (*e.g.,* the ECPG, the proposed rule, and the PEIS) that considerable uncertainty exists in all aspects of the eagle permitting program, particularly with respect to the accuracy of models used to predict the effects of actions like the operation of wind turbines on eagles. The Service has followed DOI policy and designed the eagle permitting program within a formal adaptive management framework, as described in response to other comments, in the preamble to this final rule, and in detail in Appendix A of the ECPG. Monitoring is an essential and fundamental element of adaptive management; it is absolutely necessary to reduce uncertainty and improve confidence in the permitting process; it is also essential to account for and provide credit to permittees who over-mitigate for their eagle take in the initial years of wind project operation. We will continue to require monitoring as a condition of all incidental take permits for which uncertainty exists to fulfill the Service's adaptive management objectives and to ensure take of eagles is within the terms and conditions of the permit.

Comment: Based on a review of data collected for pre-construction eagle use surveys, little in the way of standardization actually exists among the use rate data that the proposed rule characterizes as the products of a standard protocol.

Response: We agree with this commenter that the ECPG, as non-binding guidance, has not resulted in

the level of standardization that we had hoped. For that reason, we proposed incorporating key elements of the ECPG into the final rule by reference. Based on comments we received on the proposal, we have decided to instead include key language directly in this rule on pre-construction survey procedures and resulting data that will be required for eagle incidental take permit applications at wind facilities, and general guidance for other activities. We have not included similar requirements in the rule regarding post-construction fatality monitoring because these survey protocols are incorporated as binding terms and conditions of the incidental take permits. We added language to the preamble of this rule that explains why we believe this action will improve standardization of data collection.

Comment: The Service must not rely on any for-profit industry to monitor itself. Data obtained by third party monitors should be provided directly to the Service before or at the same time it is provided to project operators.

Comment: To the extent there are even benefits to using third-party monitors, there are considerable costs to using them. Without a showing or evidence that observation and/or the reporting has been biased, it is unreasonably burdensome, arbitrary, and capricious to impose such costs.

Response: We agree with the large number of entities that urged the Service to require third-party monitoring for some permits. The final regulations require that for all permits with durations longer than 5 years, monitoring must be conducted by qualified, independent entities that report directly to the Service. In the case of permits of 5-year durations or shorter, such third-party monitoring may be required on a case-by-case basis. With regard to the second comment, we do not agree that there will be significant additional costs imposed by the requirement for third-party monitoring. Most companies already rely on and pay for consultants to conduct project monitoring, presumably because it is more cost-effective than supporting those activities ''in-house.''

Comment: The Service should not codify any parts of the ECPG as that document needs to be a living document. To the extent that the Service does codify parts of the ECPG, at a minimum the entire document should be subject to further notice and comment.

Comment: The Service should provide a list of required data and estimates it needs to process an eagle incidental take permit request, rather than the methods by which the data must be obtained. The feedback loops between data collection and analysis that the Service notes as rationale for requiring standardized methods are not dependent on collection methods, only on data types.

Response: In response to these and other comments, the Service has withdrawn the proposal to codify Appendices C and D of the ECPG. However, the adaptive management process underpinning the entire eagle incidental take permit program absolutely requires standardized pre-construction, site-specific eagle exposure data. The second comment that the means by which the data are obtained do not matter for the adaptive management process is simply incorrect. Instead, the Service has incorporated minimum standards for such data for incidental take permits at wind facilities directly into this final rule, subject to waiver under exceptional circumstances. We also disagree with the suggestion that requiring these data standards necessitates additional notice and public comment. The rule language is restricted to key elements of Appendix C of the ECPG, which has gone through and been modified as a result of two rounds of public notice and comment, and the survey data requirements have been through two rounds of scientific peer review. These survey requirements should not be overly burdensome or unexpected because they were substantially modified after the first round of public comments on the ECPG to be largely compliant with the wind industry's existing voluntary standards for pre-construction eagle surveys. Moreover, these standards represent the minimum that the Service has specified as necessary to support an eagle incidental take permit application since 2013 (per the ECPG).

Comment: All wind farms should be outfitted with remote video cameras on wind turbines that can be viewed at all times by the public to aid enforcement of wildlife mortalities.

Response: The Service is unaware of data that show that video cameras on wind turbines are an effective means for obtaining unbiased estimates of eagle fatality rates. We firmly support the exploration and development of such technology, however, and these regulations are flexible enough to allow for their incorporation into post-construction monitoring protocols when warranted.

Local Area Populations

Comment: In general the use of an LAP analysis to try to ensure no impact on local populations has merit but how are LAPs determined? Please provide a greater explanation with examples so there can be greater clarity in understanding the implications of the proposed rule and just how the more restrictive implications of the LAP analysis will provide protection to key areas.

Response: The LAP is determined by extrapolating the average density of eagles in the pertinent EMU to the LAP area, which is the project area plus an 86-mile (bald eagle) or 104-mile (golden eagle) buffer; these distances are based on natal dispersal distances of each eagle species. As an example, consider a one-year golden eagle nest disturbance permit application in western Colorado, which is in Bird Conservation Region (BCR) 6 under the current 2009 EMUs. The activity being undertaken could lead to the loss of one-year's productivity, which has an expected value of 0.59 golden eagles removed from the population (the average one-year productivity of an occupied golden eagle territory in BCR 16 at the 80th quantile, as described in the Status Report). This EMU has an estimated golden eagle population size of 3,585 at the 20th quantile, and the BCR covers 199,523 square miles, yielding an average golden eagle density of 0.018 golden eagles per square mile. The local area around a single point (the nest to be disturbed in this case) is a circle with a radius of 109 miles, which yields an LAP area of 37,330 square miles, thus the estimated number of golden eagles in this LAP would be 671 individuals. The 5% LAP take limit for this permit under the current 2009 EMUs would be 34. The Service has developed a Geographic Information System (GIS) application that queries spatial databases on existing eagle take permit limits and known unpermitted take within the LAP area, as well as for any other permitted projects whose LAP intersects and overlaps the LAP of the permit under consideration. If this query indicates existing cumulative permitted (*i.e.,* over all existing permits) take for the LAP area is less than 34, and the unpermitted take database and other information available to the Service does not suggest background take in the LAP is higher than average, a permit for the take of 0.59 golden eagles could be issued without further analysis of the effects on eagles by tiering off this PEIS. If either condition were not true, the permit would require additional NEPA analysis. In either case, if the permit is issued, it would require compensatory mitigation to offset the authorized take, because the EMU take limit for golden eagles is zero.

Comment: Given the nature of the golden eagle population in the western United States, identification of local populations with meaningful demographics is very difficult, primarily due to emigration and immigration. Accordingly, the Service should focus on achieving only a stable or increasing EMU population.

Comment: As long as national and EMU eagle populations stay stable or increase, the Service's goals for eagles have been met. The LAP analysis is unnecessary and burdensome, and has no biological value.

Response: The Service disagrees. Biologically, recent data from satellite tracking studies show that while both bald and golden eagles range widely, there is high philopatry to natal, wintering, and migration stopover areas. Thus, local impacts can have far-reaching effects on eagle populations. Local populations of eagles also are of great cultural and social importance. The Service received many comments from states, tribes, local governments, and environmental organizations to this effect, and in support of including the persistence of local eagle populations in the management objective for eagles. Thus, the Service concludes that preservation of local eagle populations accomplishes both important biological and cultural objectives.

Comment: Assuming uniform density in the LAP analysis leads to greater relative protection of areas with higher than average eagle density within an EMU, and less relative protection in areas of lower density. The Service should account for variation in density, as well as improved knowledge of seasonal changes in eagle density and population-specific movement patterns.

Comment: We recommend that the Service's analysis includes more precise bald eagle LAP data where available. This would ensure that permitting decisions are well-aligned with the proposed preservation standard, and would be consistent with the Service's commitment to use the best available information and practice the best science.

Response: The Service agrees with these comments in principle. The Service acknowledges two limitations in using the LAP method to regulate incidental take. First, eagle density estimates are derived from nesting or late-summer population surveys; therefore, estimates do not account for seasonal influxes of eagles that occur through migration and dispersal. Second, eagle density estimates are not uniform across the EMU. Current LAP take thresholds allow the Service to authorize limited take of eagles while favoring eagle conservation in the face of the uncertainty. Given better information on resource selection, seasonal variation in density, and an improved understanding of seasonal changes in eagle density and population-specific movement patterns, the Service will refine the LAP analysis to better assess potential impacts of projects. We do not believe it would be appropriate to make such adjustments piecemeal or on a case-by-case basis, because LAP areas extend across state and even EMU boundaries; thus, a common frame of reference is necessary throughout each LAP. We are actively engaged in research designed to allow for better accounting of spatial and temporal variation in eagle density in the LAP calculations. We will incorporate these improvements to the LAP analysis as better estimation procedures are developed through formal updates to the ECPG after notice and public comment.

Comment: By requiring the LAP analysis and setting a take limit of 5% for the LAP, the Service appears to be setting a ''hard cap'' on take at this scale. It is unclear whether any take exceeding 5% of the LAP would be allowed, even if offset by compensatory mitigation.

Comment: The LAP analysis could unnecessarily limit incidental take and add to the regulatory burden, thereby potentially limiting some economic development in high-density bald eagle areas, without providing conservation benefit. In contrast, implementing the LAP analysis as proposed could put areas of low bald eagle densities at higher than necessary risk of local depletion.

Comment: We recommend that the LAP provision be applied as guidance, not regulation, especially for areas of high eagle densities that are not at risk of local depletion from limited take.

Comment: The proposed rule language setting a 5% LAP take limit is highly concerning. As written, it appears that no permits would be issued to new projects unless those projects can somehow reduce their own historic take.

Response: The purpose of the 5% LAP take limit is to ensure that projects that tier off this PEIS will not cause the extirpation of local eagle populations. Exceeding the 5% LAP take limit does not mean that we cannot or would not issue a permit. Instead, it would trigger a harder look at local eagle population effects at the individual project level, often through development of a project-level EA or EIS. The result of that analysis could be a determination that the permit would be inconsistent with the Eagle Act preservation standard, in which case the Service would either not issue the permit or might determine that, with the application of LAP-level compensatory mitigation, a permit could be issued. However, in some cases, mostly involving bald eagles, we expect the closer look would show that, despite the high local take rate, eagle populations at the LAP scale are robust enough to withstand additional take, in which case LAP-level mitigation might not be required in order to issue an incidental eagle take permit. The main point is that the effect at the LAP scale of take exceeding 5% will have to be determined on a case-by-case basis. Based on our analysis of the population-level effects of take for bald eagles, we do not believe that applying the LAP-scale analysis as proposed risks causing the extirpation of local bald eagle populations even in areas of lower-than-average density.

Comment: The unpermitted take is part of the baseline above which the LAP permit thresholds are applied, and it therefore must not be subtracted from available take at the scale of the LAP or EMU.

Response: The Service has determined that take, authorized or not, that was occurring prior to 2009 does not need to be accounted for within the EMU take limits. This determination does not apply to the LAP take limits, nor does it apply to unpermitted take that has been added since 2009.

Comment: Taking into account unpermitted take within an LAP is problematic because many regions may already exceed the 5% take limit cap by virtue of the existing activities to which unauthorized take is attributed. This means that unpermitted projects are essentially given priority over permitted projects.

Comment: The LAP approach seemingly penalizes developers for siting projects in areas with fewer eagles, which, if true, is entirely counter-intuitive, counterproductive, and opposite from what a permit program of this nature should attempt to accomplish. In areas where eagle densities are low, the chances that the 5% LAP take limit will be exceeded is higher.

Response: Because the 5% LAP take limit only applies to Service-authorized take, the take limit itself does not result in a priority being given to unpermitted take. However, it would be irresponsible not to consider such information when and where it is available, and that is what this component of the proposed rule requires. For example, take of golden eagles in the vicinity of the Altamont Wind Resource Area in

California is not currently under permit, yet that take has been well studied and would necessarily have to be considered as part of the cumulative effects considerations when evaluating an incidental eagle take permit application in that region.

The LAP approach will not penalize developers for siting projects in areas with fewer eagles. Because the Service uses the mean eagle population density for all LAPs within an EMU, there is no difference in the LAP population calculated for high- or low-density areas with respect to the LAP analysis.

Comment: Using unpermitted take as a metric for permit issuance provides deference to developers and others who choose not to obtain eagle permits, and increases costs for those who do. This creates a de facto prioritization of unpermitted take instead of penalizing those who take eagles illegally.

Response: The Service agrees that eagle take that is not authorized by permits should not take precedence over take for which permits are sought. Yet, biologically, either form of take results in mortality, which has the same effect on eagle populations, and so both must be accounted for in the Service's analyses and its determinations of whether additional mortality can be sustained relative to the population objectives. Relative to illegal take, the Service's Office of Law Enforcement and DOJ have placed a high priority on enforcement of the eagle take regulations, and those efforts have resulted in several recent settlement agreements with operating wind facilities. The Service intends to increase its prioritization of Eagle Act enforcement efforts following implementation of this rule change with the hopes of increasing incentives for project proponents to seek permits to cover take that is currently unpermitted but which might meet the requirements for coverage under an incidental take permit.

Comment: Because the proposed rule intends to rely on an LAP take limit to demonstrate no significant impact, it must analyze and quantify all eagle impacts, including unauthorized take levels, based upon the best available science and demonstrate how an LAP can sustain additional authorized take. It is inappropriate to limit analyses to authorized take only, which will severely underrepresent actual impacts to eagles. A science-based approach would commit to using the best available information to estimate the level of unauthorized take and then updating that information on a regular basis.

Comment: Take estimates are necessarily speculative for these unauthorized take sources, and Service personnel could use the proposed 5% LAP cap to deny an eagle permit on this basis.

Comment: In order to meet its preservation standard, the Service must require permit issuance determinations that consider all sources of anthropogenic take. The Service must address cumulative authorized and unauthorized take in an LAP when determining permit eligibility by revising 50 CFR 22.6(f)(2) as follows: The take will *likely* not result in cumulative *anthropogenic* [remove: authorized] take that exceeds *1*5 percent of the LAP, or the Service can determine that permitting *such* take [remove: over 5 percent of that LAP] is compatible with the preservation of the bald eagle or the golden eagle.

Comment: The proposed rule states that Service biologists would consider any available information on unpermitted take within the LAP area; evidence of excessive unpermitted take would be taken into consideration in evaluating whether to issue the permit. What would constitute ''any available information''? Who would be responsible for determining whether there was ''excessive unpermitted take''? How is ''excessive'' defined?

Response: The Service agrees that our estimates of unpermitted take are generally going to be speculative. There is only so much that can be done scientifically with anecdotal, incidental information, which characterizes most of the information that exists on unpermitted eagle take. However, the Service's proposal makes it very clear that we do intend to consider available information on unpermitted take as part of the LAP assessment. While the automatic trigger for additional analysis that could lead to a negative permit finding is a permitted take rate in excess of 5% of the estimated LAP, a high unpermitted take rate could also trigger the need for additional analysis and a negative finding with respect to permit issuance. For golden eagles, we have identified that an unpermitted take rate in excess of 10% could be considered high; for bald eagles, we have no scientific basis for establishing such a threshold. However, because unpermitted take is incompletely known and the degree of knowledge varies greatly from place to place, there will be few if any locations where unpermitted take can be accurately estimated, which means that in most cases the known unpermitted take will be greater than what is indicated by the available data. That is why the Service does not propose to set a hard limit on overall take, or on unpermitted take specifically. Instead, the Service will necessarily rely on best judgment to decide whether unpermitted take in any particular LAP is in excess of levels that would allow for additional take without risking extirpation of the LAP. Where data show that unauthorized take exceeds 10% of the LAP, if the incidental take permit is issued, the Service may require compensatory mitigation even if the EMU take threshold has not been exceeded. Finally, with respect to the burden on applicants, Service biologists will conduct the LAP analysis, and as such it will not trigger additional work for the permit applicant. To assist with the assessment of unpermitted take at the LAP scale, the Service has compiled and will continue to compile all available information from eagle necropsy reports, Office of Law Enforcement investigations, Special Purpose Utility Permit reports, and other sources into a national database that will be queried by Service biologists using a spatial GIS tool as part of each LAP analysis. We have also established internal processes that will result in more dead eagles being necropsied (to provide information about cause of death) and included in the database.

Comment: The Service should select an alternative in the PEIS where the LAP analysis approach is not incorporated into the regulations. Instead, it should develop specific eagle population size goals (other than the 2009 baseline) for each EMU and then use those targets to inform permit decisions within the EMUs, rather than the LAPs.

Response: The Service considered a number of other alternatives as possible management objectives for EMUs, among them setting EMU-specific population objectives. However, given the timeframe that was established for this rulemaking, the complexity involved in setting EMU-specific management objectives, and the lack of demographic data specific to each EMU, the Service decided to consider only the 2009 EMUs and Flyways as EMU alternatives for the PEIS, and to incorporate objectives for the persistence of local populations though a coupled LAP assessment process.

Comment: The Service should ensure that EMU and LAP take level analyses are aligned or provide an explanation as to why they are not. Eagle density estimates should not account for wintering or migrating birds for determining take levels in an LAP. Using density estimates is a liberal approach, which could allow for more

take (*e.g.,* involving overwintering birds that would eventually breed far from the LAP) than can be sustained by the resident breeding population in that same LAP. The Service should consider a mechanism for segmenting the population being impacted (*e.g.,* breeding/year-round vs. wintering/migrating).

Response: The EMU and LAP take limits are aligned to the degree that, across an EMU, we would expect a landscape with some areas (*e.g.,* in proximity to permitted projects) having comparatively high levels of authorized anthropogenic mortality but within the LAP take limit, but offset by other areas where authorized anthropogenic take is low, averaging to a maximum anthropogenic take across the entire EMU equal to or less than the EMU take limit. The eagle density estimates used to determine the 5% LAP take limit are summer population levels, and as such do not account for or include wintering or migrant eagles that will likely comprise some of the actual take. Thus, the take limits are conservative with respect to local breeding populations, not liberal as this comment suggests. The Service has initiated a genetic and isotopic assignment test project in conjunction with other cooperators with the goal of eventually being able to determine the approximate natal origin of eagles taken under permits. If this effort is successful, the Service will eventually be able to manage eagle take according to natal population. Until such time, we will continue to manage take in the conservative manner described here.

Comment: The proposed 5% LAP take limit for bald eagles in the southwest EMU exceeds Arizona's population growth rate of an average of 3.7% annually and could cause population declines. The Service should evaluate a separate EMU and a separate take limit for bald eagles in Arizona.

Comment: Because the LAP analysis uses EMU densities instead of local densities, it puts New Mexico's small breeding population of bald eagles at elevated risk.

Comment: The LAP criteria should be applied more strictly in the context of the Southwestern bald eagle population by either lowering the take exceedance thresholds for that population or by making take that exceeds the thresholds impermissible instead of merely ''inadvisable.''

Response: Application of the LAP analysis as explained in the PEIS leads to an eagle density in the Southwestern Bald Eagle EMU of 0.001 bald eagles per square mile. This translates into a take limit of 1 individual per year per LAP. A single LAP centered in the middle of the breeding distribution of bald eagles in Arizona encompasses most of the other occupied breeding territories; thus it is unlikely take of more than one to three bald eagles per year could be approved by the Service in Arizona without conducting a supplemental NEPA analysis. Similarly, in New Mexico, any project that would be predicted to take one or more bald eagles per year would require supplemental analysis, and the permit request could be denied. The Service's models suggest this level of take is well within the sustainable take rate and will not cause population declines in Arizona or elsewhere in the Southwest. A final point relevant to this comment is that any Service permit for take of eagles will specify that the permittee is responsible for complying with all applicable state, tribal, and local laws. States have full discretion to require more stringent protection for eagles under state law.

Comment: The LAP criteria should be applied more strictly in the context of the Sonoran Desert bald eagle population. The Service proposes to set a lower take limit for bald eagles in the proposed southern Pacific Flyway EMU; however, it appears that the proposed EMU includes more populations of eagles than just the Sonoran Desert bald eagle. The Service should separately manage the Sonoran Desert bald eagle.

Response: Although we recognize that bald eagles from the Sonoran Desert have special significance to many Native American tribes in the region, for the purposes of the PEIS and overall management of bald eagle incidental take, the Service does not recognize the Sonoran Desert bald eagle as a distinct taxon or management unit. We do, however, identify bald eagles in the Southwestern United States as a separate management unit based on differences in vital rates compared to other bald eagle populations. We note that not all of these differences are lower; for example, survival of adult bald eagles in the Southwest may be higher on average than in the other management units. Nevertheless, these differences and a desire to allow for continued population growth in the Southwest led the Service to propose a lower take rate there than is indicated based on estimated vital rates. Also, as noted in response to other comments, the LAP analysis would allow very little take per year before additional review would be necessary. For these reasons, we believe the selected PEIS alternative is adequately protective of bald eagles in the Southwest.

Comment: With regard to the cumulative effects analysis within an LAP, should all potential projects that might cause disturbance be treated uniformly? For example, should the first intrusion of relatively intensive human activity in close proximity to a natal area be treated the same as a project at the outer edge of the natal area?

Response: In cases where nest disturbance may occur, it is nearly always a matter of judgment to predict in advance whether the activity will actually constitute disturbance to the degree that take might occur (*e.g.,* a nesting attempt is unsuccessful). The Service has developed the National Bald Eagle Management Guidelines to help assess when a take permit might be advisable, and we are working on similar guidance for golden eagles.

Comment: Some activities are clear candidates for the use of the cumulative impacts analysis. It is unclear, however, if all projects in the LAP, particularly those which are relatively non-intrusive, should be subject to the same cumulative analysis.

Response: Some form of cumulative effects analysis is required for all eagle incidental take permits, and the LAP analysis provides a consistent standardized way to conduct those analyses across all activities, assuming the effect can be expressed in terms of estimated fatalities or decreased productivity.

Comment: Take thresholds should only apply to unmitigated take. For projects adhering to a no net loss standard, no take should be factored into the EMU take limit, and if mitigated within the LAP, take should also not be factored into the LAP threshold.

Response: The Service has not proposed to require compensatory mitigation except in cases where take limits are exceeded. In cases where projected take exceeds the EMU take limit, that projected take will not be subtracted from the EMU take limits, because it is offset. The take is subtracted from the LAP take limits, however, and if that results in the LAP take limit being exceeded, that would trigger additional environmental review. That additional environmental review would take into account whether the take was offset within the LAP or not, and how affects should be reflected in the LAP take accounting.

Comment: Defining the LAP using natal dispersal distance is a good starting metric, but other factors such as proximity to suitable habitat and topography should be taken into consideration, and the latest information on population genetic differentiation, population surveys, and

telemetry information should be taken into account.

Comment: We recommend that the Service's analysis includes more precise bald eagle LAP data where available. This would ensure that permitting decisions are well-aligned with the proposed preservation standard, and would be consistent with the Service's commitment to use the best available information and practice the best science.

Comment: It is important to recognize that Alaska contains a wide variety of eagle habitats, ranging from temperate rainforests in southeast Alaska to boreal forests and tundra in the north, that support differing densities of bald eagles. A one-size-fits-all management strategy, such as the proposed level of sustainable take for LAPs, is not appropriate in an EMU as diverse as Alaska, and thus levels of allowable take should not be uniform throughout the state.

Response: We agree that incorporating fine-scale biological data into the LAP analysis is a desirable goal. However, because such detailed data are not available for the vast majority of locales where incidental take permit applications are desired, it is not practical to require this level of detail in LAP analyses at present. Where such data are available and would contradict conclusions from the standard LAP analysis, they may be considered by the Service, although likely after additional NEPA analysis.

Comment: The goal of simply maintaining the persistence of local populations is not sufficient. The LAP objective, like the EMU objective, should be ''consistent with the goals of maintaining stable or increasing breeding populations.''

Response: Our analyses suggest the LAP take limit will actually allow for additional bald eagle population growth at the LAP scale. All golden eagle take will have to be offset at a 1.2 to 1 ratio, though the mitigation will not necessarily occur in the same LAP as the take.

Comment: The Service should not use the overly conservative 90th quantile for golden eagles to define the LAP area in order to match the median for bald eagles. The area bounded by typical, not extreme, movement is necessary to ensure fair analysis of the LAP under the proposed rule.

Response: The natal dispersal value the Service uses to define the LAP area for bald eagles is actually the median value for females; in bald eagles, as in most raptors, natal dispersal is female-biased (females disperse farther than males; Millsap et al. 2015). By adopting the median value for female bald eagles, the Service was able to capture most of the natal dispersal distribution for males as well. Millsap et al. (2015) lacked enough known-sex individuals to compute separate estimates of natal dispersal distance for male and female golden eagles, and so the Service used an updated 90th quantile for the pooled distribution instead. This is explained in Appendix A5 in the Status Report.

Comment: The Service advocates for siting of wind energy facilities in areas where impacts to eagles are expected to be low; however, siting facilities in low-use areas may inadvertently increase the chance that the project is sited in an area that already exceeds the 5% LAP take limit, making it more difficult or costly to obtain a permit than for a project sited in an area with higher eagle density.

Response: The Service uses the mean eagle population density for all LAPs within an EMU; thus, there is no difference in the LAP population calculated for high- or low-density areas with respect to the LAP analysis. Thus, this scenario is implausible.

Comment: Codification of the LAP cumulative effects analysis creates an economic burden on companies that have fewer resources.

Response: Actually, the LAP analysis will likely reduce costs for permits. First, the LAP cumulative effects analysis is a relatively simple exercise that is conducted by the Service, so no additional resources are required from the applicant to conduct the analysis other than what would be required otherwise. Second, in cases where the LAP analysis is conducted as analyzed in this PEIS, further project-specific NEPA analyses of the cumulative effects of the activity on eagles will not be necessary when projected take is within LAP take thresholds, thereby reducing overall costs for prospective permittees.

Comment: The LAP approach is problematic for long, linear projects such as electric transmission lines that may extend hundreds of miles or for large utility service areas that contain thousands of miles of distribution lines. Calculating and analyzing impacts over multiple LAPs for a single transmission line project or utility service area would be overly complex and very difficult for both the project proponent and the Service, particularly if the lines cross LAPs where the 5% cap is already exceeded.

Comment: The LAP analysis is specific to the wind farm and utilities industry. It cannot be fairly applied to real estate projects or any other industries.

Response: The Service has developed a spatial GIS tool that allows its biologists to compute the LAP calculations quickly, easily, and accurately. The LAP analysis can be applied to any project with borders that can be defined, including linear projects. As noted elsewhere, if these analyses indicate that take in excess of the 5% limit exists within the LAP, more thorough analysis is triggered. It does not necessarily mean an eagle incidental take permit cannot be issued.

Mitigation

Comment: The Service must clarify how proposed compensatory mitigation: (1) Would not have occurred in the absence of a specific permitting requirement; and (2) does more than require permittees to complete actions that a third party is otherwise legally required to complete under federal, state, or local law.

Response: This final rule adopts new language at 50 CFR 22.26(c)(1)(iii)(D) consistent with DOI policy requiring compensatory mitigation to be additional and improve upon the baseline conditions of the impacted eagle species in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure. Compensatory mitigation must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through legal authorities or contractual agreements.

Comment: The concept of requiring mitigation to exceed existing, ongoing, or future conservation efforts is speculative and should be removed. This concept would remove incentives for applicants to participate in voluntary actions promoting eagle conservation, especially if no credit is given for these actions.

Response: We have removed language requiring compensatory mitigation to be additional to ''foreseeably expected'' conservation or mitigation efforts. In addition, we have added language clarifying that voluntary actions to benefit eagles taken prior to permit application may be credited towards compensatory mitigation requirements.

Comment: Clear guidance on how to quantify the level of compensatory mitigation that will be required for golden eagle take, other than that it will be greater than 1:1, is currently lacking and should be provided.

Response: The preamble to this rule states that compensatory mitigation for any authorized take of golden eagles that exceeds take thresholds would be designed to ensure that take is offset at

a 1.2 to 1 mitigation ratio to achieve an outcome consistent with the preservation of golden eagles as the result of the permit. We believe this baseline mitigation ratio appropriately balances meeting our obligations under the Eagle Act with what is reasonable, fair, and practicable to permittees.

Comment: The Service should define what the unit of mitigation is, for example, territories, nests, or eagles.

Response: Impacts of an authorized project and benefits of compensatory mitigation are reflected in terms of numbers of eagles. For example, disturbance take would be analyzed for its impact on breeding success (see Tables 13 and 14 in the Status Report). Habitat restoration would be analyzed for its potential benefits to the eagle population.

Comment: Requiring compensatory mitigation at a greater than 1:1 ratio runs the risk of violating the ''rough proportionality'' requirement of the Fifth Amendment's takings clause (U.S. CONST. amendment V; *Koontz* v. *St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586, 2596 (2013) (''Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property[,] but because they impermissibly burden the right not to have property taken without just compensation.'')). By definition, requiring mitigation at a greater than 1:1 ratio will produce conservation benefits higher than needed to offset actual impacts. The government may ''choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts'' (Id. at 2595 (emphasis added) (There must be a '' 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal'' (quoting *Dolan* v. *City of Tigard,* 512 U.S. 374, 391 (1994).))). Also, because the unconstitutional conditions doctrines forbids burdening an individual's constitutional rights by coercively withholding benefits, the Service may not require compensatory mitigation at a greater than 1:1 ratio in exchange for issuance of a take permit.

Response: The two cases cited by the commenter are not relevant to the offsetting compensatory mitigation requirements in this regulation. *City of Tigard* dealt with a specific regulatory encumbrance on a portion of real property for an unrelated public benefit, and *Koontz* dealt with a requirement for a conservation easement that was far in excess of what was necessary to mitigate the impacts of the project. Even if one could argue those cases are applicable here, the Court in *City of Tigard* developed a ''rough proportionality'' test to determine whether a permit approval condition constitutes a taking, as noted by the commenter. This regulation requires an offsetting mitigation ratio of 1.2 to 1, which, even if it could be considered more than necessary to offset the impacts of a project, falls well within the bounds of being roughly proportional to the impact being mitigated. The Court in *City of Tigard* held that the regulating entity must make an individualized determination that the condition imposed is ''related in nature and extent to the impact of the proposed development,'' though no precise mathematical calculation is required. *Dolan* v. *City of Tigard,* 512 U.S. 374, 391 (1994). The Service has clearly explained in this final rule that the compensatory mitigation ratio is required to ensure that any authorization of golden eagle take is compatible with the preservation of golden eagles. The compensation ratio is not a generalized public benefit like the one struck down in *City of Tigard,* rather it is an encumbrance tied directly to the purpose of the regulations. Thus, this regulation clearly meets the Court's requirement by explaining in detail the compensatory mitigation requirement and its relation to the predicted impacts of a project and whether those impacts are compatible with the preservation of eagles as required by the statute.

Under the Eagle Act, the Service can issue a permit only if it is compatible with the preservation of eagles. We have determined that authorizing take of golden eagles while imposing compensatory mitigation at a 1 to 1 ratio is not sufficient to meet our preservation standard at this time. If eagles are not being preserved, one option is simply not to authorize take until we can determine how to reduce unpermitted take to the point where golden eagle breeding populations are stable or increasing. However, a primary purpose of this rule is to encourage more sources of unpermitted take to apply for permits and implement conservation measures. Rather than imposing a moratorium on new permits for golden eagles, we are requiring offsetting compensatory mitigation at a 1.2 to 1 ratio. In order to authorize any take of golden eagles under these regulations, we must ensure that take is compatible with eagle preservation, and because golden eagles currently are potentially facing declines, the 1.2 to 1 compensatory mitigation ratio appropriately balances compliance with the Eagle Act with not unduly burdening recipients of permits.

Comment: The Service should provide greater details in the rule and/or in guidance to clarify the standards for approving compensatory mitigation measures. Several commenters promoted the adoption of specific mitigation measures including habitat-based conservation banks, lead abatement programs, road carcass removal, support for rehabilitation centers, and others.

Response: Quantifying the benefits of various compensatory mitigation measures and developing standards for their application in permitting is complex. The Service and partners, including industry and NGO partners, has already spent considerable time and effort in developing additional compensatory mitigation measures with the goal of eventually approving their use as effective offsetting compensation. We intend to engage stakeholders to develop additional guidance and the standards for approving mitigation credits, setting appropriate mitigation ratios to address particular mitigation measure effectiveness and uncertainty, and establishing appropriate assurances for durability of mitigation measures.

Comment: In-lieu fee programs frequently do not provide meaningful compensatory mitigation prior to the onset of impacts.

Response: Any in-lieu fee program approved by the Service for use in eagle permitting must meet the same high, equivalent standards as any other mitigation type and must comply with DOI and Service mitigation policy. Compensatory mitigation for eagle take is still relatively new, with few approved methods. This final rule allows for many different types of mitigation to be proposed to allow applicants and the Service to expand the options available for providing compensatory mitigation, providing all such measures comply with the same fundamental standards. The Service will be developing additional implementation guidance to further clarify the standards by which we would approve particular compensatory mitigation types or measures.

Comment: Unproven mitigation measures should not be allowed.

Response: The Service agrees that proposed compensatory mitigation measures that have no basis for their effectiveness would not be approved. Approval of mitigation measures must be based on the best available science. This does not mean that no uncertainties can remain for a

mitigation measure to be approved. Any remaining uncertainties regarding the effectiveness of a mitigation measure must be accounted for to ensure that eagle take is appropriately offset. The Service intends to establish baseline standards for particular mitigation measures and involve the public in setting those standards.

Comment: To expand the breadth of defensible compensatory mitigation options, targeted research should be funded as part of the compensatory mitigation to facilitate the approval of additional effective compensatory mitigation tools. Funding from compensatory mitigation should not be directed toward activities that have less tangible benefits to eagles such as research, population monitoring, or education.

Response: Research and education, although important to the conservation of eagles, are not typically considered compensatory mitigation. This is because they do not, by themselves, replace impacted resources or adequately compensate for adverse effects to species or habitat. In rare circumstances, research and education that can be linked directly to threats to the resource and provide a quantifiable benefit to the resource may be included as part of a mitigation package. These circumstances may include: (1) When the major threat to a resource is something other than habitat loss; (2) when the Service can reasonably expect the benefits of applying the research or education results to more than offset the impacts; or (3) where there is an adaptive management approach wherein the results/recommendations of the research will then be applied to improve mitigation of the impacts of the project or proposal.

Comment: As written, the regulations equate to a ''first come, first served'' standard regardless of the number of eagles taken. Because the ''first come, first served'' standard will create inequities proportional to the level of take, we recommend establishing standardized mitigation for each eagle taken, so that mitigation is equitable to the level of take.

Response: We did consider requiring some level of mitigation for all take, whether within the established take limits or not. However, we have decided not to require mitigation for take that is within the established EMU take limits. For golden eagles, due to their population status, the EMU take limits are set at zero, and permits will all requiring compensatory mitigation. Given the relatively robust population status of bald eagles, and the likely demand for take permits, the Service anticipates that bald eagle populations will continue to grow without implementation of compensatory mitigation for take within the EMU take limits.

Comment: The Service should not condition eagle take protection for an individual project on a permittee acceding to compensatory mitigation for unrelated actions by others. Doing so would raise APA and due process concerns. Additionally, the Service should clarify that no permittee will be required to offset take in excess of take levels reasonably attributable to the activities covered in the permit.

Response: The Service will not impose compensatory mitigation requirements on an individual project unless that project, either singly or in conjunction with other projects in the same EMU (or possibly the same LAP), takes eagles in excess of the take limit. Projects removing eagles from the same EMU or LAP are not unrelated in terms of the eagle populations they affect, and as such the Service maintains it is appropriate and necessary to consider them cumulatively in assessing whether compensatory mitigation is necessary or not. If compensatory mitigation is required, it will be assessed in proportion to the number of eagles estimated to be taken under each permit. For golden eagles, permittees will be expected to contribute to reversing potential population declines, a necessary action if the Service is to allow any additional take of golden eagles and meet the stable population objective. Permittees are not expected to carry the full burden of offsetting unauthorized take; the Service has and will continue to increase enforcement actions against those taking eagles illegally so that unauthorized take will be reduced and restitution can be obtained.

Comment: The proposed rule's modification of the preservation standard with the goal of achieving a net conservation gain or no net loss is premature in light of the Service's agency-wide mitigation policy still being in draft form.

Response: The Service is relying primarily on the standards set forth in the Eagle Act, as interpreted by the Service. The Service has interpreted ''compatible with the preservation'' of eagles to mean consistent with the goal of maintaining or improving breeding populations of eagles since 2009. This final rule adopts the following definition: ''*Compatible with the preservation of the bald eagle or the golden eagle* means consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species.'' We have coordinated the development of these revised eagle regulations with development of the Service-wide mitigation policy to ensure consistency. In addition, these final regulations are in compliance with both Presidential and DOI mitigation policy, which have both been finalized.

Comment: The provisions for compensatory mitigation state that it must be based on ''best available science.'' Please provide a definition for this term.

Response: For the purposes of the Eagle Rule, we regard the best available science as scientific data that are available to the Service and that the Service determines are the most accurate, reliable, and relevant for use in a particular action.

Comment: It is not clear how compensatory mitigation requirements will or will not apply to federal and other government entities that apply for incidental take permits.

Response: Federal and other government agencies applying for an eagle incidental take permit would have to comply with the compensatory mitigation requirements of this rule, consistent with agency authorities. The Service understands there may be some circumstances where an agency does not have the discretion or available appropriations to implement compensatory mitigation and would make appropriate accommodations for these circumstances.

Comment: If a separate, distinct agency action benefits eagles, can that action be used or credited towards its compensatory mitigation requirements?

Response: Only actions that meet the additionality standards set forth in this rule could be used for compensatory mitigation. Compensatory mitigation must be additional and improve upon the baseline conditions of the impacted eagle species in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

Comment: The payment into conservation banks and in-lieu fee programs by a government agency could be problematic and potentially in violation of federal appropriations. Consequently, how does the Service foresee compensatory mitigation being implemented by permit applicants that are federal or state agencies?

Response: The Service cannot require a government agency to take an action outside the scope of its authorities. This rule does not assign a preference for any mitigation type. If an agency was

precluded from participating in an approved third-party mitigation program, the agency could implement its own compensatory mitigation.

Comment: Take should not be authorized above EMU take limits, regardless of compensatory mitigation.

Response: The Service believes that the rigorous standards for monitoring and compensatory mitigation in this rule ensure that authorized take over EMU take limits will be compatible with the preservation of eagles. The Service reserves the right to deny a permit if we determine the specific project is not compatible with the preservation of eagles.

Comment: The Service should require compensatory mitigation for all authorized take, including take within EMU take limits.

Response: The Service defines ''compatible with the preservation'' of eagles to mean ''consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and persistence of local populations throughout the geographic range of each species.'' Based on the Service's status review of the two eagle species, the Service has determined that the sustainable take rate for golden eagles is zero, while the bald eagle population can withstand the loss of several thousand individuals and still meet established preservation goals. DOI mitigation policy requires that mitigation be tiered to achieving landscape-level goals. The Service has determined that when take is below modeled sustainable take rates, we can achieve our conservation goals for the species without compensatory mitigation. By including the persistence of local populations in the preservation standard, the Service may also require compensatory mitigation if a permittee's action would threaten the persistence of a local population.

Comment: Compensatory mitigation should address project impacts by being located in the same LAP as the project impacts.

Response: Authorized projects may affect both resident and migratory individual eagles. Compensatory mitigation for eagle take is still in its infancy, and there are currently limited options to effectively compensate for the loss of eagles. Further limiting those options to the LAP is not practicable to implement at this time. The final rule retains the requirement to site within the same EMU where the take occurred. This allows the Service to target compensatory mitigation to have the greatest benefit to eagles while compensating for the impacts of the authorized project in a biologically meaningful way. For compensatory mitigation that is required to address concerns for a LAP, the Service has a preference for compensatory mitigation projects to be sited in the LAP where the impacts occurred. Projects that raise concerns over a local population would generally require site-specific environmental analysis, including would include consideration of where to site compensatory mitigation.

Comment: Habitat conservation is important for eagles. The Service should provide more guidance on how habitat conservation and restoration may be used for compensatory mitigation.

Response: While the current primary limiting factors affecting both eagle species are not habitat-based, the condition and availability of habitat is an important factor in eagle conservation. The condition and availability of habitat will likely be increasingly important in the future in light of climate and land-use changes. As with other forms of compensatory mitigation, the Service will continue to work with stakeholders to develop further guidance on how to structure habitat conservation efforts in ways that meet the standards set forth in the rule.

Comment: Compensatory mitigation should be implemented prior to the onset of impacts. The Service should allow for flexibility in the timing of mitigation, recognizing that not all mitigation can be provided prior to impacts.

Response: Service mitigation policy prefers that compensatory mitigation be implemented prior to project impacts. This is important to document the effectiveness of the mitigation measure. However, requiring compensatory mitigation to be in place prior to project impacts is not always practicable. All compensatory mitigation must follow the standards set forth in this rule, which are designed to ensure that compensatory mitigation is effective and offsets the impacts of the authorized take of eagles. If compensatory mitigation is implemented after project impacts, then it would have to account for temporal loss of the eagles taken, and mitigation ratios would be adjusted accordingly.

Comment: Unauthorized take and violations of the law are a law enforcement issue, not a permit issue. Unusually high levels of unauthorized eagle mortality within a LAP should not be a trigger for compensatory mitigation.

Response: From a biological perspective, it does not matter whether take is authorized or not; both unpermitted and permitted take result in mortality, and the effects of that mortality on eagle populations is the same. Thus, meeting the Service's management objective of not causing the extirpation of local populations requires that we consider and take into account existing levels of unpermitted take, and where those levels are excessive, to either not issue a permit or to require mitigation if we believe mitigation can be effective in offsetting additional take in the LAP. The commenter is correct that unpermitted take is also a law enforcement issue, and part of the solution lies in increased compliance. Towards this end, the Service's Office of Law Enforcement has and will continue to prioritize enforcement of illegal take of eagles.

Comment: The Service should not employ a ''practicable'' standard when evaluating compensatory mitigation. Compensatory mitigation must be designed to effectively offset all authorized take.

Response: These final regulations better align compensatory mitigation requirements with DOI and Service policy. Compensatory mitigation is required for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

Comment: The Service should refrain from establishing an explicit preference for use of in-lieu fee programs, mitigation and/or conservation banks at this time. The Service should continue working with third-party mitigation providers to develop effective mitigation programs and policies governed by equivalent mitigation standards.

Response: This rule does not state a specific preference for mitigation type. While there could be advantages to certain mitigation types in the future, like an in-lieu fee program targeting mitigation actions to maximize benefits to eagles, third-party mitigation options are not yet available for mitigating eagle take. This rule clearly states that all forms of compensatory mitigation must meet the same equivalency standards. More detailed guidance and standards for particular mitigation methods will be developed with public input.

Comment: The Service should consider allowing mitigation proposed under existing regulatory mechanisms, such as the U.S. Army Corps of Engineers' Clean Water Act section 404 permitting and ESA section 10 permitting, to be used for eagle mitigation to avoid unnecessary duplication among agencies and programs.

Response: The Service has particular mandates under the Eagle Act that differ from requirements under the ESA and U.S. Army Corps of Engineers' mandates under the Clean Water Act. To the

extent that existing mitigation programs meet the standards set forth in this rule and future guidance, they could contribute to compensatory mitigation for eagles.

Comment: Tribes are uniquely affected by eagle take permits. The Service should look to tribes with the resources and expertise to support the management of eagles to host mitigation activities, including giving preference for tribal lands for compensatory mitigation projects.

Response: The Service understands and respects that tribes have religious and cultural relationships to eagles that are unique, and that the Service has government-to-government consultation obligations with tribes. The Service values its partnerships with tribes and will continue to seek ways to strengthen these partnerships to advance wildlife conservation, including eagle conservation. This rule states that tribal take of eagles is a higher priority than incidental take covered by these revised regulations. Compensatory mitigation for eagles is relatively new, and there are currently only limited options for permittees. It is not appropriate at this time to further narrow the availability of compensatory mitigation projects to any specific land ownership, including tribal lands. However, nothing in the rule precludes the use of tribal lands as sites for compensatory mitigation, and such matters could be appropriate subjects for tribal consultation on individual permits that may affect tribal interests.

Miscellaneous—§ 22.26

Comment: With the Service's small staff and shrinking budget, the commitment to gathering solid population data for eagles at least every 6 years may be impossible to meet. Adjusting eagle take permits every 5 years (whether they are part of a permit given once, or part of a 30-year permit reexamined every 5 years), particularly based on local scale information about eagle populations, is impossible to do if population data are not gathered in a consistent, comprehensive way, making it impossible for the Service to implement the rules in any meaningful way ''consistent with the goal of maintaining stable or increasing breeding populations.''

Response: The schedule of monitoring proposed in the PEIS balances available dedicated eagle funding in the Service with the technical and logistical demands of eagle monitoring. Under this schedule, eagle monitoring will be conducted annually (not once every 6 years as implied by the comment), but the three major eagle surveys (golden eagle summer, golden eagle winter, bald eagle summer) will be conducted in rotation once each, every 3 years, with reassessments and updates of status every 6 years.

Comment: The Service misapplies the term ''take'' to include injuries or mortalities caused by accidental collisions with wind turbines, since such a statutory construction is inconsistent with the statute's required *mens rea,* and generally ''would offend reason and common sense'' *See United States* v. *FMC Corp.,* 572 F.2d. 902 (2d Cir. 1978).

Response: Operating turbines that incidentally (accidentally) take or kill migratory birds is a violation of the MBTA and the Eagle Act. Collisions with wind turbines are foreseeable and can be avoided, minimized, or mitigated for with the proper implementation of conservation measures. The Second Circuit Court of Appeals in the *United States* v. *FMC Corp.* decision cited by the commenter, along with most other courts, interpreted the MBTA to be a strict liability crime for misdemeanor violations, which means no *mens rea* (mental state) is required to determine guilt *See* 572 F.2d at 905–08. The *United States* v. *FMC Corp.* case dealt specifically with violations of the MBTA and not the Eagle Act, although eagles are also protected by the MBTA. Similar to the MBTA, the Eagle Act requires no *mens rea* for certain violations, including those that incidental take would fall under. *See* 16 U.S.C. 668(b).

Courts have concluded that, under strict liability, incidental take caused by many different activities violates the MBTA *See, e.g., FMC Corp.* (hazardous wastewater pond); *United States* v. *Corbin Farm Serv.,* 444 F. Supp. 510 (E.D. Cal. 1978) (improper pesticide use); *United States* v. *Moon Lake Elec. Ass'n,* 45 F. Supp. 2d 1070 (D. Col. 1999) (power line electrocution and collisions); *Ctr. for Biological Diversity* v. *Pirie,* 191 F. Supp. 2d 161 (D.D.C. 2002) (U.S. Navy military training activities); *United States* v. *Apollo Energies, Inc.,* 611 F.3d 679 (10th Cir. 2010) (oil extraction equipment). *But cf. United States* v. *CITGO Petroleum Corp.,* 801 F.3d 477 (5th Cir. 2015) (oil waste water facilities, but based on the conclusion that the MBTA was primarily enacted to regulate hunting and poaching). Recently, courts have reached similar conclusions with regard to wind-energy operations *See, e.g., Pub. Employees for Envtl. Responsibility* v. *Hopper,* 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016). There is no reason to conclude that courts would reach different conclusions for incidental take of eagles under the Eagle Act.

Comment: The revised 30-year eagle rule will allow wind energy facilities to cumulatively kill up to 4,200 bald eagles and 2,000 golden eagles annually with no prosecution.

Response: This brief and widely publicized statement distorts the actual facts about the proposed rule in at least four ways. First, it simply ignores the existence of the permitting process and implies the Service will ignore violations by wind companies. Second, the numbers presented for bald eagles are in reality the amount of take that the Service estimates could occur without resulting in a population decline (and the actual number is likely significantly higher; this is a conservative estimate that errs on the side of protection). The numbers do not represent the level of take the Service anticipates authorizing under permits. Third, mention of allowable take of 2,000 golden eagles is completely without basis; the take level for golden eagles is set at zero without offsetting compensatory mitigation. Finally, the estimated sustainable take limits are not allotted to the wind energy industry; the Service issues permits to homeowners and other individuals; local, state, tribal, and federal agencies; and many types of businesses. In fact, the majority of permits that have been issued under the 2009 regulations have been for temporary disturbance or removal of inactive nests for safety purposes.

Comment: The Service does not adequately enforce the Eagle Act when it comes to wind power. Companies, therefore, are not deterred from constructing projects in essential habitats of eagles and other migratory birds. Without increased enforcement, there is no reason to assume the new regulations will lead to any greater degree of compliance.

Response: Eagle take is prohibited by law, and violations may be prosecuted criminally or through civil enforcement authorities. Which type of enforcement is used depends upon the facts of each situation, including the conduct of a wind energy company in siting and operating wind projects. The Service and the U.S. DOJ have taken enforcement action where and when warranted and will continue to do so. In the last 18 months, the Service has resolved five civil enforcement actions concerning unauthorized incidental take of eagles at wind facilities. However, when investigations are ongoing, information about them is not released to the public. It is understandable that the public is unaware of the enforcement actions being pursued by

the Service's Office of Law Enforcement. When investigations are ongoing, information about them is not released to the public, or even to other Service programs, until cases are resolved. In this case, the commenter's statement is just wrong. In fact, just in the last 18 months, the Service has resolved four civil enforcement actions against wind companies. Taken together, the four civil settlements reached over the last 18 months have addressed legacy and interim eagle take at 15 different wind-energy facilities, resulting in 10 additional wind energy facilities applying for eagle take permits (5 had applied for permits at the time settlement discussions commenced) and commitments by the wind energy facilities to spend a minimum of $1,855,000 over the next 3 years on research and development of avian detection and deterrent technologies and to pay $55,000 in civil penalties.

Comment: The Service should consider an approach to ensure permitting and siting regulations are properly followed. In Osage County, Oklahoma, although injunctions were granted at the federal level against construction of wind turbine projects, lack of enforcement meant construction continued without interference. The Service must clarify and strengthen its approach for instances where eagle permitting regulations are not followed by energy developers or others.

Response: The Eagle Act does not directly regulate otherwise legal activities that may result in the take of an eagle or eagles. Specific effects of otherwise lawful activities, including construction and operation of wind facilities, can constitute actions that are prohibited under the Eagle Act, such as disturbance, injury, or killing of eagles. The permit authorization is for the otherwise-prohibited take, which is usually directly caused by the operation of the project. The eagle permit does not authorize the construction of the facility itself.

An injunction is an order issued by a court requiring a person to do or cease doing a specific action. An injunction is considered to be an extraordinary remedy and is available only in special cases where the injunction is necessary to preserve the status quo or to require some specific action in order to prevent irreparable injury or damages that cannot adequately be remedied. The Service is not aware of any injunctions currently in effect ordering any wind energy company to cease taking eagles in Oklahoma. The injunction the commenter refers to may be related to federal cases involving the potential intrusion of subsurface mineral rights by construction of wind-turbine foundations at a facility constructed in Osage County, Oklahoma. The cases did not relate to eagles and construction continued because the cases were resolved in favor of the wind company.

Comment: The Service has the ability to regulate the wind industry, including influencing siting. For example, if the Service recommended that a project not be placed at a particular site due to high risks to federally protected species, but the developer ignored the recommendation or failed to obtain appropriate permits, then the Service could subject that facility to enhanced scrutiny, including independent monitoring of fatalities and/or unannounced visits by law enforcement. The developer could also be warned that, if protected species are killed, the Service will refer the case to the Justice Department and request prosecution to the greatest extent of the law, including the possibility of temporary or permanent shut down.

Comment: Proper siting for wind energy projects and adequate protection for eagles and migratory birds must take a higher priority. There should be no siting of wind turbines in eagle breeding, nesting, and migratory areas under any circumstances. While more stringent and responsible guidelines on proper siting may be more difficult and costly, we contend that this is an instance where the federal government and the Service must stand firm and defend our eagle populations.

Comment: The Service is wrong in asserting that it lacks any authority to ''prohibit development in areas that are important to eagles,'' and that the most it can do, is ''recommend'' that a company not build its project in a high-risk site. 18 U.S.C. 371 makes it a crime for any person to conspire ''to commit any offense against the United States.'' The government has relied on this provision to prosecute not only actual ''takings'' in violation of federal wildlife protection laws, but also the predicate actions necessary to bring such takings to fruition. The government need not wait until the actual taking of an eagle, but may undertake appropriate enforcement action to prevent harm to protected wildlife before it occurs.

Response: The Service has been consistent with our message that we focus our resources on investigating and prosecuting individuals and companies that take migratory birds, including eagles, without identifying and implementing all reasonable, prudent, and effective measures to avoid that take. Companies are encouraged to work closely with the Service to identify available protective measures in their avian protection plans when developing project plans, and to implement those measures prior to/during and after construction and operation, including during the siting process. However, if a wind company ignores our advice and develops a project in an area that results in the take of eagles or concerning numbers of other migratory birds or federally protected bats, we can and do investigate and, if appropriate, pursue appropriate enforcement action. The Service and DOJ have taken enforcement action where and when warranted using the enforcement authorities available to them and will continue to do so.

Comment: How is the Service going to find out if protected species have been taken since it relies solely on the regulated industry to volunteer that they have broken the law? The wind energy industry (which is already paying for their own studies) should contribute to a fund that the Service will use to hire independent experts to conduct pre-construction risk studies and post-construction bird and bat mortality studies.

Response: We agree that independent third parties reporting directly to the Service should monitor take under long-term permits, and we have incorporated this requirement into the final regulations.

Comment: The regulations should include a requirement that all baseline and post-construction data on wildlife will be made fully available to the public as soon as possible. Lack of transparency is a pervasive problem. Reports of baseline studies and of impacts monitoring at wind projects are increasingly kept confidential. These data pertain to public trust resources, and should not be kept confidential.

Comment: The Service should establish mechanisms to automatically provide all data and reports, including raw data collected on-site, to the public in real-time and as soon as it is available.

Comment: The Service should require that all monitoring data (reports and raw monitoring data) be submitted electronically to a publicly available database. Federal agencies are moving towards electronic reporting as evidenced by the Environmental Protection Agency's (EPA's) ''Next Generation Compliance'' initiative. The Service should develop a public electronic portal/database from which it can track permit compliance, authorize take across populations, and publish proposed and final permitting decisions. This portal would allow stakeholders and regulators to quickly search permits and quickly access all available

monitoring reports and 5-year reviews. This approach would not only facilitate transparency but also provide a valuable tool for its staff to track permit compliance.''

Response: The permit regulations already contained the provision that all mortality data will be available to the public prior to this rulemaking. We will post cumulative reported mortality data that is summarized to a state and flyway level on a Web site that can be viewed by the general public. We will consider posting pre-construction (or pre-permitting) data that we require as part of the permit application for projects that receive eagle take permits.

Comment: The proposed rule is focused on eagle breeding populations; however, the eagles killed in wind resource areas are not necessarily participants in breeding populations at the times of their deaths.

Response: The proposed rule did not focus on breeding populations, and in fact one aspect of the proposal, to adopt Flyways rather than maintain the current EMUs, was introduced to better account for non-breeding season movements. The Service's population size estimates, sustainable take rate estimates, and take limits all apply to eagles across all age classes, both sexes, and throughout the year. Even the LAP analysis, which does focus heavily on breeding eagle densities, is not intended to only be protective of breeding populations, as explained in the Status Report on page 27.

Comment: The Service should provide more clarity and transparency concerning data collected concerning causes of eagle mortality in the United States. As the agency responsible for the National Eagle Repository (NER), the Service is in a unique position to obtain, track, and disclose data surrounding eagles being sent to the repository. Disclosure of these data would provide a necessary starting point to check the accuracy of Service priorities regarding eagle mortality in the United States.

Comment: Tribes should have access to eagle injury and death reporting related to their historic reservation areas to provide for better collaboration regarding eagle incidents. Eagle injury and death incidents should be coordinated with tribal eagle research facilities as a collaborative measure to ensure improved data and research related to wind turbine impacts.

Response: The Service is in the process of developing a database to centralize and grow the dataset on injury and mortality incidents involving eagles and other birds across the nation. This will include data on any eagles recovered by, reported to, or delivered to the Service and/or any partners who data share with the Service, and will include eagles that go on to be sent to the NER. The database is still being populated with a number of historical records and prepared for use by others outside of the Service, but is anticipated to be fully functional by the end of 2017. Once the database is populated and fully operational, we do anticipate that some level of information will be made publicly available, along with information on the role these data play in helping the agency address and research impacts to eagles and other birds. It is important to note that the Service will not be depending solely on the data collected in this database to accurately depict the relative causes of eagle and other bird mortality across the landscape. While some of the data collected in the database should help to inform these questions, there are targeted, structured studies that are more useful for this purpose. A list summarizing these studies is available upon request, but a good example is a study the Service is conducting that involves using the fates of a sample of satellite-tagged eagles to estimate the importance of different mortality factors, as described in the Status Report. We note that many Native American tribes have been active participants and collaborators in that study, and that collaboration has greatly improved the extent and scientific quality of the findings.

Comments: The Service has stated that: ''The current regulations provide that eagle mortality reports from permitted facilities will be available to the public. We will also release mortality data on other migratory birds if we receive that data as a condition of the permit, provided no exemptions of the FOIA (5 U.S.C. 552) apply to such a release. If we receive mortality data on a voluntary basis and we conclude it is commercial information, it may be subject to Exemption 4 of the FOIA, which prevents disclosure of voluntarily submitted commercial information when that information is privileged or confidential.'' That statement strongly suggests that the Service will accede to the wishes of companies that desire to shield from the public their impacts on public trust resources—which is hardly consistent with the purposes of the Eagle Act, MBTA, or FOIA. Any wind energy company could declare that disclosure of eagle kill data could hurt its bottom line or is somehow ''confidential'' business information, with the result that virtually all eagle mortality data will likely continue to remain unavailable to the public and concerned conservation organizations.

Response: Under the FOIA's Exemption 4, the Service independently determines whether submitted data is commercial information not subject to disclosure (confidential business information), whether or not it is marked as such by the submitter. A submitter cannot simply insulate information from disclosure under FOIA by marking it as privileged or confidential and expect the Service to accede without an independent analysis. Also, there is a distinction between ''voluntarily submitted'' records and records that are required to be submitted, and in the language quoted by the commenter, we were talking about other birds in addition to eagles. Under eagle take permits, submission of eagle mortality information is not voluntary, and our regulations, both current and those made final with this rule, require data on permitted eagle mortality to be publicly available.

Comment: While tribal members are required to apply for and receive individual permits from the Service to even possess eagle feather or parts—despite the Constitutional rights and religious freedoms of tribal people that have long been acknowledged in the law—the Service intends to issue permits for lethal take of eagles to the wind industry for up to a 30-year term, not to protect eagles as the Service now suggests, but rather to facilitate a purely commercial activity by wind developers. The requirement that permits for traditional religious use of tribal members be renewed annually imposes administrative and cost burdens on the practice of religion, as well as on the Service's limited resources. The Service should consider issuing take permits for Native American religious use in perpetuity, or at a minimum for the 30-year term the Service proposes for non-religious incidental take. The inequities between the durations of these two permits warrant staying the final incidental take permit regulations until the Service can address this very serious question.

Response: We are aware that the 1-year permit duration for permits to take eagles for religious use may impose an unnecessary burden on some tribes, and we are considering revisions to those permit regulations to address a variety of issues, including the permit duration. We will consult with tribal governments before proposing any revisions.

Comment: The proposal lacks meaningful or specific guidance as to how the Service will conduct tribal consultation with potentially affected

Indian tribes on a project-by-project basis when the Service receives permit applications. There is no assurance the Service will engage in proper consultation with affected Indian tribes. Tribes are likely to be cut out of the permitting process, depriving the Service of valuable traditional ecological knowledge and tribal data about the historic and current presence of eagles in the area.

Response: Where issuance of a permit has the potential to affect Native American tribes, we will notify the potentially affected tribes and provide them with the opportunity to consult. If tribes have valuable traditional ecological knowledge they will share, we will welcome that information. The Service relies on a numerous guidance documents to inform how it consults with tribes, including Executive Orders; Presidential memoranda; DOI Secretary's Orders; and policies of the DOJ, DOI, and the Service. We do not see any advantage to tribes of incorporating all this guidance into the eagle permit regulations, and the result would be either a repetition of information already provided or a summarized (and, therefore, more generalized and less helpful) version of the existing authorities and guidance. Further, as with any federal action warranting tribal consultation, the specific circumstances of the actions will affect the process and parameters of the consultations. Additionally, individual tribes have different preferences for how they wish the consultation process to proceed. For all these reasons, we did not address specific protocols for consultation with tribes.

Comment: The Service should mandate that each permit application identify affected tribes in the requisite eagle conservation plan. Consultation with tribes should occur at every stage of the permitting process. The regulations should ensure that affected tribes receive notice by sending a copy of each eagle take permit application to tribes. If this is not feasible due to legal, confidentiality, or other concerns, tribes should at least receive notice of an application and information necessary to allow for effective and meaningful consultation. Also, affected tribes should be included in the NEPA analysis of each permit. To ensure increased participation and input by tribes in the NEPA process, affected tribes should be invited to serve as cooperating agencies under NEPA. Further, the Service should send a copy of an eagle take permit to all affected tribes upon the issuance of that permit.

Comment: Tribes that will be affected by eagle take authorized under a particular permit must be identified and contacted to facilitate participation in the permit decision-making process. The Service should cast the widest net possible to identify affected tribes, which the regulations should broadly define to include: (1) All tribes with an interest in eagles in the vicinity of a wind energy project; or (2) all tribes that may have interest in eagles within the relevant flyway.

Response: We maintain our commitment to consulting with interested tribes as early as possible in the permitting process when issuance or review of individual permits may affect a tribe's traditional activities, practices, or beliefs. We do not think it is appropriate to require a permit applicant to identify potentially affected tribes. Instead, it is incumbent on the Service to make that determination. Thus, we will continue to rely on our trust relationship and open communication with each federally recognized tribe to help us determine when a project may affect tribal interests. Because of the myriad differences in the interests of federally recognized tribes regarding eagles, we do not find it appropriate to limit or circumscribe consultation with individual tribes by outlining a more specific framework for the consultation process. Each consultation will depend on the specific needs and concerns of the affected tribe. In some cases, it may be appropriate to consult with a tribe regarding its interest in projects occurring in a region or flyway. In other cases, it may be appropriate for a tribe to act as a cooperating agency for the NEPA process for an eagle permit. Regardless of any consultation process, the effects of an eagle permit on tribal cultural, religious, or socioeconomic interests will be analyzed in the appropriate NEPA document for that permit.

Comment: The Service should clarify that projects that attempted in good faith to comply with eagle take regulations, especially those that also applied for permits but were unable to obtain a permit due to difficulties inherent in the current permit program, should not be required to undergo additional mitigation prior to being issued a take permit under the new regulations. Consistent with the template eagle settlement agreement framework, the Service should clarify in the eagle permit program that not all such projects will need to enter into a settlement agreement prior to being granted a permit; instead, the Service will, in determining whether prior unpermitted take requires any additional actions, take into consideration the nature, circumstances, extent, and gravity of the acts with respect to the degree of culpability and cooperation, history of noncompliance, levels of past take, and efforts to reduce take.

Comment: The proposed rule implies that applicants would need to take corrective actions and/or make payments for all takes over the life of the project, which, for transmission line providers, may have been in operation since the early 1900s. It is unreasonable and ineffective to require that those seeking a voluntary permit must ''settle up.'' Voluntary applicants would then need to incriminate themselves to obtain an eagle permit, creating a strong disincentive to seek permits.

Comment: The Service should reconsider its position that applicants may be required to address past take by entering a settlement agreement; why does historic take need to be taken into account now considering that take occurring prior to 2009 is already reflected in the bald and golden eagle population status?

Response: A permit can be issued without resolving unauthorized past eagle take; however, the applicant continues to be subject to an enforcement action at any time for unpermitted prior take of eagles. Such decisions will be made on a case-by-case basis considering the totality of the circumstances. Project proponents have been encouraged to consult with the Service early and often to avoid and mitigate migratory bird and eagle take to the extent practicable, and to apply for an eagle take permit where take cannot be avoided. The Service's goal has been to work closely with project developers to ensure unlawful (unpermitted) take does not occur. However, many entities have chosen to avoid the Service's involvement all together, or only engage with the Service after eagles were killed and a law enforcement investigation began. A determination by the Service whether to pursue criminal or civil enforcement of prohibited eagle take and, if so, whether it is appropriate to resolve any such enforcement through a settlement will consider the conduct of a company in siting and operating projects. Settlement agreements may be appropriate under either the criminal or civil provisions of the Eagle Act. Finally, in response to the last comment, the statute of limitations for criminal and civil enforcement actions is five years and we would not expect enforcement of take prior to 2009.

Comment: In the original 2009 rulemaking, existing projects were

considered part of the baseline and were not required to implement any additional mitigation requirement for take when obtaining a permit. The Service should consider a similar approach here for existing projects that have already invested significant resources in their projects and are meeting the recommended measures outlined in the Wind Energy Guidelines (WEG) and ECPG. Similar to the analysis for historical tribal take for religious use, the Service should acknowledge that take from existing infrastructure is part of the baseline. Authorization of such take should not affect take limits established by the Service. Many existing power line retrofit programs are improving the baseline condition by reducing mortalities.

Response: Ongoing incidental take that has been occurring on a relatively steady basis since before 2009 is part of the baseline and therefore does not require offsetting compensatory mitigation. The Service will take into consideration the conservation measures already in place in developing permit conditions for these sources of take.

Comment: We agree with the Service's decision to decline to require the following measures at wind energy projects: Increase in frequency of turbine site inspection to search for physical evidence of mortality/injury event; development and employment of video surveillance and other technologies (impact alarms); and/or providing onsite personnel to facilitate monitoring of larger wind farms. These practices are clearly not demonstrated, effective best management practices.

Response: We appreciate this opportunity to clarify our position. We have not made any final decisions about the use of such measures; we merely noted that they have not yet been shown to be effective.

Comment: The standard language on permits stating that the authorization granted is not valid unless the permittee is in compliance with all other federal, tribal, state, and local laws and regulations is concerning. The language creates the result that some federal permits could be of little value due to state restrictions on issuing incidental take permits for ''fully protected'' species, such as in California. The Service should consider alternative language that would state that the applicant is responsible for ensuring compliance with other federal, state, and local law.

Comment: Entities seeking a federal permit to take bald or golden eagles may not be able to obtain a state-level permit to be in compliance with state laws. This could potentially put the state fish and wildlife agencies in the position of holding up the issuance of a federal permit or revocation of a permit, due to the lack of authority or ability to issue a state-level permit. The regulations should be revised to include a framework or pathway within the permit structure that requires coordination between the Service region, the state fish and wildlife agency, and the applicant to discuss issuance of any state permits. This will be imperative in states where there is no authority or process to issue a state-level permit to reduce the potential conflict between the state agency and the permit applicant.

Comment: The provision that permits can be issued to or valid only for ''otherwise lawful'' activities should be removed. It is built into the ESA statutory language, but is not present in the Eagle Act. The concept under both ESA programs and the Eagle Act has been misconstrued and inappropriately applied. Specifically, it can cause confusion, leading to delays and to occasional litigation over permit processing and issuance.

Response: We have revised the language that said the federal Eagle Act authorization is not valid if a permittee is not in compliance with the laws and regulations of other jurisdictions. The new language states: ''You are responsible for ensuring that the permitted activity is in compliance with all Federal, tribal, State, and local laws and regulations applicable to eagles'' (§ 22.26(c)(11)). When seeking a federal permit, persons should do their due diligence to determine whether bald and golden eagles are protected under other laws and whether their action may require additional authorizations. We will defer to state, tribal, and local authorities' interpretation of their own laws and regulations and will continue to work closely with those entities in providing any requested assistance in enforcing non-federal laws and regulations.

Comment: The timeframes associated with processing a permit application were initially underestimated. Only one eagle permit has been issued by the Service at the time of this letter. The final regulations should contain processing timeframes.

Response: The Service has issued over 400 permits under the 2009 permit regulations. The false assertion that we have issued only one permit has been made repeatedly by one industry for which we have issued only one permit. We are not including permit issuance timeframes in the regulations because the time it takes to issue a permit varies enormously depending on the scale and complexity of the activity that will result in take, the need to prepare an analysis under NEPA, the quality and completeness of the data and other information provided by the applicant, and many other factors.

Comment: We recommend more realistic penalties for violations be instituted. The Service should review and address enforcement actions and measures in the context of eagle take violations (under both the MBTA and the Eagle Act). Presently, it appears that resources are inadequate for enforcement in the field, as well as a reticence for the Service and the courts to prosecute violators.

Response: The Service, as part of DOI, is an agency in the Executive Branch of government. Civil and criminal penalties tied to federal laws are set in statute and those statutes are set by the Legislative Branch of government (Congress). However, in 2015 Congress mandated that federal agencies update penalties for civil violations of statutes they are responsible for enforcing. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires agencies to adjust the level of civil monetary penalties and to make subsequent annual adjustments for inflation. *See* Public Law 114–74, 701, 129 Stat. 584. The Service subsequently updated civil penalty amounts for all statutes it enforces, including the Eagle Act. *See* 81 FR 41862 (June 28, 2016). The maximum civil penalty under the Eagle Act increased from $5,000 to $12,500 for any violation occurring after July 28, 2016, and the new penalty will be adjusted annually for inflation. *See* 50 CFR 11.33 & 16 U.S.C. 668(b).

When issues of take are brought to the attention of the Service, they become an investigative priority for the Service. If it appears that the take violated federal law, the results of the investigation are brought to the attention of either the DOJ or DOI's Office of the Solicitor, for review and criminal or civil prosecution. The DOJ decides, in consultation with the Service and the Office of the Solicitor, whether or not to prosecute violations of federal law.

Comment: In the proposed rule, the Service provided a response to comments that implies requiring a Bird and Bat Conservation Strategy (BBCS) is consistent with its regulations: A BBCS is a vehicle created by the 2012 land-based WEG. Requiring a BBCS contradicts the voluntary nature of the WEG, and also contradicts the WEG-created concept of the BBCS. The Service should clarify in the preamble

to the final rule that a BBCS (or collection of documents that serve the function of a BBCS) is voluntary.

Response: Preparation of a BBCS is voluntary under the WEG. Preparation of an eagle conservation plan is voluntary under the ECPG. Neither the WEG nor the ECPG confers the take authorization necessary to shield an entity from enforcement for prohibited take under the Eagle Act. A permit is the necessary mechanism to confer the authorization needed to take eagles, and permits require avoidance and minimization measures. Some applications for eagle permits (*e.g.,* for most wind energy facilities and other projects that are large-scale and have the potential for significant or ongoing impacts) will require essentially all the information and commitments that are generally found in a BBCS. In those cases, the compilation of information submitted need not be referred to as a ''Bird and Bat Conservation Strategy'' (particularly if take of bats is not likely) or an eagle conservation plan, but whatever it is called does not change the requirement that certain information necessary for the Service to determine that the applicant will undertake appropriate avoidance and minimization measures must be submitted by the applicant.

Comment: The Service should clearly define for its staff that the scope of the NEPA analysis should only include an analysis of the environmental effects of the issuance of an eagle permit and its associated effects. As applying for the permit is voluntary, the general siting, construction, and operation of a project should fall outside of the typical NEPA analysis.

Response: We agree that the scope of the NEPA analysis should include only an analysis of the environmental effects of the issuance of an eagle permit and its associated effects, including the effects of mitigation measures. Because nearly all of the environmental impacts associated with issuance of an eagle permit relate to eagles, the analysis already included for these species should already be covered by the PEIS for the majority of permits. Among the exceptions would be most cases where the 5% LAP take limit is exceeded and whenever there exist extraordinary circumstances that require an exception to a categorical exclusion as defined under NEPA. As such, any project-specific NEPA analysis should truly be circumscribed, as a majority of the necessary analysis has already been covered. The impacts of construction and operation may be part of the impacts analysis to the degree that the permit covers the effects of those activities, including the mitigation for the permit. Thus, the environmental effects of any permit conditions and any modifications to the proposed construction or operation of the project triggered by the permit review and issuance process should be analyzed as part of the NEPA process. We also note that, although applying for a permit is voluntary in nature, take of federally protected species such as eagles is a violation of federal law unless that take has been authorized under a permit or regulation.

Comment: The Service invokes the Eagle Act statutory language that refers to the ''protection of . . . other interests in any particular locality'' as the foundation for its proposed regulation. However, promotion of a national renewable energy industry is not an ''interest'' that relates to a ''particular locality.''

Response: The fact that the permit program overall may enhance a national interest does not mean it violates the Eagle Act. Individual permits are not being issued to a national interest. As a comparison, preservation of eagles is also a national interest, and we can issue a permit that would benefit eagles in any particularly locality. In fact, a specific town, city, county, or set of coordinates at which one or more wind turbines is located would constitute a ''locality,'' which accurately reflects the scale at which the Service issues individual permits.

Comment: The language relating to ''resource development and recovery operations'' indicates that, to the extent Congress considered that the Service could use incidental take permits issued under the Eagle Act as a tool to promote a national industry, the agency's authority to issue them is specifically limited to ''the taking of golden eagle nests.''

Response: This comment confuses two different provisions of the Eagle Act that were established by Congress in separate amendments to the Act, one in 1962 (''for the protection . . . of agricultural or other interests in any particular locality'' (Pub. L. 87–884, October 24, 1962)), and one in 1978 (''the Secretary of the Interior, pursuant to such regulations as [s]he may prescribe, may permit the taking of golden eagle nests which interfere with resource development or recovery operations'' (Pub. L. 95–616, November 8, 1978)). The two clauses provide the Secretary authority to issue permits for different activities and are separated by multiple clauses addressing separate types of entities and interests that may receive permits.

Comment: The proposed regulation is inconsistent with the 1916 convention with Canada aimed at conservation of migratory birds and its 1995 protocol (''U.S.-Canada Convention''). Article II.3 of the Convention specifies that ''the taking of migratory birds may be allowed at any time of the year for scientific, educational, propagative, or other specific purposes consistent with the conservation principles of th[e] Convention.'' However, the rule is not aimed at advancing ''scientific,'' ''educational,'' or ''propagative'' purposes. Also, none of the conservation principles listed in the Convention includes promotion of wind energy or any efforts aimed at addressing climate change.

Response: This regulation does not ''promote'' wind energy; it sets forth a suite of new and amended provisions to increase protection of eagles and streamline the permitting process to encourage any project proponent that may take eagles to apply for permits and thereby implement conservation measures to reduce and offset projected take of eagles that otherwise would not be implemented. The regulatory amendments are consistent with the preservation of eagles under the Eagle Act, which is a standard that potentially provides more protection to eagles than the MBTA or any of its underlying treaties. Moreover, the Canada Convention does not prohibit the Service from authorizing incidental take of eagles or other migratory birds by industrial activities. As an initial matter, the Canada Convention itself does not include eagles in the list of bird species and families it applies to; the treaty with Mexico covers the avian family that includes eagles, and the treaty with Russia specifically includes bald and golden eagles. Second, as the commenter notes, the Canada Convention, as amended by the 1995 protocol, authorizes the parties to allow the taking of migratory birds for ''other specific purposes consistent with the conservation principles of this Convention.'' The 1995 protocol called for a comprehensive approach to the conservation and management of migratory birds, outlining several conservation principles and the means to pursue those principles, including monitoring, regulation, and enforcement. *See* Article II. Several court cases have confirmed the Service's authority to regulate and enforce the MBTA's take prohibitions in the context of incidental take (see, *e.g., United States* v. *FMC Corp.,* 572 F.2d 902 (2d. Cir. 1978) (holding that it is appropriate for the Service to use enforcement

discretion to police activities that incidentally take migratory birds); *Publ. Employees for Envtl. Responsibility* v. *Hopper,* 827 F.3d 1077, 1088, n. 11 (D.C. Cir. 2016) (noting that an offshore wind facility could apply for a permit to cover its activities likely to cause incidental take)). Third, Congress enacted legislation directing the Service to specifically authorize incidental take caused by military readiness activities, signifying that Congress both interpreted the MBTA to otherwise prohibit incidental take and viewed the incidental take authorization as consistent with the underlying treaties. *See* Public Law 107–314, 315, 116 Stat. 2458 (2002); and 50 CFR 21.15.

Comment: If the Service actually believes any additional anthropogenic mortality cannot be sustained by golden eagles, how can they presently be giving out a permit for the take of 40 nestlings by the Zuni Tribe? The Zuni Tribe has been getting a permit since 1987; that is a long track record of very local mortality.

Response: The permit referenced by this commenter is actually issued to the Hopi, not the Zuni, Tribe. Region 2 of the Service has fully analyzed the effects of this permit in an April 2013 environmental assessment (U.S. Fish and Wildlife Service 2013b). That document found the actual take, which averages around 23 annually, is biologically sustainable under the Service's management objective for golden eagles. It is also important to recognize that the Hopi take of golden eagles pre-dates all other forms of recorded anthropogenic mortality and is a protected activity under the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*). The Service assigned priority over all but emergency take of eagles to Indian religious take in the 2009 Eagle Rule; thus the Service has an obligation to reduce other forms of more recently instituted anthropogenic take before it impacts the Hopi by reducing their take.

Comment: The regulations should include an explanation of how the Service intends to implement the United Nations Declaration on the Rights of Indigenous People (''UN DRIP'') relative to the issuance of 30-year take permits for eagles. Relevant provisions of the UN DRIP that should have been discussed include, among other things, the impact of the following Articles on the Service's take regulations: Article 19 (requiring ''free, prior and informed consent'' of indigenous peoples where the United States adopts or implements legislative or administrative measures which may affect them); Article 24 (clarifying, inter alia, that indigenous peoples have ''the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals''); and Article 25 (emphasizing the right of indigenous peoples to ''maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources'').

Response: The United States did not originally vote in favor of the United Nations Declaration on the Rights of Indigenous Peoples in 2007, but in 2010, President Obama announced U.S. support for the Declaration by Presidential Proclamation while noting that the Declaration is not legally binding or a statement of current international law (see Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples, U.S. Dept. of State (2010), available at: *http://www.state.gov/documents/organization/184099.pdf*). The Service will continue to consult with federally recognized tribes in the spirit of the Declaration when any potential authorization of eagle take may affect tribal interests, consistent with the Presidential Proclamation and the Service's Native American Policy at 510 FW 1. The **Federal Register** publication of 50 CFR 22.26 in 2009 sets forth our policy with respect to consultation and NHPA compliance when issuing permits (74 FR 46836, September 11, 2009, pp. 46844, 46873, 46874).

Comment: The rule needs more clarity as to when a permit is required. For example, should items such as the distance from a known natal area, significant presence of eagles based on telemetry data or similar measures, or the density of eagles in the immediate vicinity of the proposed project be made into clear triggers for consultation? Furthermore, there is no specific guidance as to the type of projects that may need to apply. Would, for example, a 10- to 12-story building in a valley with minimal documented flyovers be treated the same as the conversion of a small jeep road to a paved thoroughfare? If the newly paved road brings significant and ongoing human disturbance to a relatively pristine location in close proximity (say within 15 miles) of known eagle nests or natal areas, would both have the same consultation need?

Response: A permit is required to be in compliance with the Eagle Act if take of an eagle occurs. It is difficult to predict with certainty exactly what precise circumstances will result in an eagle being taken. However, we have developed guidance documents to help people understand when their activities may take eagles. Guidance for how to avoid disturbance of bald eagles can be found in our 2007 National Bald Eagle Management Guidelines. It is important to note that some of the recommended distance buffers in those guidelines should be increased in more open and less forested landscapes. We are working on official guidance for avoiding disturbance of golden eagles.

Comment: Projects with eagle permit applications that have been in process prior to release of the final regulations should not be subject to new rule provisions unless an applicant volunteers to incorporate the new provisions. Such changes would significantly extend the time to provide project information, increase Service staff time, drive up costs further, delay permit processing, and adversely affect project financing very late in the financing process. These applications should be considered first in line for the purposes of consideration of the LAP threshold. Many of the sites did not perform 2 years of preconstruction eagle use monitoring because they believe they are low risk. If these rules are finalized, they should not be required to perform additional monitoring.

Response: The final regulations contain provisions that allow applicants to obtain coverage under all of the provisions of the prior regulations if they submit complete applications satisfying all of the requirements of those regulations within 6 months of the effective date of this final rule. However, with respect to one of the examples used by the commenter, we note that the Service guidance since 2011 has recommended 2 or more years of pre-construction eagle surveys, so any prospective wind projects conceived since then should have been aware of this.

Comment: We believe additional clarification is needed regarding whether the proposed rule is retroactive.

Response: The regulations are not retroactive, and we are incorporating a 6-month ''grandfathering'' period after the effective date of this rule (see **DATES,** above, and § 22.26(i), below) wherein applicants (persons and entities who have already submitted applications) and project proponents who are in the process of developing permit applications can choose whether to apply (or re-apply) to be permitted under all the provisions of the 2009 regulations or all the provisions of these final regulations.

Comment: Existing HCPs that include golden eagle coverage should be ''grandfathered'' in without fear of these proposed regulations being interpreted to undermine the HCP take authorization by imposing additional mitigation requirements. These HCPs were designed to assure permittees there would be ''no surprises,'' that they were not committing to conservation measures, only to have the rules changed on them part way into the permit term. The final eagle permit rule must exempt from the final rule any eagle ESA incidental take permits whose applications have been submitted prior to the effective date of the final rule. The regulations should also exempt Natural Resource Community Plans and HCPs that address eagles in anticipation of obtaining ESA incidental take permits.

Response: In 2008, we issued a final rule addressing incidental take authorization under the ESA and Eagle Act (73 FR 29075, May 20, 2008). This rule established regulations under 50 CFR 22.11 to provide take authorization under the Eagle Act to ESA section 10(a)(1)(B) permittees, where bald or golden eagles are included as covered species, as long as the permittee is in full compliance with the terms and conditions of the ESA permit. Compliance with the terms and conditions of the permit includes not exceeding the amount of incidental take that was authorized. Failure to abide by the ESA section 10 permit requirements that pertain to eagles may, however, potentially void the Eagle Act take authorization for these permits, and result in permit revocation. In addition, the 2008 rule included a provision clarifying the criterion for permit revocation for eagles: Whether the activities covered under the permit are compatible with the preservation of the bald or golden eagle, instead of the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv). For ESA permits already in effect, the conservation measures required to cover bald and golden eagles under previously issued ESA incidental take permits were deemed to be compatible with the conservation standards of the Eagle Act. This final rule does not modify those 2008 regulations. Thus, the terms and conditions of existing ESA section 10 permits where eagles were included as covered species, and where the permittee is in compliance with the conditions of ESA permit, are not affected by this rulemaking. In contrast, ESA incidental take authorizations for eagles that are not already permitted are subject to the standards of permits issued under the Eagle Act incidental take permit regulations, due to the Eagle Act requirement that any permit issued must be ''compatible with the preservation of eagles'' and the Service's 2009 interpretation and application of that preservation standard under the Eagle Act. On May 10, 2011, the Service Director issued a memorandum to the Regional Directors clarifying that the terms and conditions of new ESA incidental take permits that cover eagles, including the mitigation requirements, must meet the issuance criteria of the Eagle Act regulations at 50 CFR 22.26. The memorandum reads, in part: ''[T]he Service publically committed through its Finding of No Significant Impact for the new Eagle Act regulations that it will not issue any take permits for golden eagles beyond historically authorized take levels, unless the impacts to golden eagles can be completely offset'' to achieve no net loss to the breeding population. This policy applies to permits issued under the ESA as well as the Eagle Act. If bald or golden eagles are included as covered species in a section 10 permit, the avoidance, minimization, and other mitigation measures in the project description and permit terms and conditions must meet the Eagle Act permit issuance criteria of 50 CFR 22.26.'' Therefore, in order for the Service to confer Eagle Act take coverage through the ESA section 10 permit program, ESA HCPs must meet the Eagle Act standards for permitting, including mitigation requirements. We believe it is appropriate to allow potential applicants who are well along in the planning process to move forward under the existing regulations. Therefore, we are taking a similar approach for potential ESA section 10 applicants as we are for potential Eagle Act permit applicants, in that applicants who submit an ESA section 10 application that includes take coverage for bald or golden eagles within 6 months of the effective date of this rule may choose whether the standards of 50 CFR 22.26 that were in place prior to that effective date will apply to their permits or the standards of these final regulations.

Comment: The Service encourages applicants to include bald and golden eagles as covered species in HCPs developed for incidental take permits under the ESA. The final eagle rule should make clear that Eagle Act permits would satisfy the requirements under the ESA regulations at 50 CFR part 17 for future permittees that are seeking permit coverage for a single project for take of species covered by the ESA and the Eagle Act.

Response: Eagle Act permit coverage that is not conferred under issuance of an ESA section 10(a)(1)(B) incidental take permit associated with an HCP explicitly does not satisfy the requirements under the ESA regulations at 50 CFR part 17 for permit applicants seeking permit coverage for take of species prohibited by the ESA and the Eagle Act. Simply put, an Eagle Act permit issued under 50 CFR 22.26 does not provide take authorization under the ESA.

Comment: Affected tribes should be notified immediately upon receiving notice of a take and invited to take culturally appropriate action with respect to eagle remains with which the tribe has a geophysical association.

Response: Regarding allowing affected tribes to take culturally appropriate action with respect to remains of eagles taken under permits, much depends on what those cultural practices are. For example, we cannot authorize tribal rites on private land, and we also will not allow tribes to take direct possession of the eagle remains. We understand the desire of some tribes to retain eagles found on or near Indian lands; however, to maintain a fair and equitable distribution of eagle feathers to all federally recognized tribes, the NER must fill orders on a first-come, first-served basis, and require that all usable eagles be sent to the NER for distribution in this manner. Any eagles diverted from coming to the NER would decrease the number of eagles available to other tribal members, and may unfairly impact some tribes.

Comment: Proposed new standards for ''required determinations'' found at 50 CFR 22.26(f)(2)–(8) are so vague as to render the refusal of the Service to issue a permit wholly discretionary, and unreviewable by judicial authority. A protected local interest such as a utility must be reasonably allowed to receive a permit in order to meet the statutory objective of continuing its activity without fear of enforcement. While certain simple, objective, and inexpensive criteria are appropriate, the proposed criteria are generally vague or overreaching to the extent of flouting the statutory purpose of the permit program for protected local interests. Any protected interest should not have to satisfy the population requirement because the statute mandates that a permit program must ''permit the taking of such eagles *for the protection of . . . other interests* in a particular locality . . . .'' [emphasis added]. In such instances, the statute clearly requires that protected activities shall be

permitted over the interests of the birds in order for those activities to be conducted without fear of enforcement. [This comment also specifically objected to provisions of § 22.26(f)(2)–(8) related to the LAP, stipulations that permit issuance take into account ongoing criminal or civil actions, and the priority afforded to take to satisfy Native American religious needs.]

Response: We disagree with the commenter that the required determinations in § 22.26(f) are ''generally vague or overreaching to the extent of flouting the statutory purpose of the permit program for protected local interests.'' The preamble to the proposed rule explains most of the criteria added to 50 CFR 22.26(f) in this rulemaking in detail and clarifies how the Service will determine whether an applicant is in compliance. The proposed required determinations are consistent with the statutory purposes of the Eagle Act. As we stated when first promulgating this regulation in 2009, the Service interprets the statutory phrase ''for the protection of . . . other interests in any particular locality'' as enabling us to accommodate a broad spectrum of public and private interests that might incidentally take eagles, as long as we can determine that any authorized take is compatible with the preservation of eagles (see 74 FR 46836, September 11, 2009, p. 46837). We do not agree with the commenter's interpretation that the ''protection of . . . other interests'' language requires the Service to ensure the protection of other interests without balancing those interests with the management and protection of the species the statute was enacted to protect.

The commenter takes issue with the definition of ''LAP,'' referenced in proposed § 22.26(f)(2), as being arbitrary and vague, and the commenter misconstrues the effect of exceeding the LAP threshold as requiring the rejection of a permit application. This required determination does not compel us to reject an application when take in the LAP exceeds 5%; it instead specifies that any take within the limit is compatible with the preservation of eagles. Take above the limit would require further environmental analysis over that conducted in the PEIS for this rule. That analysis might show that no additional action is required for the permit to be compatible with the preservation of eagles, or it may show the take could be compatible with additional action. Examples of such additional actions could be to require implementation of additional compensatory mitigation to offset take above the 5% LAP threshold or, for existing projects within the LAP area, to require measures that reduce the project's take when they seek incidental take permits. Many commenters, in particular state agencies and federally recognized tribes, strongly support the decision to ensure management and protection of not only the national population of bald eagles and golden eagles, but also regional and local populations. The LAP analysis, along with the regulatory requirements contingent upon that analysis, is one of the primary methods by which we can properly manage and adequately protect local eagle populations and ensure that cumulative effects do not become significant.

To the extent the commenter argues that denial of a permit on any of the grounds listed in § 22.26(f) would be unverifiable and arbitrary, the general permit regulations contain review procedures at 50 CFR 13.29 setting forth the administrative remedies an applicant may pursue if a permit application is denied for any reason. These administrative remedies require the issuing officer to state the reasons for permit denial and to describe the evidence used to reach that decision. A permit applicant would also be free to pursue judicial review of a permit denial once all administrative remedies are exhausted.

With regard to proposed § 22.26(f)(8) (§ 22.26(f)(7) in this final rule), which requires the Service to determine, before issuing a permit, that issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle take at the project, one element of civil and criminal cases is establishing that take of eagles is not permitted, requiring coordination between the Service's law enforcement and migratory bird divisions early in an investigation. Later in the process, court judgments may include a sentencing or probation condition that an eagle take permit be sought; or where settlement negotiations have been successful, settlement agreement often includes a requirement that a company apply for an eagle take permit. Without such a determination, issuance of a permit may in some cases disrupt the ongoing investigation, prosecution, or negotiation process.

Finally, the commenter disagrees that authorization of take for the religious purposes of Indian tribes should be prioritized over activities such as farming or utility development or maintenance. These amendments do not change the relative priority order of religious take and take for other activities. Moreover, we stand by the reasons for originally establishing the priority order set forth in the preamble to the 2009 regulation (74 FR 46836, September 11, 2009).

Comment: Rather than require a permit, the Service should develop best management practices (BMPs) for industries to serve as a tool box from which companies can select and tailor components as necessary to operate under, monitor activities, and voluntarily report any passive ''take.'' Companies can choose either to rely on the guidelines or instead to develop their own internal construction standards that meet or exceed these guidelines. The use of BMPs, coupled with a commitment by the Service to exercise enforcement discretion for situations in which the BMPs did not avoid all impacts to eagles, could be an alternative to permitting. The Service should evaluate an alternative under which *de minimis* levels of passive ''take,'' including at oil and gas facilities, would be explicitly exempted from regulation under the incidental take permitting program. The Service should consider an activity-based programmatic approach similar to that under the Clean Water Act's nationwide permit program. That program covers specific activities that may be used across a number of industry sectors. Similarly, the Service should consider an approach utilizing the permit-by-rule method, which may also improve the approval process for activities that present known hazards and with known and effective mitigation techniques.

Response: The process described in the first comment is exactly how the permit process is designed to work, except under a permit: (1) Enforcement discretion is not necessary because the take is authorized; and (2) compensatory mitigation is required for take of golden eagles to offset the effects of the take. Because of the statutory language of the Eagle Act, the Service cannot exempt any take from regulation, and cannot exempt any bald eagle take from take liability without a permit (16 U.S.C. 668 and 668a). We will consider legal mechanisms for streamlining take authorizations to low-risk or lower impact activities in the future.

Comment: The Service should not postpone redefining the definition of a ''low risk'' project of the eagle permit program in this rulemaking. The effort to establish a low-risk permit category should be a high-priority item for the Service as it is integral to establishing a streamlined permitting process.

Response: We agree that this is a high priority item. In the meantime, the PEIS programmatically analyzes eagle take within certain levels and the effects of complying with compensatory

mitigation requirements to allow the Service to tier from the PEIS when conducting project-level NEPA analyses. The PEIS will cover the analysis of effects to eagles under NEPA if: (1) The project will not take eagles at a rate that exceeds (individually or cumulatively) the take limit of the EMU (unless take is offset); (2) the project does not result in Service authorized take (individually or cumulatively) in excess of 5% of the LAP; and (3) the applicant will mitigate using an approach the Service has already analyzed (*e.g.,* power pole retrofitting), or the applicant agrees to use a Service-approved third-party mitigation program such as a mitigation bank or in-lieu fee program to accomplish any required offset for the authorized mortality. The PEIS, therefore, should streamline the NEPA process for these projects.

Nest Take Permits

Comment: The proposed rule leaves ''home range'' undefined, but it is used in the definition of ''territory'': ''the area that contains one or more eagle nests within the home range of a mated pair of eagles, regardless of whether such nests were built by the current resident pair.''

Response: Home range means the area an animal uses to secure food and shelter, and through which the animal moves on a regular basis.

Comment: The proposed definition of ''eagle nest'' is ambiguous and likely subject to misinterpretation. Using our residential development project as an example, the Service has constructed two manmade experimental platforms in the vicinity of our project with the intent of encouraging golden eagle nesting. The experiment has not been successful. No nests have been built since the platforms were installed more than 3 years ago. Based on the ambiguous language of this definition, however, the experimental platforms themselves could be considered nests if a golden eagle simply lands on, and thereby ''uses'' the platform—which is an assemblage of material—during the breeding season.

Comment: There seems to be ambiguity surrounding the definition of an in-use nest. The proposed rule will allow for removal of an in-use nest prior to egg-laying, yet the definition fails to determine if alternate nests in which the adults regularly perch would also be considered an in-use nest.

Response: The definition of ''eagle nest'' in this rule includes the phrase ''for purposes of reproduction,'' so it does not encompass nest structures that an eagle simply lands on.

Comment: With regard to the proposed definition of ''alternate nest,'' it is unreasonable to assume that a nest is an alternate nest in perpetuity, but this definition assumes that all nests not in use within a nesting territory are, in fact, alternate nests without reference to any time frame. Similarly, the definition makes no reference to the condition of the nest.

Response: There is a great deal of variability as to how long a nest will be unused before eagles return to use it again. Eagles typically build nests where conditions are suitable for raising young relative to other locations. Sometimes those conditions remain relatively steady, sometimes they fluctuate between years, and sometimes they disappear. Even nests in good locations may not be used for many years. As for the condition of nests being the determining factor in whether they should remain protected, eagle nests are not infrequently damaged or partially destroyed by severe weather, but then restored to good condition by the eagles early in the breeding season. We think it is reasonable to err on the side of caution in protecting potentially valuable nests by not providing an arbitrary timeframe for when an eagle nest is no longer considered an eagle nest. At any rate, these regulations provide for a permit process that allows for removal of nests.

Comment: Loss of a nesting territory is far more significant than the take of an individual, as the cumulative reproductive contribution of the pair or territory over time is lost. For this reason, loss of nesting territories should not be permitted unless it can be affirmatively determined that such loss will not have a detrimental effect on the LAP or on a critical subpopulation.

Response: The Service agrees with this comment, and does take into account the effects of territory loss on the eagle management unit and LAP take limits, as described in the Status Report on page 26.

Comment: Allowing removal of eagle nests just because it is outside of the breeding season is short sighted, and ignores the underlying role of adult pairs to annually defend their nests and near nest proximity, so that reproduction can continue in subsequent years, not just in the current nest cycle.

Response: Prohibiting removal of nests outside the breeding season amounts to prohibiting eagle nest removal under any circumstances. It is not realistic to place a total ban on removing eagle nests. As bald eagle populations continue to grow, an increasing number of nests are built in locations that pose safety hazards or severely restrict a landowner's ability to use his or her property. The regulations for permitting eagle nest removal include many safeguards to ensure that nest removal is compatible with the preservation of eagles.

Comment: Established protocols for monitoring throughout the course of nest take permits must be developed, and monitoring must be required by trained and approved independent experts. Monitoring time for nest and incidental take permits as required by permits should be similar to that required by most eagle-nest monitoring programs—a minimum of 2 hours per week by a trained independent monitor.

Response: For nest take permits, as opposed to disturbance permits, monitoring would be required mostly to detect whether the resident pair of eagles nest successfully elsewhere. The level of monitoring will be contingent on the biological significance of the nest site to the eagle population or local (human) community, the ability to identify the pair of eagles that were potentially displaced, the feasibility of monitoring at different levels of intensity, and other case-specific factors.

Comment: The Service should clarify that it is their intention that wind energy projects apply the buffer distances set forth in the National Bald Eagle Management Guidelines to wind farm infrastructure.

Response: The National Bald Eagle Management Guidelines do not include recommended buffer distances between bald eagle nests and wind turbines because the primary concern with turbines is blade strike mortality and not disturbance. With respect to disturbance, many of the other recommendations in the Guidelines would apply to wind turbines during construction and maintenance. However, at this time, we do not have sufficient information to recommend buffer distances between eagle nests and wind turbines to avoid or reduce the likelihood of mortality. More observation is needed before the Service will issue official guidance for distance buffers between eagle nests and wind turbines.

Comment: Without an objective assessment (*i.e.,* not based on nest structures) of what the spatial extent of a specific pair's territory is, there is no way to assess whether or not a nest is within a pair's territory without circular reasoning, and therefore no way to determine if a territory, rather than a nest or set of nests, was abandoned. Only in cases where there is independent observation of the extent of

space use of a specific breeding pair, most likely through telemetry or color-mark observations, will it be possible to assess territory boundaries independently of nests. The Service should provide an objective, operationally defined (*i.e.,* defined in terms of observable characteristics) definition of the spatial extent of an eagle territory or abandon its reliance on availability of a nest ''within the nesting territory'' to assess territory abandonment.

Response: What this commenter is suggesting is not possible. The Service directly addresses this admittedly difficult issue in the Status Report in the following way: ''We recognize that for golden eagles in particular, nesting territories are often occupied by successive generations of individuals. Additionally, for both species, some nesting territories hold more value than others (Millsap et al. 2015, Watts 2015). Moreover, it is often difficult to predict in advance whether an activity will result in loss of a nesting territory, or simply the loss of a nest structure and cause a shift in use to an existing or new alternative nest—which may have little or no consequence to the eagle population (Watts 2015). For these reasons, each instance where loss of a nesting territory is a possible outcome requires additional review on the part of Service biologists. Permitting the loss of high-value nesting territories with a long history of occupancy and production could have greater population-level consequences.''

Comment: The Service has described that in populations with high eagle density, the biological value of a single nest to eagle populations is lower, as productivity in highly saturated eagle populations decreases due to nests being built in less than ideal locations in relation to food sources and increased competition among nesting pairs. Eagle nest-monitoring data by the Florida Fish and Wildlife Conservation Commission do not support this conclusion. The Service should consider data available from state agencies and similar partners when determining biological value of individual nests in order to ensure permitting decisions are evidence-based and consistent with the proposed preservation standard.

Response: There is increasing evidence in raptor populations that high-quality nesting sites are occupied first, and more consistently, than lower quality nesting sites. This factor contributes to what is known as the habitat heterogeneity effect, a biological process whereby overall per capita productivity of a raptor population declines with increasing density of nests because newer territories are in lesser habitats and have lower productivity. This is the basis for the Service's statement, and it is described in more detail in the Status Report on page 6. However, the Service also acknowledges the importance of taking individual circumstances into account, including shifts in prey availability over time that may lead to temporal variation in territory quality.

Comment: The Service refers to ''alternate nests just being built'' as having low biological value. However, in some territories, a newly built nest may have greater biological value than the most recently ''in use'' nest depending on territory-specific factors. We recommend that the Service allow for territory-specific factors to be considered in determining biological value of nests when permitting nest removal.

Response: We fully agree with this comment. Assessing the biological value of nests will include consideration of site-specific factors, including information pertaining to the availability and past use of other nests in the territory.

Comment: The Service should consider the potential for inconsistency in determining and applying ''net benefit'' calculations, similar to the issues raised in the Service's approach for determining compensatory mitigation for permits under the 2009 regulations. The Service should also consider whether the standard for ''net benefit'' incentivizes removal of nests over avoidance and minimization measures, which could accelerate loss of nest territories. If acceptable ''net benefit'' standards for nest removal are relatively low, as compared to the cumulative cost for projects to avoid and minimize, it can be expected that more projects will pursue nest removal permits rather than incidental take permits.

Response: We acknowledge that the net benefit requirement is somewhat vague and could potentially be applied inconsistently. However, we have regular coordination calls between staff who issue eagle permits from the different Service Regional Offices, and the application of this standard to particular permits has been discussed so far for every case where it has been applied. We hope to be able to continue that level of coordination to further consistency in how this provision is applied. We typically will require a disturbance permit rather than a nest removal permit if it is possible for the potential applicant to avoid actual removal of the nest. The regulations prevent the Service from issuing a permit unless we determine there is no practicable alternative to nest removal that would protect the interest to be served.

Comment: We recommend the Service consider options to ensure the persistence of local populations in areas where eagle nests on artificial structures represent a larger percentage of the LAP.

Response: Nests that eagles build on artificial structures fall within the definition of ''eagle nests'' protected under the Eagle Act, the removal of which would require a permit. The LAP cumulative effects analysis, and revised definition of the Eagle Act preservation standard that includes the persistence of local populations, both apply to nest removal permits and are designed to protect local populations even if a large percentage of eagles breed on nests built on artificial structures.

Comment: The proposed regulations would retain the requirement that the Service consider the availability of alternative suitable nesting habitat, but a finding that there is would not be a prerequisite for issuing a permit. We request that the Service reconsider this proposal to remove this requirement and instead require that suitable nesting habitat be present, but not necessarily available, in the area. Removal of this requirement would reduce or eliminate opportunities to apply mitigation measures within the immediate vicinity of the affected area.

Response: The types of conditions that eagles nest in are widely variable. In some circumstances, making nest removal contingent on there being suitable nesting habitat available is not warranted or reasonable. For example, more and more often, bald eagles are nesting in risky infrastructure that does not provide the conditions needed for successfully nesting and fledging of young. Such nests can also present safety hazards and/or unduly restrict people's ability to conduct daily routine activities. The regulations need to provide an option to issue permits for removal of nests that have marginal biological value and also pose problems or hazards to people or eagles, regardless of there being suitable nesting habitat in the vicinity.

Comment: The Service proposes to use 10 consecutive days of continuous absence as a national metric for declaring a nest inactive. This metric should be researched further and should take into consideration activity patterns of the species within the LAP where nest take would occur. There is ample research showing that juvenile bald eagles use their nests up to 45 days after fledging before they migrate, and often

do not return to the nest for periods of more than 10 days.

Response: The metric of 10 consecutive days has been in the regulations for several decades and has proven to be a reasonable timeframe for purposes of both permitting and protection of eagles. If young eagles have left and not returned to a nest over 10 consecutive days, it is reasonable to conclude the nest structure is no longer critical to them and can be removed, assuming other criteria warranting nest removal have been met. We fully recognize that nests might be revisited and used for longer periods of time, but loss of a nest after 10 days of non-use is unlikely to pose a threat to survival of the juveniles.

Comment: The proposed new nest take rules do not give consideration to the loss of habitat that accompanies a nest take in areas with rampant growth and development.

Comment: The regulations should increase protection to the areas surrounding active nests. The proposed rule does not directly address buffers of protection surrounding nests throughout the year. Habitat modification can undermine the viability of that food source, threatening the continued success of the nest. This potential loss of productivity is not accounted for in the permitting framework, yet could have significant impacts on local populations.

Response: The Eagle Act does not provide direct protection to eagle habitat, except for nests themselves. However, our regulations and guidance include a variety of strategies that take habitat into consideration, because habitat is, of course, necessary to preserve eagles. With regard to nest take permits, they can be issued only for specific limited purposes, unless a net benefit to eagles will be provided. The biological value of a nest is closely tied to the value of the surrounding habitat. Thus removal of a high-value nest would require a significant net benefit to eagles. The Service's recommendations for preventing disturbance to nesting bald eagles are in our National Bald Eagle Management Guidelines, including recommended buffer distances for construction and other activities near bald eagle nests. We are in the process of developing comparable guidance for golden eagles.

Comment: The Service should include in the final document a clear decision-making process that includes discreet criteria as to what constitutes an anticipated emergency situation. Permits should be limited to cases where human health or safety is highly likely to be endangered if no action is taken, and there is high confidence that the nest does not contain eggs or young.

Comment: What is the definition of a safety emergency (as used in the context of the proposed rule revision)? How does the Service make this determination? Does the Service intend to gain insight/formal input from other federal agencies (*e.g.,* Federal Aviation Administration, U.S. Department of Agriculture—Animal and Plant Health Inspection Service—Wildlife Services, Federal Highway Administration) that have expertise and/or regulatory authority in specific situations?

Response: We disagree with the suggestion that, unless there is high confidence that no eggs or young are in a nest, the Service cannot issue a permit for the purpose of protecting human or eagle lives. We believe a safety risk to people or eagles should take precedence above leaving eggs or nestlings undisturbed in the nest. In response to the question about what constitutes a safety emergency, the term is defined in the regulations at 50 CFR 22.3 as ''a situation that necessitates immediate action to alleviate a threat of bodily harm to humans or eagles.'' How we will make the determination is a fair question, but it may not be advisable or helpful to codify specifications for what factors must be present because of the risk of excluding circumstances that we failed to consider but which present a serious risk of bodily harm. However, we may develop some relatively broad guidance to assist in making these determinations in the future.

Comment: Under the proposed changes to nest take permits, there is a provision for the Service to waive the requirement that nestlings be transported to a foster nest or permitted rehabilitator in the case of an emergency nest removal. Even in cases where a nest is not near a possible foster nest or rehabilitator, the Service should put forth all efforts to ensure that nestlings are released back into the wild.

Response: The revision makes it possible for the Service to legally authorize the nest removal in a case of emergency (imminent risk to human or eagle safety) even when it is not feasible to place the eggs or young with a rehabilitator. Where it is reasonably possible to do so, the permit will require the eggs or young to be placed with a permitted rehabilitator or other similarly authorized facility.

Comment: We support the Service's position that a minimal level of compensatory mitigation is appropriate when authorizing take of golden eagle nests; however, the Service should clarify that no compensatory mitigation is required when these instances involve bald eagle nests.

Response: Actually, we did not and do not take the position that only a minimal level of compensation is required for take of a golden eagle nest. Our position then and now is that golden eagle nest take permits will be more restrictive in nature, but without including different criteria for the two species in the regulations. Our view is that regulations should not be species-specific; rather, they should address specific conditions that could apply to any of the species they are designed to protect. All golden eagle take permits, except for those authorizing ongoing take occurring prior to 2009, will require offsetting mitigation. The avoidance and minimization requirements in the existing and these regulations are designed to ensure that removal of a nest of either species is the last option. 81 FR 27934, 27961 (May 6, 2016). Regarding bald eagle nests, mitigation will be required if the activity that necessitates the take does not in itself provide a ''net benefit.'' As explained earlier in the preamble of this rule, the mitigation is likely to be minimal for new bald eagle nests established in areas densely populated by eagles, which are more and more typically the nests for which applicants seek nest take permits.

Comment: Eagle nests may be subject to protections of the National Historic Preservation Act (NHPA) due to the status of eagle nests as traditional cultural properties (36 CFR 800.16(I)(1): *Historic property* includes properties of traditional religious and cultural importance to an Indian tribe). Therefore, for nesting sites subject to the NHPA, the Service must comply with the NHPA's section 106 consultation process prior to authorizing an undertaking that could affect eagle nesting sites (36 CFR 800.2(c)(2)(ii) requires consultation with tribes where properties of religious or cultural significance may be affected by a federal undertaking). Consultation with tribal governments regarding nest removal permits is also necessary to determine whether a vacant nest site has or has not been permanently abandoned.

Response: The Service is responsible for compliance with the NHPA and to review all projects that may have the potential to affect historic properties. Traditional cultural properties, and religious and sacred areas, are all elements that might be included within the borders of projects under our review. As we follow the NHPA consultation process, information about such sites will develop that will help inform our decisions. With regard to the

status of the nest, that is, whether it has been used for breeding purposes in recent years or is currently in use, we will rely on any available and reliable source of such information, including through consultation with tribes that have such information.

Comment: The eagle nest take permit regulations should take into account existing practices adopted to address take or removal of eagle and other raptor nests. For example, the Bridger Coal Mine in Wyoming is operated under a permit from the Wyoming Department of Environmental Quality. The mine permit incorporates a raptor mitigation plan that is reviewed by the Service. Under the raptor mitigation plan, if the mine operators locate an inactive (or ''alternate,'' as now defined in the proposed rule) nest in an active mining area, in most cases it may remove the nest as long as a substitute nest is constructed without applying for a separate take permit.

Response: Wyoming's Coal Mine Migratory Bird Plans do not allow removal of eagle nests without a permit, and the mining permit issued by the Wyoming Department of Environmental Quality provides no exemption from Service authorities or permitting processes. The plan addresses when there is a need for a nest permit application and proposed mitigation (which may or may not be the final mitigation approved in the permit as determined by the Service's Migratory Bird Office).

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121, 201, 110 Stat. 847)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small businesses, small organizations, and small government jurisdictions. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act and determined that this action will not have a significant economic impact on a substantial number of small entities. This analysis first estimates the number of businesses impacted and then estimates the economic impact of the rule.

To assess the effects of the rule on small entities, we focus on home construction companies, wind energy facilities, and electric transmission companies. Although small, non-commercial wind energy facilities could seek permits, we anticipate that most of the applications for wind energy facilities will be for those that are commercial or utility scale. Although businesses in other business sectors, such as railroads, timber companies, and pipeline companies, could also apply for permits, we anticipate the number of permit applicants in such sectors to be very small, on the order of one or two per year for each such sector.

The U.S. Small Business Administration (SBA) defines a small business as one with annual revenue or employment that meets or is below an established size standard, which is less than 250 employees for ''Wind Electric Power Generation (NAICS 221115), less than 1,000 employees for ''Electric Power Distribution'' (NAICS 221122), less than 500 employees for ''Logging'' (NAICS 113310), less than $36.5 million for ''Construction of Buildings'' (NAICS 236115, 236116, 236117, 236210, and 236220), less than $36.5 million for ''Highway, Street, and Bridge Construction'' (NAICS 237310), less than $15.0 million for ''Support Activities for Rail Transportation'' (NAICS 488210), and less than 1,500 employees for ''Gold Ore Mining'' (NAICS 212221). Table 1 describes the number of businesses within each industry and the estimated percentage of small businesses impacted by this rule.

TABLE 1—DISTRIBUTION OF POTENTIAL IMPACTED BUSINESSES

NAICS code	Description	Total businesses		Small businesses potentially impacted by rule	
		Number of all businesses	Number of small businesses	Number	Percentage
221115	Wind Electric Power Generation	410	402	10	2
221122	Electric Power Distribution	7,547	7,513	<26	<1
113310	Logging	7,908	7,907	1 to 2	<1
236115	New Single-family Housing Construction (Except For-Sale Builders).	30,380	29,469	<26	<1
236116	New Multifamily Housing Construction (except For-Sale Builders).	1,788	1,734	<26	<2

TABLE 1—DISTRIBUTION OF POTENTIAL IMPACTED BUSINESSES—Continued

NAICS code	Description	Total businesses		Small businesses potentially impacted by rule	
		Number of all businesses	Number of small businesses	Number	Percentage
236117	New Housing For-Sale Builders	16,093	15,610	<26	<1
236118	Residential Remodelers	77,855	75,519	<26	<1
236210	Industrial Building Construction	2,622	2,543	<26	<1
236220	Commercial and Institutional Building Construction	35,758	34,685	<26	<1
237310	Highway, Street, and Bridge Construction	8,854	8,588	<26	<1
237990	Other Heavy and Civil Engineering Construction	3,423	3,320	<26	<1
488210	Support Activities for Rail Transportation	1275	613	1 to 2	<1
212221	Gold Ore Mining	214	214	1 to 2	<1

Source: U.S. Census Bureau, 2012 County Business Patterns.

In the first 5 years (2011 through 2015) since the eagle permit regulations at 50 CFR 22.26 and 50 CFR 22.27 were published, the Service has issued 347 standard permits which averages about 70 permits annually. For the 347 standard permits, 131 permits were issued to businesses, 172 permits to Government agencies, and 44 permits to individuals. The average annual distribution was 26 permits to businesses, 34 permits to government, and 9 permits to individuals. Businesses that apply for permits typically include home construction, road construction, and various other construction projects. Thus, the maximum impact to any single construction industry would be less than 26 businesses annually. It is more likely that the permits would be distributed across various construction industries. As a result, less than 1to 2 percent of small businesses in these sectors will be impacted by this rule.

Homeowners have no fee increases except for applications for multiple eagle nest take ($500). Given the number of standard permits issued (44), this rule will not have a significant economic effect on a substantial number of homeowners. Commercial businesses will face higher permit fees under this rule. A commercial business applying for what was a standard permit would have to pay $2,500 (an increase of $2,000). Businesses in the construction industry are defined as small if they have annual revenue less than $36.5 million, yet many construction businesses (38 percent) have revenue less than $250,000. To conservatively estimate the potential impact to commercial businesses applying for standard permits, we utilize $250,000 to depict small businesses' sales. Depending on the type of permit applications submitted by an individual small business, the permit fees will represent 1 to 3 percent of revenue for this size of business. Thus, the changes in standard permit fees will not have a significant economic effect on a substantial number of small businesses in the construction sectors. The changes in permit application processing and amendment fees are shown in Table 2.

Table 2. Change in Permit Fees

	Activity/Requirement	Current Fee	New Fee	Fee Increase
Standard Permits	3-200-71 – Eagle Incidental Take Application	$500	$500 – Non-commercial $2,500 – Commercial	$0 – Non-commercial $2,000 – Commercial
	3–200-72 – application, Eagle Nest Take Application	$500	$500 – Non-commercial $2,500 – Commercial	$0 – Non-commercial $2,000 – Commercial
	3–200-72 – Eagle Multiple Nest Take Application	$1,000*	$Non-commercial5,000	Non-commercial$4,000
	3-200-71– Eagle Incidental Take Amendment	$150	$150 – Non-commercial $500 – Commercial	$0 – Non-commercial $350 – Commercial
	3-200-72 – Eagle Single Nest Take Amendment	$150	$150 – Non-commercial $500 – Commercial	$0 – Non-commercial $350 – Commercial
Programmatic Permits	3-200-71 – Eagle Incidental Take Programmatic Amendment	$1,000	$0	-$1,000
	Eagle Incidental Take – Application Processing Fee	$36,000	$36,000	$0
	§ 22.26(c)(7)(v) – Programmatic Permit reviews every 5 years	$0	$8,000	$8,000

* Programmatic nest take

From 2011 to 2015, we received a total of 37 programmatic permit applications and have issued one programmatic permit thus far. All of the applications except three are for wind energy projects. Two applications were from electric utilities, while one application was from a gold mining operation. We anticipate a greater volume of applications for permits for long-term activities in the future, although we expect the number to increase gradually over time. At the current average rate (7 applications annually), approximately 2 percent of small wind energy businesses apply for permits annually (Table 1). Furthermore, less than 1 percent of small businesses within the electric utility and mining sectors apply for permits (Table 1). Assuming perhaps a ten-fold increase in such permit applications over the foreseeable future, this rule will not impact a substantial number of small entities.

Initial permit application processing fees for long-term permits will not change from the current $36,000. If a permittee requests the programmatic permit to exceed 5 years, then there will be an $8,000 review fee every 5 years to recoup the Service's review costs. With a 5-year maximum permit duration, renewal of a permit would require a $36,000 permit application processing fee, so the $8,000 administration fee reduces costs to small businesses engaged in long-term acitivities. We therefore certify that the rule will not have a significant economic impact on a substantial number of small entities, and no regulatory flexibility analysis is required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule will not ''significantly or uniquely'' affect small governments. A small government agency plan is not required. The regulations changes will not affect small government activities in any significant way.

b. This rule will not produce a Federal mandate of $100 million or greater in any year. It is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, the rule will not have significant takings implications. This rule does not contain any provisions that could constitute taking of private property. Therefore, a takings implication assessment is not required.

Federalism

This rule will not have sufficient Federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132. It will not interfere with the States' abilities to manage themselves or their funds. No significant economic impacts are expected to result from the regulations change.

Civil Justice Reform

In accordance with E.O. 12988, the Office of the Solicitor has determined that the rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995 (PRA)

This final rule contains a collection of information that we have submitted to the Office of Management and Budget (OMB) for review and approval under the PRA (44 U.S.C. 3501 *et seq.*). After publication of the ''Duration Rule'' in 2013, we included the burden associated with eagle permits in our renewal of OMB Control No. 1018–0022. OMB has reviewed and approved the information collection requirements for

applications, annual reports, and nonhour cost burden associated with eagle permits and assigned OMB Control Number 1018–0022, which expires May 31, 2017. The approval includes long-term (more than 5 years) eagle take permits.

This final rule does not revise the number of responses or total annual burden hours associated with eagle permits. However, we believe the approved estimates for the number of annual responses are high. We will adjust our estimates when we renew OMB Control No. 1018–0022. This final rule:

(1) Establishes an administration fee of $8,000 that each permittee will pay every 5 years to cover the cost of the 5-year permit evaluations. We will not collect this fee until the permittee has had a permit for at least 5 years. We expect that we will not impose this fee until at least 2022.

(2) Changes the application fees associated with some permits.

(3) Requires annual reports. This requirement is approved under OMB Control Number 1018–0022. There are no fees associated with annual reports.

(4) Establishes a new reporting requirement and a new administration fee for permits of over 5 years.

(5) Requires pre- and post-construction monitoring of eagle use of the project area, which may include preparation of an Eagle Conservation Plan, and requires immediate reporting of take of eagles and Threatened and Endangered species.

OMB has not yet approved the information collection requirements associated with this rule. We will announce the approval in a separate notice in the **Federal Register**. When we seek renewal of OMB Control Number 1018–0022, we will incorporate the new hour and nonhour burden into that renewal and discontinue this OMB control number. An agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Title: Eagle Take Permits and Fees, 50 CFR 22.

OMB Control Number: 1018–0167 (number assigned by OMB).

Service Form Number(s): 3–200–71, 3–200–72.

Description of Respondents: Individuals and businesses. We expect that the majority of applicants seeking long-term permits will be in the energy production and electrical distribution business.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

The Service inadvertently omitted Table 1 and its burden from the proposed rule. The following Table cites the total burden for this information collection.

TABLE 1—ESTIMATED HOUR AND COST BURDEN FOR LONG TERM EAGLE TAKE PERMITS

Activity/requirement	Annual number of responses	Average completion time per response (hours)	Total annual burden hours	Cost/hour	$ Value of annual burden hours (rounded)
Pre-construction Monitoring Surveys	15	650	9750	$34.26	$334,035
Preparation of Eagle Conservation Plan	15	200	3000	34.26	102,780
Post Construction Monitoring	15	700	10,500	34.26	359,730
Reporting Take of Eagles	10	2	20	34.26	685
Reporting Take of Threatened & Endangered Species	1	2	2	34.26	69
§ 22.26(c)(7)(ii)—*Permit reviews.* At no more than 5 years from the date a permit that exceeds 5 years is issued, and every 5 years thereafter, the permittee compiles and submits to the Service, eagle fatality data or other pertinent information that is site-specific for the project.[9] Footnote 9 may be found in Table 2 Note that the dollar value of the annual burden cost is included in the $8,000 permit 5-year permit review fee	4	8	32	34.26	1,096
Total	60	1562	23,304		798,395

TABLE 2—CHANGES IN NONHOUR BURDEN FEES FOR EAGLE TAKE PERMITS

Activity/requirement	Existing approval (1018–0022)	Current fee	Proposed fee	Total approved nonhour burden cost	Total proposed nonhour burden cost	Difference between 1018–0022 and proposed
3–200–71—application, Eagle Incidental Take—(not programmatic or long-term) [1].	No. of responses and annual burden hours approved under OMB Control No. 1018–0022.	$500 Non-commercial.	$500 Non-commercial.	$12,500 Non-commercial.	$12,500 Non-commercial.	$0 Non-commercial.
	This rule revises fees and nonhour costs.	$500 Commercial.	$2,500 Commercial.	$60,000 Commercial.	$300,000 Commercial.	+$240,000 Commercial.
3–200–72—application, Eagle Nest Take—single nest (formerly "standard") [2].	No. of responses and annual burden hours approved under OMB Control No. 1018–0022.	$500 Non-commercial.	$500 Non-commercial.	$5,000 Non-commercial.	$5,000 Non-commercial.	$0 Non-commercial.
	This rule revises fees and nonhour costs.	$500 Commercial.	$2,500 Commercial.	$10,000 Commercial.	$50,000 Commercial.	+$40,000 Commercial.

TABLE 2—CHANGES IN NONHOUR BURDEN FEES FOR EAGLE TAKE PERMITS—Continued

Activity/requirement	Existing approval (1018–0022)	Current fee	Proposed fee	Total approved nonhour burden cost	Total proposed nonhour burden cost	Difference between 1018–0022 and proposed
3–200–72—application, Eagle Nest Take—multiple nests (formerly "programmatic") [3].	No. of responses and annual burden hours approved under OMB Control No. 1018–0022.	$1,000	$500—Non-commercial.	$0 [3]	$500 Non-commercial.	+$500 Non-commercial.
	This rule revises fees and nonhour costs.		$5,000—Commercial.		$40,000 Commercial.	+$40,000 Commercial.
3–200–71 Eagle Incidental Take Amendment—less than 5 years (formerly "standard" [4].	No. of responses and annual burden hours approved under OMB Control No. 1018–0022.	$150 Non-commercial.	$150—Non-commercial.	$300 Non-commercial.	$300 Non-commercial.	$0 Non-commercial.
	This rule revises fees and nonhour costs.	$150 Commercial.	$500—Commercial.	$2,700 [5] Commercial.	$9,000 Commercial.	+$6,300 Commercial.
3–200–72 Eagle Nest Take Amendment—"Single nest" (formerly "standard") [4].	No. of responses and annual burden hours approved under OMB Control No. 1018–0022.	$150 Non-commercial.	$150—Non-commercial.	$150 Non-commercial.	$150 Non-commercial.	$0 Non-commercial.
	This rule revises fees and nonhour costs.	$150 Commercial.	$500—Commercial.	$600 [6] Commercial.	$2,000 Commercial.	+$1,400 Commercial.
3–200–71 Amendment—Eagle Incidental Take Programmatic.	No. of responses and annual burden hours approved under OMB Control No. 1018–0022.	$1,000 Commercial.	No Fee [7]	$1,000 Commercial.		− $1,000 Commercial.
NEW REPORTING REQUIREMENT AND NEW ADMINISTRATION FEE						
§ 22.26(c)(7)(ii)—*Permit reviews.* At no more than 5 years from the date a permit that exceeds 5 years is issued, and every 5 years thereafter, the permittee compiles and submits to the Service, eagle fatality data or other pertinent information that is site-specific for the project.[9]	No. of responses and annual burden hours shown in Item 12, Table 1.	0	$8,000	0	$32,000	+$32,000
Total				$92,250	$431,450	$359,200.

[1] Approved under 1018–0022—145 annual responses (25 from individuals/households (homeowners) and 120 from the private sector (commercial) totaling 2,320 annual burden hours) (400 burden hours for individuals and 1,920 annual burden hours for private sector); $500 permit fee for both individuals and private sector for a total nonhour burden cost of $72,500. This rule changes the application fees: Homeowner fee would remain $500; private sector fee (commercial) would increase to $2,500. Total for 25 homeowners—$12,500; Total for 125 commercial applicants—$300,000).

[2] Approved under 1018–0022 (standard and programmatic permits were combined)—30 responses (10 from Individuals/homeowners and 20 from private sector (commercial) totaling 480 burden hours (160 hours (individuals) and 320 hours (private sector). Homeowner fee would remain $500; private sector fee (commercial) would increase to $2,500. Total for 10 homeowners—$5,000.; Total for 20 commercial applicants—$50.000).

[3] Approved under 1018–0022 (standard and programmatic permits were combined)—9 responses (1 from Individuals/homeowners (non-commercial) and 8 from private sector (commercial) totaling 360 burden hours (40 hrs (individuals) and 320 hrs (private sector). The approved nonhour burden cost is $0; however, that is an error. The permit application processing fee for programmatic nest take permits under the current regulations is $1,000, so the total current burden cost should be $9,000 (9 responses). Under the rule, the homeowner fee would increase to $500; private sector fee (commercial) would increase to $5,000. Total for 1 homeowner—$500; total for 8 commercial—$40,000.

[4] The amendments for standard non-purposeful eagle take permits and standard eagle nest take permits are combined in the approved collection for a total of 25. Here they are split into 20 eagle incidental take permit amendments and 5 eagle nest take permit amendments.

[5] Two Homeowner, Eighteen Commercial.

[6] One Homeowner; Four Commercial

[7] The amendment fee for long-term programmatic permits is approved under 1018–0022. Under this rule, it is being removed because the costs associated with it would be included under the Administration Fee.

[8] ROCIS would not allow entering negative $1,000 to account for the elimination of fees. Therefore, in ROCIS, the elimination is reflected for the eagle nest take amendment total nonhour cost burden.

[9] This is a new reporting requirement as well as a new Administration Fee and applies only to Commercial permittees. We will not receive any reports or assess the Administration Fee until after a permittee has had a permit for 5 years (earliest probably 2022). We estimate that we will receive 19 responses every 5 years, annualized over the 3-year period of OMB approval results in 4 responses annually. We estimate that each response will take 8 hours, for a total of 32 annual burden hours. We will assess an $8,000 administration fee for each permittee for a total of $32,000. Note: This burden reflects what will be imposed in 5 years. Each 5 years thereafter, the burden and nonhour costs will increase because of the number of permittees holding 5-year or longer term permits.

Estimated Total Hour Burden: 23,304 hours, the total number of new respondents is 60.

Estimated Total Hour Burden Cost: $798,395 for gathering information required to support an application, which may include preparation of an Eagle Conservation Plan (ECP). This includes 650 hours for pre-construction monitoring surveys of eagle use of the project site and 700 hours of post-construction monitoring for each respondent. Preparation of the application, which may include preparation of an ECP, will take approximately 200 hours per respondent. These burden hours only apply to those seeking a long-term eagle take permit. In addition, those that receive a permit are required to report take of eagles and Threatened or Endangered species within 48 hours of discovery of the take. It is estimated that of the 15 projects permitted to take eagles each year, 10 will actually take eagles, requiring 2 hours per respondent to report. Take of threatened or endangered species is expected to be a rare event, and occur at only one of the 15 projects permitted each year, requiring only 2 hours to report. The burden hours also include the costs for the 5-year permit review. We estimate 8 hours per respondent to complete the requirements of the permit review for a total of 32 hours.

Estimated New Total Nonhour Burden Cost: $359,200 for administration fees and application fees associated with changes in this proposed rule. This does not include the nonhour cost burden for eagle/eagle nest take permits approved under OMB Control No. 1018–0022. States, local governments, and tribal governments are exempt from paying these fees.

Endangered and Threatened Species

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531–1544), requires Federal agencies to consult to ''insure that any action authorized, funded, or carried out'' by them ''is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat'' (16 U.S.C. 1536(a)(2)). Intra-Service consultations and conferences consider the effects of the Service's actions on listed, proposed, and candidate species. Our final action of issuing our regulations regarding take of non-ESA-listed eagles does not authorize, fund, or carry out any activity that may affect—directly or indirectly—any ESA-listed species or their critical habitat. *See, e.g., Sierra Club* v. *Bureau of Land Mgmt.,* 786 F.3d 1219 (9th Cir. 2015). Indeed, the Eagle Act does not empower us to authorize, fund, or carry out project activities by third parties. The Eagle Act empowers us to authorize take of bald and golden eagles. Thus, we have determined these revisions have no effect on any listed, proposed, or candidate species or their critical habitat. As a result, section 7 consultation is not required on this proposed action. As appropriate, we will conduct project-specific, intra-Service section 7 consultations in the future if our proposed act of issuing a permit for take of eagles may affect ESA-listed species or critical habitat.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that this rule will not interfere with tribes' abilities to manage themselves, their funds, or tribal lands. In September of 2013, well before the Service published its notice of intent to develop a draft PEIS for the rule and held public scoping meetings, we sent a letter to all federally recognized tribes inviting them to consult about possible changes to the eagle take permit regulations. The letter notified Tribes of the Service's intent to amend the regulations and sought feedback about their interest in consultation on the amendment. After sending these letters and receiving responses from several Tribes, we conducted webinars, group meetings, and meetings with individual Tribes. We will continue to respond to all Tribal requests for consultation on this effort.

Several tribes that value eagles as part of their cultural heritage objected to the 2013 rule that extended maximum permit duration for programmatic permits based on a concern that the regulations would not adequately protect eagles. Those tribes may perceive further negative effects from similar provisions proposed in this rulemaking. However, eagles will be sufficiently protected under this rule because only those applicants who commit to adaptive management measures to ensure the preservation of eagles will receive permits with terms longer than 5 years and those permits will be reviewed at 5-year intervals and amended if necessary.

Energy Supply, Distribution, or Use (Executive Order 13211)

E.O. 13211 addresses regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule will likely be used by numerous energy generation projects seeking compliance with the Eagle Act. However, the rule is not a significant regulatory action under E.O. 13211, and no Statement of Energy Effects is required.

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List of Subjects

50 CFR Part 13

Administrative practice and procedure, Exports, Fish, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 22

Exports, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

For the reasons described in the preamble, we hereby amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 13—GENERAL PERMIT PROCEDURES

■ 1. The authority for part 13 continues to read as follows:

Authority: 16 U.S.C. 668a, 704, 712, 742j–l, 1374(g), 1382, 1538(d), 1539, 1540(f), 3374, 4901–4916; 18 U.S.C. 42; 19 U.S.C. 1202; 31 U.S.C. 9701.

■ 2. Amend the table in § 13.11(d)(4) by:

■ a. Removing the column with the heading ''Administration fee [1]''; and

■ b. Revising the section ''Bald and Golden Eagle Protection Act'' and footnote 1.

The revision reads as follows:

§ 13.11 Application procedures.

* * * * *

(d) * * *

(4) * * *

Type of permit	CFR citation	Permit application fee	Amendment fee
*	*	*	*
Bald and Golden Eagle Protection Act			
Eagle Scientific Collecting	50 CFR part 22	100	50
Eagle Exhibition	50 CFR part 22	75	
Eagle Falconry	50 CFR part 22	100	
Eagle—Native American Religion	50 CFR part 22	No fee	
Eagle Take permits—Depredation and Protection of Health and Safety	50 CFR part 22	100	
Golden Eagle Nest Take	50 CFR part 22	100	50
Eagle Transport—Scientific or Exhibition	50 CFR part 22	75	
Eagle Transport—Native American Religious Purposes	50 CFR part 22	No fee	
Eagle Incidental Take—Up to 5 years, Commercial	50 CFR part 22	2,500	500
Eagle Incidental Take—Non-commercial	50 CFR part 22	500	150
Eagle Incidental Take—5–30 years [1]	50 CFR part 22	36,000 [1]	
Eagle Incidental Take—Transfer of a permit	50 CFR part 22	1,000	
Eagle Nest Take—Single nest, Commercial	50 CFR part 22	2,500	500
Eagle Nest Take—Single nest, Non-commercial	50 CFR part 22	500	150
Eagle Nest Take—Multiple nests	50 CFR part 22	5,000	500
Eagle Take—Exempted under ESA	50 CFR part 22	No fee	
*	*	*	*

[1] An additional Administration Fee of $8,000 will be assessed every 5 years for permits with durations longer than 5 years for permit review.

* * * * *

PART 22—EAGLE PERMITS

■ 3. The authority citation for part 22 is revised to read as follows:

Authority: 16 U.S.C. 668–668d; 703–712; 1531–1544.

■ 4. Amend § 22.3 by:

■ a. Removing the definition of ''Advanced conservation practices'';
■ b. Adding a definition for ''Alternate nest'';
■ c. Removing the definition of ''Area nesting population'';
■ d. Adding definitions for ''Compatible with the preservation of the bald eagle or the golden eagle'' and ''Eagle management unit (EMU)'';
■ e. Revising the definition of ''Eagle nest'';
■ f. Removing the definition of ''Inactive nest'';
■ g. Adding definitions for ''In-use nest'' and ''Local area population (LAP)'';
■ h. Removing the definition of ''Maximum degree achievable'';
■ i. Adding a definition for ''Nesting territory'';
■ j. Revising the definition of ''Practicable''; and
■ k. Removing the definitions of ''Programmatic permit'', ''Programmatic take'', and ''Territory''.

The additions and revisions read as follows:

§ 22.3 What definitions do you need to know?

* * * * *

Alternate nest means one of potentially several nests within a nesting territory that is not an in-use nest at the current time. When there is no in-use nest, all nests in the territory are alternate nests.

* * * * *

Compatible with the preservation of the bald eagle or the golden eagle means consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species.

* * * * *

Eagle management unit (EMU) means a geographically bounded region within which permitted take is regulated to meet the management goal of maintaining stable or increasing breeding populations of bald or golden eagles.

Eagle nest means any assemblage of materials built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction.

* * * * *

In-use nest means a bald or golden eagle nest characterized by the presence of one or more eggs, dependent young, or adult eagles on the nest in the past 10 days during the breeding season.

* * * * *

Local area population (LAP) means the bald or golden eagle population within the area of a human activity or project bounded by the natal dispersal distance for the respective species. The LAP is estimated using the average eagle density of the EMU or EMUs where the activity or project is located.

* * * * *

Nesting territory means the area that contains one or more eagle nests within the home range of a mated pair of eagles, regardless of whether such nests were built by the current resident pair.

* * * * *

Practicable means available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value to eagles and the activity's overall purpose, scope, and scale.

* * * * *

§ 22.4 [Amended]

■ 5. In § 22.4, amend paragraph (a) by removing ''and 1018–0136'' in the first sentence.

■ 6. Amend § 22.11 by revising paragraph (c) to read as follows:

§ 22.11 What is the relationship to other permit requirements?

* * * * *

(c) A permit under this part only authorizes take, possession, and/or transport under the Bald and Golden Eagle Protection Act and does not provide authorization under the Migratory Bird Treaty Act or the Endangered Species Act for the take, possession, and/or transport of migratory birds or endangered or threatened species other than bald or golden eagles.

* * * * *

■ 7. Amend § 22.25 by:
■ a. Revising the first sentence of the introductory text;
■ b. Removing the semicolons at the ends of paragraphs (a)(1) and (2) and adding periods in their place;
■ c. Revising paragraph (a)(4);
■ d. Removing the semicolon at the end of paragraph (a)(5) and adding a period in its place;
■ e. Removing paragraph (a)(6), and redesignating paragraphs (a)(7) through (9) as paragraphs (a)(6) through (8);
■ f. Removing the semicolon at the end of newly redesignated paragraph (a)(6) and adding a period in its place and removing ''; and'' at the end of newly redesignated paragraph (a)(7) and adding a period in its place;
■ g. Revising paragraphs (b)(1) and (4);
■ h. Revising the first sentence in paragraph (c) introductory text;
■ i. Removing paragraphs (c)(3) and (6), and redesignating paragraphs (c)(4) and (5) as paragraphs (c)(3) and (4); and
■ j. Revising newly redesignated paragraphs (c)(3) and (4).

The revisions read as follows:

§ 22.25 What are the requirements concerning permits to take golden eagle nests?

The Director may, upon receipt of an application and in accordance with the issuance criteria of this section, issue a permit authorizing any person to take alternate golden eagle nests during a resource development or recovery operation if the taking is compatible with the preservation of golden eagles.

* * *

(a) * * *

(4) *Nest and territory occupancy data.* (i) For each golden eagle nest proposed to be taken, the applicant must identify on an appropriately scaled map or plat the exact location of each golden eagle nest in the nesting territory. The map or plat must contain enough details so that each golden eagle nest can be readily located by the Service.

(ii) A description of the monitoring that was done to verify that eagles are not attending the nest for breeding purposes, and any additional available documentation used in identifying which nests within the territory were in-use nests in current and past breeding seasons.

* * * * *

(b) * * *

(1) Only alternate golden eagle nests may be taken;

* * * * *

(4) The permittee must comply with any mitigation and monitoring measures determined by the Director to be practicable and compatible with the resource development or recovery operation; and

* * * * *

(c) *Issuance criteria.* The Director shall conduct an investigation and not issue a permit to take any golden eagle nest unless such taking is compatible with the preservation of golden eagles.

* * *

* * * * *

(3) Whether suitable golden eagle nesting and foraging habitat unaffected by the resource development or recovery operation is available to accommodate any golden eagles displaced by the resource development or recovery operation; and

(4) Whether practicable mitigation measures compatible with the resource development or recovery operation are available to encourage reoccupation by golden eagles of the resource development or recovery site. Mitigation measures may include, but are not limited to, reclaiming disturbed land to

enhance golden eagle nesting and foraging habitat, relocating in suitable habitat any golden eagle nest taken, or establishing one or more nest sites.

* * * * *

■ 8. Amend § 22.26 by:
■ a. Revising paragraphs (a) and (c)(1) through (3);
■ b. Redesignating paragraphs (c)(7) through (10) as (c)(8) through (11), adding new paragraph (c)(7), and revising newly redesignated paragraphs (c)(8), (9), and (11);
■ c. Revising paragraph (d)(2);
■ d. Adding paragraph (d)(3);
■ e. Revising paragraph (e)(1);
■ f. Redesignating paragraphs (e)(3), (4), and (5) as paragraphs (e)(5), (7), and (9), and adding new paragraphs (e)(3), (4), (6), and (8);
■ g. Revising newly redesignated paragraphs (e)(5) and (e)(7)(i) through (iv);
■ h. Removing newly redesignated paragraph (e)(7)(v); and
■ i. Revising paragraphs (f), (h) and (i).

The revisions and additions read as follows:

§ 22.26 Permits for eagle take that is associated with, but not the purpose of, an activity.

(a) *Purpose and scope.* This permit authorizes take of bald eagles and golden eagles where the take is compatible with the preservation of the bald eagle and the golden eagle; is necessary to protect an interest in a particular locality; is associated with, but not the purpose of, the activity; and cannot practicably be avoided.

* * * * *

(c) * * *

(1) You must comply with all avoidance, minimization, or other mitigation measures specified in the terms of your permit to mitigate for the detrimental effects on eagles, including indirect and cumulative effects, of the permitted take.

(i) Compensatory mitigation scaled to project impacts will be required for any permit authorizing take that would exceed the applicable eagle management unit take limits. Compensatory mitigation for this purpose must ensure the preservation of the affected eagle species by reducing another ongoing form of mortality by an amount equal to or greater than the unavoidable mortality, or increasing the eagle population by an equal or greater amount.

(ii) Compensatory mitigation may also be required in the following circumstances:

(A) When cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population; or

(B) When available data indicate that cumulative unauthorized mortality would exceed 10 percent of the local area population.

(iii) All required compensatory mitigation must:

(A) Be determined based on application of all practicable avoidance and minimization measures;

(B) Be sited within the same eagle management unit where the permitted take will occur unless the Service has reliable data showing that the population affected by the take includes individuals that are reasonably likely to use another eagle management unit during part of their seasonal migration;

(C) Use the best available science in formulating and monitoring the long-term effectiveness of mitigation measures and use rigorous compliance and effectiveness monitoring and evaluation to make certain that mitigation measures achieve their intended outcomes, or that necessary changes are implemented to achieve them;

(D) Be additional and improve upon the baseline conditions of the affected eagle species in a manner that is demonstrably new and would not have occurred without the compensatory mitigation (voluntary actions taken in anticipation of meeting compensatory mitigation requirements for an eagle take permit not yet granted may be credited toward compensatory mitigation requirements);

(E) Be durable and, at a minimum, maintain its intended purpose for as long as impacts of the authorized take persist; and

(F) Include mechanisms to account for and address uncertainty and risk of failure of a compensatory mitigation measure.

(iv) Compensatory mitigation may include conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements. Permittee-responsible mitigation may be approved provided the permittee submits verifiable documentation sufficient to demonstrate that the standards set forth in paragraph (c)(1)(iii) of this section have been met and the alternative means of compensatory mitigation will offset the permitted take to the degree that is compatible with the preservation of eagles.

(2) *Monitoring.* (i) You may be required to monitor impacts to eagles from the permitted activity for up to 3 years after completion of the activity or as set forth in a separate management plan, as specified on your permit. For ongoing activities and enduring site features that will likely continue to cause take, periodic monitoring will be required for as long as the data are needed to assess impacts to eagles.

(ii) The frequency and duration of required monitoring will depend on the form and magnitude of the anticipated take and the objectives of associated avoidance, minimization, or other mitigation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring, which is to provide data needed by the Service regarding the impacts of the activity on eagles for purposes of adaptive management. You must coordinate with the Service to develop project-specific monitoring protocols. If the Service has officially issued or endorsed, through rulemaking procedures, monitoring protocols for the activity that will take eagles, you must follow them, unless the Service waives this requirement. Your permit may require that the monitoring be conducted by qualified, independent third parties that report directly to the Service.

(3) You must submit an annual report summarizing the information you obtained through monitoring to the Service every year that your permit is valid and for up to 3 years after completion of the activity or termination of the permit, as specified in your permit. The Service will make eagle mortality information from annual reports available to the public.

* * * * *

(7) *Additional conditions for permits with durations longer than 5 years*—(i) *Monitoring.* Monitoring to assess project impacts to eagles and the effectiveness of avoidance and minimization measures must be conducted by qualified, independent third parties, approved by the Service. Monitors must report directly to the Service and provide a copy of the reports and materials to the permittee.

(ii) *Adaptive management.* The permit will specify circumstances under which modifications to avoidance, minimization, or compensatory mitigation measures or monitoring protocols will be required, which may include, but are not limited to: Take levels, location of take, and changes in eagle use of the activity area. At a minimum, the permit must specify actions to be taken if take approaches or reaches the amount authorized and anticipated within a given time frame. Adaptive management terms in a permit will include review periods of no more than 5 years and may require prompt action(s) upon reaching specified

conditions at any time during the review period.

(iii) *Permit reviews.* At no more than 5 years from the date a permit that exceeds 5 years is issued, and at least every 5 years thereafter, the permittee will compile, and submit to the Service, eagle fatality data or other pertinent information that is site-specific for the project, as required by the permit. The Service will review this information, as well as information provided directly to the Service by independent monitors, to determine whether:

(A) The permittee is in compliance with the terms and conditions of the permit and has implemented all applicable adaptive management measures specified in the permit; and

(B) Eagle take does not exceed the amount authorized to occur within the period of review.

(iv) *Actions to be taken based on the permit review.* (A) In consultation with the permittee, the Service will update fatality predictions, authorized take levels and compensatory mitigation for future years, taking into account the observed levels of take based on approved protocols for monitoring and estimating total take, and, if applicable, accounting for changes in operations or permit conditions pursuant to the adaptive management measures specified in the permit or made pursuant to paragraphs (c)(7)(iv)(B) through (D) of this section.

(B) If authorized take levels for the period of review are exceeded in a manner or to a degree not addressed in the adaptive management conditions of the permit, based on the observed levels of take using approved protocols for monitoring and estimating total take, the Service may require additional actions including but not limited to:

(*1*) Adding, removing, or adjusting avoidance, minimization, or compensatory mitigation measures;

(*2*) Modifying adaptive management conditions;

(*3*) Modifying monitoring requirements; and

(*4*) Suspending or revoking the permit in accordance with part 13 of this subchapter B.

(C) If the observed levels of take, using approved protocols for monitoring and estimating total take, are below the authorized take levels for the period of review, the Service will proportionately revise the amount of compensatory mitigation required for the next period of review, including crediting excess compensatory mitigation already provided by applying it to the next period of review.

(D) Provided the permittee implements all required actions and remains compliant with the terms and conditions of the permit, no other action is required. However, with consent of the permittee, the Service may make additional changes to a permit, including appropriate modifications to avoidance and/or minimization measures or monitoring requirements. If measures are adopted that have been shown to be effective in reducing risk to eagles, appropriate adjustments will be made in fatality predictions, take estimates, and compensatory mitigation.

(v) *Fees.* For permits with terms longer than 5 years, an administration fee of $8,000 will be assessed every 5 years for permit review.

(8) The Service may amend, suspend, or revoke a permit issued under this section if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations. This provision is in addition to the general criteria for amendment, suspension, and revocation of Federal permits set forth in §§ 13.23, 13.27, and 13.28 of this chapter.

(9) Notwithstanding the provisions of § 13.26 of this chapter, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

* * * * *

(11) You are responsible for ensuring that the permitted activity is in compliance with all Federal, Tribal, State, and local laws and regulations applicable to eagles.

(d) * * *

(2) Your application must consist of a completed application Form 3–200–71 and all required attachments. Send applications to the Regional Director of the Region in which the take would occur—Attention: Migratory Bird Permit Office. You can find the current addresses for the Regional Directors in § 2.2 of subchapter A of this chapter.

(3) Except as set forth in paragraph (d)(3)(ii) of this section, an applicant must coordinate with the Service to develop project-specific monitoring and survey protocols, take probability models, and any other applicable data quality standards, and include in the application all the data thereby obtained.

(i) If the Service has officially issued or endorsed, through rulemaking procedures, survey, modeling, or other data quality standards for the activity that will take eagles, you must follow them and include in your application all the data thereby obtained, unless the Service waives this requirement for your application.

(ii) Applications for eagle incidental take permits for wind facilities must include pre-construction eagle survey information collected according to the following standards, unless exceptional circumstances apply and survey requirements can be modified to accommodate those circumstances after consultation with, and written concurrence by, the Service:

(A) Surveys must consist of point-based recordings of bald eagle and golden eagle flight activity (minutes of flight) within a three-dimensional cylindrical plot (the sample plot). The radius of the sample plot is 2,625 feet (ft) (800 meters (m)), and the height above ground level must be either 656 ft (200 m) or 82 ft (25 m) above the maximum blade reach, whichever is greater.

(B) The duration of the survey for each visit to each sample plot must be at least 1 hour.

(C) Sampling must include at least 12 hours per sample plot per year for 2 or more years. Each sample plot must be sampled at least once per month, and the survey start time for a sampling period must be selected randomly from daylight hours,[1] unless the conditions in paragraph (d)(3)(ii)(F) of this section apply.

(D) Sampling design must be spatially representative of the project footprint,[2] and spatial coverage of sample plots must include at least 30 percent of the project footprint. Sample plot locations must be determined randomly, unless the conditions in paragraph (d)(3)(ii)(F) of this section apply.

(E) The permit application package must contain the following:

(1) Coordinates of each sample point in decimal degrees (specify projection/datum).

(2) The radius and height of each sample plot.

(3) The proportion of each three-dimensional sample plot that was observable from the sample point for each survey.

(4) Dates, times, and weather conditions for each survey, to include the time surveys at each sample point began and ended.

(5) Information for each survey on the number of eagles by species observed (both in flight and perched), and the amount of flight time (minutes) that each was in the sample plot area.

[1] Daylight hours are defined as the hours between sunrise and sunset.

[2] The project footprint is the minimum-convex polygon that encompasses the wind-project area inclusive of the hazardous area around all turbines and any associated utility infrastructure, roads, etc.

(6) The number of proposed turbines and their specifications, including brand/model, rotor diameter, hub height, and maximum blade reach (height), or the range of possible options.

(*7*) Coordinates of the proposed turbine locations in decimal degrees (specify projection/datum), including any alternate sites.

(F) Stratified-random sampling (a sample design that accounts for variation in eagle abundance by, for example, habitat, time of day, season) will often provide more robust, efficient sampling. Random sampling with respect to time of day, month, or project footprint can be waived if stratification is determined to be a preferable sampling strategy after consultation and approval in advance with the Service.

(iii) Application of the Service-endorsed data quality standards of paragraphs (d)(3)(i) and (ii) of this section may not be needed if:

(A) The Service has data of sufficient quality to predict the likely risk to eagles;

(B) Expediting the permit process will benefit eagles; or

(C) The Service determines the risk to eagles from the activity is low enough relative to the status of the eagle population based on:

(*1*) Physiographic and biological factors of the project site; or

(*2*) The project design (*i.e.,* use of proven technology, micrositing, etc.).

(e) * * *

(1) Whether take is likely to occur based on the magnitude and nature of the impacts of the activity.

* * * * *

(3) Whether the cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population.

(4) Any available data indicating that unauthorized take may exceed 10 percent of the local area population.

(5) Whether the applicant has proposed all avoidance and minimization measures to reduce the take to the maximum degree practicable relative to the magnitude of the impacts to eagles.

(6) Whether the applicant has proposed compensatory mitigation measures that comply with standards set forth under paragraph (c)(1) of this section to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

(7) * * *

(i) Safety emergencies;

(ii) Increased need for traditionally practiced Native American tribal religious use that requires taking eagles from the wild;

(iii) Non-emergency activities necessary to ensure public health and safety; and

(iv) Other interests.

(8) For projects that are already operational and have taken eagles without a permit, whether such past unpermitted eagle take has been resolved or is in the process of resolution with the Office of Law Enforcement through settlement or other appropriate means.

* * * * *

(f) *Required determinations.* Before we issue a permit, we must find that:

(1) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting the eagle populations within the eagle management unit and the local area population, are compatible with the preservation of bald eagles and golden eagles.

(2) The taking is necessary to protect an interest in a particular locality.

(3) The taking is associated with, but not the purpose of, the activity.

(4) The applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles.

(5) The applicant has applied all appropriate and practicable compensatory mitigation measures, when required, pursuant to paragraph (c) of this section, to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

(6) Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority as set forth in paragraph (e)(7) of this section.

(7) Issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle take at the project.

* * * * *

(h) *Permit duration.* The duration of each permit issued under this section will be designated on its face and will be based on the duration of the proposed activities, the period of time for which take will occur, the level of impacts to eagles, and the nature and extent of mitigation measures incorporated into the terms and conditions of the permit. A permit for incidental take will not exceed 30 years.

(i) Applicants for eagle incidental take permits who submit a completed permit application by July 14, 2017 may elect to apply for coverage under the regulations that were in effect prior to January 17, 2017 provided that the permit application satisfies the permit application requirements of the regulations in effect prior to January 17, 2017. If the Service issues a permit to such applicants, all of the provisions and conditions of the regulations that were in effect prior to January 17, 2017 will apply.

■ 9. Amend § 22.27 by:

■ a. Revising paragraphs (a)(1)(i) through (iv), (a)(3), and (b)(1), (2), and (7);

■ b. Redesignating paragraphs (b)(8) through (10) as paragraphs (b)(9) through (11), adding a new paragraph (b)(8), and revising newly designated paragraph (b)(11); and

■ c. Revising paragraphs (e)(1), (e)(2) introductory text, (e)(2)(ii) and (iii), and (e)(3) through (6).

The revisions and addition read as follows:

§ 22.27 Removal of eagle nests.

(a) * * *

(1) * * *

(i) An in-use or alternate nest where necessary to alleviate an existing safety emergency, or to prevent a rapidly developing safety emergency that is otherwise likely to result in bodily harm to humans or eagles while the nest is still in use by eagles for breeding purposes;

(ii) An alternate nest when the removal is necessary to ensure public health and safety;

(iii) An alternate nest, or an in-use nest prior to egg-laying, that is built on a human-engineered structure and creates, or is likely to create, a functional hazard that renders the structure inoperable for its intended use; or

(iv) An alternate nest, provided the take is necessary to protect an interest in a particular locality and the activity necessitating the take or the mitigation for the take will, with reasonable certainty, provide a net benefit to eagles.

* * * * *

(3) A permit may be issued under this section to cover multiple nest takes over a period of up to 5 years, provided the permittee complies with comprehensive measures developed in coordination with the Service to minimize the need to remove nests and specified as conditions of the permit.

* * * * *

(b) * * *

(1) The permit does not authorize take of in-use nests except:

(i) For safety emergencies as provided under paragraph (a)(1)(i) of this section; or

(ii) Prior to egg-laying if the in-use nest is built on a human-engineered structure and meets the provisions set forth in paragraph (a)(1)(iii) of this section.

(2) When an in-use nest must be removed under this permit, any take of nestlings or eggs must be conducted by a Service-approved, qualified agent. All nestlings and viable eggs must be immediately transported to foster/recipient nests or a rehabilitation facility permitted to care for eagles, as directed by the Service, unless the Service waives this requirement.

* * * * *

(7) You must comply with all avoidance, minimization, or other mitigation measures specified in the terms of your permit to mitigate for the detrimental effects on eagles, including indirect and cumulative effects, of the permitted take.

(8) Compensatory mitigation scaled to project impacts will be required for any permit authorizing take that would exceed the applicable eagle management unit take limits. Compensatory mitigation must conform to the standards set forth at § 22.26(c)(1)(iii). Compensatory mitigation may also be required in the following circumstances:

(i) When cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population;

(ii) When available data indicate that cumulative unauthorized mortality would exceed 10 percent of the local area population; or

(iii) If the permitted activity does not provide a net benefit to eagles, you must apply appropriate and practicable compensatory mitigation measures as specified in your permit to provide a net benefit to eagles scaled to the effects of the nest removal.

* * * * *

(11) You are responsible for ensuring that the permitted activity is in compliance with all Federal, Tribal, State, and local laws and regulations applicable to eagles.

* * * * *

(e) * * *

(1) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations, are compatible with the preservation of the bald eagle or the golden eagle.

(2) For alternate nests:

* * * * *

(ii) The nest is built on a human-engineered structure and creates, or is likely to create, a functional hazard that renders the structure inoperable for its intended use; or

(iii) The take is necessary to protect an interest in a particular locality, and the activity necessitating the take or the mitigation for the take will, with reasonable certainty, provide a net benefit to eagles.

(3) For in-use nests prior to egg-laying, the nest is built on a human-engineered structure and creates, or is likely to create, a functional hazard that renders the structure inoperable for its intended use.

(4) For in-use nests, the take is necessary to alleviate an existing safety emergency, or to prevent a rapidly developing safety emergency that is otherwise likely to result in bodily harm to humans or eagles while the nest is still in use by eagles for breeding purposes.

(5) There is no practicable alternative to nest removal that would protect the interest to be served.

(6) Issuing the permit will not preclude the Service from authorizing another take necessary to protect an interest of higher priority, according to the following prioritization order:

(i) Safety emergencies;

(ii) Increased need for traditionally practiced Native American tribal religious use that requires taking eagles from the wild;

(iii) Non-emergency activities necessary to ensure public health and safety;

(iv) Resource development or recovery operations (under § 22.25, for golden eagle nests only); and

(v) Other interests.

* * * * *

Dated: December 8, 2016.

Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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Part VII

Department of Defense

Department of the Army, U.S. Army Corps of Engineers

33 CFR Part 209

Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply; Proposed Rule

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

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[COE–2016–0016]

RIN 0710–AA72

Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Army, U.S. Army Corps of Engineers (Corps) proposes to update and clarify its policies governing the use of its reservoir projects for domestic, municipal and industrial water supply pursuant to Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958 (WSA). Specifically, the Corps proposes to define key terms under both statutes and to respond to issues that have arisen in exercising these authorities, in order to take into account court decisions, legislative provisions, and other developments. The Corps intends through this rulemaking to explain and improve its interpretations and practices under these statutes, and seeks comment from all interested stakeholders on those interpretations and practices. The proposed rule is intended to enhance the Corps' ability to cooperate with State and local interests in the development of water supplies in connection with the operation of its reservoirs for federal purposes as authorized by Congress, to facilitate water supply uses of Corps reservoirs by others as contemplated under applicable law, and to avoid interfering with lawful uses of water by any entity when the Corps exercises its discretionary authority under either Section 6 or the WSA. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities, and it would not impose requirements on any other entity, alter existing contractual arrangements at Corps reservoirs, or require operational changes at any Corps reservoir. The Corps intends by this rulemaking proposal to initiate a positive dialogue with stakeholders on these important issues, and to promote program certainty and efficiency by ultimately establishing a uniform understanding of Section 6 and the WSA, and the range of activity authorized thereunder.

DATES: Comments must be received by February 14, 2017.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

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

Email: WSRULE2016@usace.army.mil. Include the docket number, COE–2016–0016, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, ATTN: CECC–L, U.S. Army Corps of Engineers, 441 G St NW., Washington, DC 20314.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2015–0016. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through *regulations.gov* or email. The *regulations.gov* Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through *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 we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Executive Summary:

The proposed rule would formally set forth the Department of the Army, U.S. Army Corps of Engineers' (Corps') interpretation of its authority under both Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (Section 6), and the Water Supply Act of 1958, 43 U.S.C. 390b (WSA), by defining key statutory terms and explaining the differences between the activities authorized under each of these authorities. The proposed rule would also explain the Corps' approach to important policy questions that have arisen nationwide, including the pricing of surplus water agreements under Section 6, the reallocation of storage under the WSA, and accounting of storage usage and return flows under WSA agreements, and would solicit public input and comments on those subjects. The rule will also clarify and simplify processes for approving and entering into water supply agreements at Corps reservoirs, and includes procedures for coordinating with States, Tribes, and other federal agencies to ensure that water rights are protected and the views, expertise, and prerogatives of others are taken into account. The overall intent of the proposed rule is to enhance the Corps' ability to cooperate with State and local interests by facilitating water supply uses of Corps reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water under State law or other Federal Law. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities.

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I. Background

A. Purpose of Rulemaking

The purpose of the proposed rulemaking is to seek public comment on the Corps' interpretation of key provisions of Section 6 and the WSA, and on the Corps' proposed policies to more clearly and effectively provide for use of its reservoirs within the authority conferred by these two statutes. The Corps has utilized these authorities at different times since their enactment in 1944 and 1958, respectively, to accommodate water supply uses at more than one hundred Corps reservoirs nationwide.[1] However, the Corps has never set forth, in formal, notice-and-comment regulations, a definitive interpretation of these authorities or a complete statement of the policies that govern their use. The Corps' existing water supply policies and practices are generally set forth in an internal publication, Engineer Regulation (ER) 1105–2–100, Planning Guidance Notebook (Apr. 22, 2000). This guidance has not been updated to reflect recent legal opinions, judicial decisions, and legislation affecting Section 6 and the WSA, does not fully articulate the Corps' understanding of the differing Congressional intent behind the two statutes, and does not clearly define the Corps facilities to which the statutes apply, or the types of water uses, that can be accommodated under Section 6 and the WSA.

In the absence of more formal regulations, and in response to different issues that have arisen over time, practices have varied across the Corps' multiple District offices. In the past, some water supply agreements have been based on different or uncertain statutory authority, and have contained unclear or inconsistent terms and conditions. The majority of agreements have been entered into pursuant to the WSA, providing approximately 10 million acre-feet of storage for water supply in Corps reservoirs. These WSA agreements provide for the use of storage, but in many cases do not clearly set forth the amount of water that can be withdrawn under the agreement, or how the availability of water in storage will be determined. Some Corps Districts have developed storage accounting practices to measure storage usage and the availability of water for withdrawal, but those practices have not been formally adopted nationwide. The Corps has only rarely entered into surplus water contracts under Section 6, with fewer than ten such agreements in effect as of 2016. In many cases—approximately 1,600, according to a 2012 audit—the Corps has allowed water to be withdrawn from its reservoirs simply by means of an easement across federal project lands, without formal water supply agreements citing a specific authority, without formal determinations that surplus water is available, and without clear documentation of impacts to other authorized purposes or costs incurred by the Government in authorizing the withdrawals.[2]

Meanwhile, the Corps' operation of reservoir projects in connection with water supply has come under increased scrutiny, as some parties have questioned the authority for those operations in litigation, and others have

[1] *See* U.S. Army Corps of Engineers, Institute for Water Resources, 2014 Municipal, Industrial and Irrigation Water Supply Database Report at 5–6 (August 2015), available at *http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-02_Municipal_Industrial_and_Irrigation_Water_Supply_Database_Report.pdf.* Of the more than 300 water supply agreements currently in effect at Corps reservoirs, the great majority are storage agreements under the authority of the Water Supply Act of 1958, 43 U.S.C. 390b (''WSA''), with only a small number of surplus water agreements—9, as of 2014—pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (''Section 6'').

[2] The Corps recognizes that water supply uses of Corps reservoirs, including the Missouri River mainstem reservoirs, may be made under separate legislative authority. *See, e.g.,* Flood Control Act of 1944, Public Law 78–534 §§ 8, 9, 58 Stat. 891 (Dec. 22, 1944); Memorandum of Agreement Between the Department of the Interior, Bureau of Reclamation and the Department of the Army, U.S. Army Corps of Engineers for Joint Procedures Regarding Reclamation Water-Related Activities Associated with the Missouri River in Montana and North and South Dakota (Feb. 21, 2014). The proposed rule would not affect implementation of these authorities.

expressed concerns that the Corps' implementation of its water supply authorities may impinge upon other authorized purposes, or sovereign prerogatives to allocate rights to consumptive uses of water. Steadily increasing demands for limited supplies of water at Corps reservoirs, interstate conflicts over water use, and pressures from drought, environmental changes, and aging infrastructure are expected to intensify all of the above concerns.[3] This notice-and-comment rulemaking is intended to bring greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, facilitate access to Corps reservoirs for water supply where water can be made available under Section 6 or the WSA, provide clear documentation of the potential impacts to other authorized purposes, promote more effective cooperation with State and local interests in the development of water supplies, and allow for the development of new policies to address complex issues that have arisen since the statutes were enacted.

Within the Corps' Northwestern Division area of operations, uncertainty over Corps policies and practices has engendered opposition in connection with proposals to enter into surplus water agreements under Section 6, and a proposed WSA reallocation study for the Missouri River mainstem reservoirs. In practice, the Corps has authorized numerous water supply withdrawals by non-federal entities from its mainstem reservoirs without clearly stating the authority for the withdrawals, without entering into separate water supply agreements, and without charging any fee for such agreements. Although the Corps has recently identified, in draft and final Surplus Water Reports for the six mainstem reservoirs, sufficient quantities of surplus water in those reservoirs to accommodate all existing and projected water withdrawals over a ten-year period, some stakeholders have submitted public comments critical of some of the conclusions and recommendations contained in the draft Surplus Water Reports. Some commenters have objected to the Corps' proposal to enter into surplus water agreements (in addition to easements necessary to cross federal project land) when authorizing withdrawals from the mainstem reservoirs, and to impose a charge for those agreements, based on the cost of providing the amount of storage in the reservoir calculated to yield the quantity of water desired. Others have questioned whether surplus water withdrawals from the mainstem reservoirs actually utilize storage, and whether it is reasonable to charge for surplus water withdrawals based upon the cost of storage, if those withdrawals could be made from the natural flow of the river absent reservoir storage. In addition, States and Tribes have expressed concern that proposed actions would interfere with citizens' rights to gain access to Missouri River flows, and limit or impinge upon existing uses of water, State prerogatives to allocate water resources, and Tribal reserved water rights. The Assistant Secretary of the Army (Civil Works) has expressed her intent that the Corps develop a nationwide pricing policy under Section 6 with public input, through notice-and-comment rulemaking, and in the meantime, Congress has enacted legislation precluding charges for uses of surplus water from the Corps' Missouri River mainstem reservoirs for a ten-year period. This background, including the recent legislation, illustrates the need for the Corps to clarify its interpretation and implementation of its Section 6 authority.

In the Corps' South Atlantic Division area of operations, recent litigation has highlighted the need for clearer, more consistent water supply policies under the WSA, and the need to consider issues not addressed by current Corps guidance. In litigation regarding the Corps' operation of reservoir projects in the Apalachicola-Chattahoochee-Flint (ACF) and Alabama-Coosa-Tallapoosa (ACT) River basins, two federal courts found that the Corps' actual or potential operation of Lake Lanier in the ACF basin to accommodate water supply uses in Georgia exceeded the Corps' authority under the WSA. See *Southeastern Federal Power Customers, Inc.* v. *Geren,* 514 F.3d 1316, 1324 (D.C. Cir. 2008); *In re Tri-State Water Rights Litigation,* 639 F. Supp. 2d 1308, 1347 (M.D. Fla. 2009), *rev'd,* 644 F.3d 1160 (11th Cir. 2011). That litigation culminated in a decision by the U.S. Court of Appeals for the Eleventh Circuit in 2011, reversing and vacating a district court judgment and directing that the case be remanded to the Corps to make a final determination as to its legal authority under several statutes, including the WSA, to accommodate water supply from the Lake Lanier project. *In re MDL–1824 Tri-State Water Rights Litigation,* 644 F.3d 1160 (11th Cir. 2011). In issuing that remand order, the Eleventh Circuit encouraged the Corps to consider a number of policy issues not addressed in the Corps' existing guidance, including the optimal methodology for determining whether a proposed action is within the authority of the WSA, ''whether percent reallocation of storage is the correct or sole measure of operational change'' under the WSA, or whether increases in water supply use over time ''constitute a 'change' of operations at all''; the relationship of multiple authorized purposes and statutory authorities; and whether and how to account for ''return flows'' in connection with water supply uses of a Corps reservoir. *Id.* at 1196 n. 31, 1200–1206.

In response to the Eleventh Circuit remand order, the Corps' Chief Counsel prepared a legal opinion, building on a 2009 legal opinion that had addressed the authority for then-current withdrawals from Lake Lanier, clarifying the Corps' interpretation of its authority under the WSA. Earl H. Stockdale, Chief Counsel, Memorandum for the Chief of Engineers, Subject: Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia (June 25, 2012) (2012 Chief Counsel Legal Opinion), available at *http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf.* That opinion applied to Lake Lanier and the federal ACF system of projects specifically. It examined the legislative history of the WSA, as well as the authorizations for the federal ACF projects, set forth the Corps' understanding of the limits of its authority under those statutes, and identified certain technical considerations that must be analyzed in order to determine the legal authority for proposed inclusions of storage at Lake Lanier pursuant to the WSA. The opinion was filed with the court in compliance with the remand order, and led to the entry of final judgment in the *Tri-State Water Rights Litigation.* However, the Chief Counsel's legal opinion did not resolve a number of outstanding policy issues, including methods of accounting for storage usage and return flows; and the Corps' internal water supply policies contained in ER 1105–2–100 have not been updated to take account of the general legal tenets set forth in the opinion. The Assistant Secretary of the Army (Civil Works) has indicated that outstanding issues under the WSA should be addressed through a nationwide, notice-and-comment rulemaking.

The proposed rule would address the specific issues that have arisen most notably in the Corps' Northwestern and

[3] *See generally* U.S. Army Corps of Engineers, Institute for Water Resources, Status and Challenges for USACE Reservoirs (May 2016), available at *http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2016-RES-01.pdf.*

South Atlantic Divisions, but is also intended to provide greater clarity, consistency, and efficiency in implementing Section 6 and the WSA nationwide. Numerous parties have urged the Corps to undertake rulemaking to address water supply issues, and the Administration has included this rulemaking initiative in its Unified Agenda of Regulatory and Deregulatory Actions published by the Office of Management and Budget. The Corps solicits comments on the proposed rule and suggestions for improvements that could be made to Corps policies and practices in this area. The Corps intends, through this rulemaking process, to initiate a positive dialogue with all interested parties, resulting in a final rule that will more effectively accomplish Congressional intent regarding the utilization of Corps reservoirs for water supply. We are not proposing to require changes to current Section 6 and WSA agreements. All new agreements entered into after the effective date of the final rule, as well as new agreements for users with expiring water supply agreements, will comply with the rule. Current uses that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. If those withdrawals are found to require a Section 6 surplus water contract or a WSA storage agreement, the appropriate agreement shall be required in order for the withdrawals to continue. We are soliciting comment on the effective date and transition period.

The proposed rule is not intended to upset the balance between federal purposes and State prerogatives, or to assert greater federal control over water resources, or to interfere with the responsibilities of other federal agencies under other laws, such as the federal reclamation laws implemented by the Department of the Interior, or the marketing of federal hydropower by the Department of Energy through the four federal Power Marketing Administrations (PMAs). It is also not intended to interfere with or preempt the Environmental Protection Agency's Clean Water Act (CWA) authorities and responsibilities to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities.[4]

Nor would the proposed rule itself result in any physical changes or changes to operations at Corps reservoirs. The Corps constructs and operates its reservoir projects pursuant to specific Congressional authorization, and adopts water control plans and manuals to govern operations for authorized purposes. Operating manuals are reviewed periodically and may be updated for a variety of reasons, including changing requirements resulting from developments in the project area and downstream, improvements in technology, changes in hydrology, opportunities for enhanced coordination with other federal reservoirs, new legislation and other relevant factors. *See* 33 CFR 222.5(f); Engineer Regulation (ER) 1110–2–240, Water Control Management at 3–3 (May 30, 2016). Before promulgating or revising water control manuals, or including storage for water supply, or finalizing a surplus water determination, the Corps solicits public comment, prepares all required documentation, and complies with applicable law, including but not limited to the CWA, the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA). When proposing to reallocate storage for water supply under the WSA and prior to issuance of a final surplus water determination, the Corps prepares, and considers public comments on, reports evaluating such proposals, including evaluation of environmental impacts, effects on operations for authorized purposes, and continued compliance with applicable law. *See* ER 1105–2–100 at E–214 to E–216. The proposed rule would reinforce these practices by defining key terms under both statutes, clarifying policies, and providing for improved coordination with the public and other federal agencies prior to taking final action pursuant to Section 6 or the WSA. The proposed rule would bring greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, but would not itself cause particular decisions to be made or actions to be taken at particular projects. Decisions or actions for a particular project would be made only after the reporting and documentation requirements described above are met for that project.

B. Summary of Proposed Rule

The proposed rule seeks to clarify the Corps' understanding of the Congressional intent behind Section 6 and the WSA, define key statutory terms, more clearly delineate the authority conferred under each statute, and establish policies that would improve efficiency and coordination with States, federal agencies, and other stakeholders regarding water supply uses of Corps reservoirs. The proposed rule is intended to ensure that the Corps carries out its authority under Section 6 and the WSA in a manner that does not interfere with State, Tribal, or other water rights, and that recognizes related responsibilities and authorities under the CWA, ESA, NEPA, and other federal law. Section 6 and the WSA are discretionary statutes that authorize the Secretary of the Army to make Corps reservoirs available for water supply uses, under different terms as set forth in the statutes. The proposed rule would acknowledge that when the Corps acts pursuant to either Section 6 or the WSA, the Corps does not issue, sell, adjudicate, or allocate water rights for domestic, municipal, industrial, or other consumptive uses. Rather, under both statutes, the Corps makes water in a Corps reservoir available for water supply use by others. These users are exercising their separately-derived water rights, and they bear the sole responsibility to acquire and defend any water rights necessary to make withdrawals, in accordance with State or other applicable law.

Section 6 authorizes the Secretary of the Army to enter into agreements ''for domestic and industrial uses of surplus water that may be available at any [Corps] reservoir,'' provided that use does not ''adversely affect then existing lawful uses of such water.'' The term ''surplus water'' is not defined in the statute, but plainly refers to water that is already present at a Corps reservoir at a particular moment in time, and which could be withdrawn without conflict with other lawful uses of water. Section 6 does not make water supply a purpose of any Corps reservoir project, but does enable the Corps to allow individual users to make withdrawals from any Corps reservoir if surplus water is available. The WSA, on the other hand, authorizes the Corps to ''include storage'' in a reservoir project ''to impound water'' for municipal and industrial water supply uses, effectively making that water supply storage an authorized purpose of the project, on the condition that State or local interests agree to pay a share of reservoir costs, on the principle that project costs shall

[4] The Corps recognizes that certain provisions of the WSA authorize actions by the Secretary of the Interior, and apply to reservoir projects of the Department of the Interior, Bureau of Reclamation. This proposed rule is intended only to interpret the WSA authority as it pertains to the Department of the Army and Corps facilities. It would have no effect on the authorities governing projects operated by the Bureau of Reclamation, or on the Bureau of Reclamation's discretion to determine whether and how to apply the WSA to its projects.

be allocated among the authorized purposes of the reservoir in proportion to the benefits realized for those purposes. The WSA therefore envisions making water supply an authorized purpose of a Corps reservoir project, so that storage in the reservoir is available for long-term, current and future water supply needs. The proposed rule would provide clearer distinctions between the two statutory authorities, while also providing consistent definitions of terms that are common or similar in the two statutes.

The proposed rule would provide a common definition of the terms ''reservoirs,'' ''projects'' and ''reservoir projects'' that are employed in Section 6 and the WSA, to clarify which Corps facilities are subject to those acts. The Corps believes that the terms employed in both statutes should be read expansively to include any Corps facility that impounds water and is capable of being operated for multiple purposes and objectives. Any other Corps water resource development facility that does *not* impound water, or that may *not* be operated for multiple purposes and objectives, could not reasonably be expected to serve as a source of water supply for others, and therefore would not be included within the proposed definitions. The proposed definitions would also acknowledge that these terms may comprise individual facilities or a system of improvements, depending on Congressional intent expressed in the relevant authorizing legislation.

The proposed rule would also include parallel definitions of the terms ''domestic and industrial uses,'' for which surplus water can be made available under Section 6, and ''municipal and industrial water supply,'' for which storage can be included under the WSA. The proposed rule would define these terms broadly, to encompass all uses of water under an applicable water rights allocation system other than irrigation uses as provided under 43 U.S.C. 390. These definitions are intended to enable the Corps to accommodate withdrawals of water from Corps reservoirs by individuals or entities that hold rights to the use of that water, without interfering with other lawful uses of that water, and without interfering with the authority of the U.S. Department of the Interior pursuant to the federal reclamation laws. The Corps believes that these interpretations are respectful of the rights of States and Tribes, consistent with other Federal interests, rights and authorities, and consistent with Congressional intent, as expressed through the text of both Section 6 and the WSA.

With regard to Section 6 specifically, the proposed rule offers new definitions of ''surplus water'' and ''then existing lawful uses.'' The proposed rule would define the term ''surplus water,'' as used in Section 6, as water that is not required during a specific time period to accomplish an authorized purpose or purposes of that reservoir. As explained below, the Corps interprets this to mean water available at a Corps reservoir that is not needed for (*i.e.,* is surplus to) federal project purposes, because the authorized purpose or purposes for which such water was originally intended have not fully developed; because the need for water to accomplish such authorized purpose or purposes has lessened; or because the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes. The consideration of how much water is needed for authorized purpose depends in each case on the Congressional authorization for the project in question, and on the particular facts and circumstances. Accordingly, as explained below, the proposed rule would recognize that surplus water determinations require both technical and legal analysis of the circumstances and project authorization. We invite comments on whether there may be a minimum or *de minimis* threshold amount of water that could meet these requirements, particularly the ''virtually no effect'' requirement.

Additionally, at projects with a hydropower purpose, under the proposed rule, the Corps would coordinate surplus water determinations in advance with the applicable federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone. To the extent that water is determined to be required for a federal purpose, it would not be considered ''surplus'' under the proposed rule. The revised definition of ''surplus water'' would conform to the statutory language and help to distinguish the Corps' authority to make ''surplus water'' available under Section 6 from its authority to include storage for water supply as a project purpose under the WSA.

We also invite comments on monitoring procedures that the Corps might implement to assess whether withdrawals under a surplus water contract either cause an exceedance of the amount of water determined to be surplus or utilize reservoir storage that is allocated to another active purpose.

The proposed rule would define the phrase ''then existing lawful uses'' to mean ''uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.'' The proposed rule would also require coordination before decisions are made, to foster more effective communication with States and Tribes, and to ensure that State water rights prerogatives and reserved water rights of Tribes are protected. The proposed rule would simplify the process for approving access to surplus water by eliminating the need for multiple documents (*e.g.,* a real estate easement as well as a separate surplus water contract) to provide the approvals for access and withdrawal of surplus water, and would enable surplus water uses to continue for a term not to exceed the duration of the surplus water determination. Taken together, these revised definitions and policies under Section 6 are intended to maintain the viability of the Congressionally authorized purposes of Corps reservoirs and facilitate access to and use of water in those reservoirs by others.

The Corps also proposes to establish a new methodology for determining a ''reasonable'' price for surplus water contracts under Section 6. The proposed rule would base the price of surplus water contracts on the actual, full, separable costs, if any, that the Government would incur in making surplus water available during the term of the surplus water agreement, such as by administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus water withdrawals. The Corps expects that these costs would be small or non-existent in most cases, since surplus water by definition is not needed for federal purposes, and typically would not require any operational changes. But to the extent that the Government may incur costs in making surplus water available, it is reasonable that such costs should be borne by the users on whose behalf they are incurred. Depending on the terms or complexities of the contract, the costs could be more significant. For those surplus water contracts where Federal law provides that no charges may be assessed, including the Missouri River mainstem reservoirs until June 2024, pursuant to Section 1046(c) of the Water Resources

Reform and Development Act of 2014, Public Law 113–121, 128 Stat. 1193 (June 10, 2014) (WRRDA 2014), no charges will be assessed. We solicit comments on whether the price of surplus water contracts should include the economic value of the water supply storage benefit these contracts provide (*e.g.,* greater reliability in withdrawing water from a reservoir), or reimbursement of indirect costs such as foregone hydropower revenue. We solicit comments on these potential alternative pricing structures.

The proposed rule for pricing of surplus water contracts would differ from the methodology currently set forth in ER 1105–2–100, which indicates that surplus water contracts should include charges equivalent to the annual price that a water supply user would pay if the Corps had permanently reallocated storage to water supply at that project under the WSA. However, when making surplus water available, the Corps is not permanently reallocating storage to water supply as it would be under the WSA, and the Corps is not choosing to use storage to provide surplus water at the expense of Congressionally authorized project purposes. Rather, under Section 6, the Corps is authorizing the withdrawal, for a limited term on a provisional basis, of water that it determines is not needed for authorized purposes. Accordingly, the proposed rule would not adopt the annual-cost-of-storage methodology presently set forth in ER 1105–2–100 for surplus water contracts. The Corps does not anticipate that the new proposed methodology, based on the full, separable cost (if any) incurred by the Government, would result in significant costs to surplus water users, or revenues or benefits foregone by the United States. In practice, the few surplus water contracts currently in existence that cite Section 6 (nine contracts, as of July 2016) do not fully apply the ER 1105–2–100 methodology; and by law, the Corps cannot charge any price for surplus water uses at the Missouri River mainstem reservoirs for a ten-year period ending in 2024.

The proposed rule would not affect existing contracts or impose any charges for Missouri River surplus water withdrawals before 2024. Under the proposed rule, the Corps would require formal documentation, through a combined easement and contract document, for all users of surplus water at a Corps reservoir. Current withdrawals that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. This will ensure that all uses of surplus water at Corps reservoirs, and any impacts from such uses on reservoir operations, are formally evaluated; and that all withdrawals are documented and authorized, whether under Section 6, the WSA, or another authority. The Corps would coordinate surplus water determinations in advance with federal PMAs and other entities, and would utilize in its determinations any information provided regarding impacts to authorized purposes and revenues or benefits foregone, to ensure that the water is truly surplus to federal requirements. Assuming that it is, then by making such water available for withdrawal under Section 6, the Corps would not be foregoing any revenues or benefits that Congress expected to be realized from an authorized purpose at the project, or any substantial payments from future surplus water contracts that are reasonably likely to be executed.

With regard to the WSA specifically, the Corps proposes in this rule to formalize its view that the WSA authorizes modifications to make water supply a purpose by ''including'' storage for water supply at any stage in pre-authorization or post-authorization project development, by changing the design plan, physical structure, or operation of a reservoir project (or system of projects, if authorized as a system). This is consistent with the Corps' longstanding practice and interpretation of the WSA since the time it was enacted in 1958, and with recent legal opinions of the Corps' Chief Counsel. The proposed rule would also formally adopt the legal interpretation set forth in those opinions that the statutory limitations on modifications under the WSA that would involve ''major structural or operational changes,'' or that would ''seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed,'' refer to actions that would fundamentally depart from Congressional intent, as expressed through the authorizing legislation relevant to the project or system of projects. Such determinations require both legal analysis of the legislation applicable to the project (or system of projects, if authorized as a system), and technical assessment of the effects of the proposed change on operations of that project or system for its authorized purposes, in light of the particular circumstances, and are not susceptible to bright-line, numerical or percentage limits applicable to all projects. When Congress has authorized Corps projects, it has done so by approving reports of the Chief of Engineers that set forth the plans of improvement, and the purposes those improvements will serve. Those documents, and any other direction that Congress provides through legislation, serve to define the authorized project purposes. The proposed rule would clarify that the touchstone for analysis of whether a proposed modification is ''major'' or ''serious'' is the extent to which the modification would depart from Congressional intent for the structure, operation, and purposes of the particular project in question, as expressed in the relevant legislation. Although the determination whether to undertake an action pursuant to the WSA will ultimately be made by the Department of the Army, the proposed rule would expressly require that the basis for such determinations be set forth in a written report, which would be coordinated with interested Federal, State, and Tribal agencies, with public notice and opportunity for comment, prior to a final decision. At projects with federal hydropower as an authorized purpose, the proposed rule would require the Corps to coordinate any proposal to include storage pursuant to the WSA in advance with the PMA that is responsible for marketing power from those projects. The Corps would utilize in its determinations any information provided by the PMA in its evaluation of the impacts of the proposed action.

The Corps invites comments on the proposed interpretation of the statutory limitations on modifications that would ''seriously affect'' authorized purposes or involve ''major structural or operational changes.'' We also invite comments on whether it may be appropriate to adopt in the proposed rule a maximum threshold percentage or amount of storage that may be reallocated within the limits stipulated by the WSA.

The proposed rule also would carry forward the current principles by which the Corps determines the amount of storage to include for a given water supply demand, and allocates a cost to that storage. Generally, under the WSA, the Corps includes an amount of storage that the Corps believes will be sufficient to yield the gross amount of water to be withdrawn or released under projected hydrologic conditions. Costs are then allocated to that amount of water supply storage in a manner that is reflective of the benefit being afforded—storage with a dependable yield to meet a projected water supply demand—consistent with standard economic evaluation practices for federal water resources development projects, and with the requirement in the WSA that water supply storage costs

''be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction,'' 43 U.S.C. 390b(b). At projects with federal hydropower as an authorized purpose, the Corps currently coordinates with federal PMAs regarding the delivery of power and the allocation of costs to hydropower. The proposed rule would expressly provide that whenever the Corps proposes to include storage for water supply under the WSA at such projects, the Corps will coordinate that proposal in advance with the PMA that is responsible for marketing that federal power. The Corps considers this information, including evaluation of hydropower impacts and cost information regarding revenues foregone and replacement power costs, in determining the cost of storage to be charged to the prospective water supply user. The proposed rule would continue and formalize these policies and practices, and further the collaboration by utilizing the PMA information in the Corps' determinations. The proposed rule would not address or affect the rates that PMAs may establish for hydroelectric power, nor any credits that might apply to the hydropower purpose for revenues foregone and replacement power costs, as those determinations are made through separate administrative processes.

Additionally, in response to issues that have arisen over time in the Corps' administration of water supply storage agreements, the proposed rule would adopt new policies to more clearly indicate how much water will be available for a user to withdraw from that storage, and the relationship of any ''return flows'' and other inflows to those withdrawals. The Corps' WSA storage agreements typically allocate to water supply an amount of storage estimated to yield the user's desired withdrawal amount during projected hydrologic conditions, including the worst drought of record—that is, the dependable yield, or firm yield. These agreements entitle the water supply user to make withdrawals from the allocated storage, so long as water is available. Because storage yields change over time, the amount of water that can be withdrawn from storage also changes, and the Corps' storage agreements have not generally specified fixed or not-to-exceed withdrawal amounts. Although consistent with the principle that under the WSA, the Corps makes storage available, and does not sell or guarantee fixed quantities of water, these practices have contributed to disputes over the amount of water supply use that can be made from Corps reservoirs, especially during times of drought and in the context of water rights disputes among third parties.

Moreover, the Corps' past policies and practices have not clearly or consistently addressed questions related to ''return flows''—that is, water that is withdrawn from and later flows back into a reservoir, such as treated wastewater returns—and other ''made inflows'' that may be directed into a reservoir by a particular entity in connection with water supply withdrawals from the reservoir. The Corps does not have a universal policy or practice regarding return flows, but generally has not distinguished particular inflows and credited them solely to water supply storage allocated to particular uses. Instead, the Corps has generally accounted for return flows and other additive inflows in the same manner as it accounts for all inflows to a reservoir, that is, as water that is available for storage or release for all purposes, including but not limited to water supply. In contrast, in some states, water rights may be based on net withdrawals, as opposed to gross withdrawals, and take into account made inflows. Some entities have advocated directly crediting return flows or other made inflows to water supply users who provide those flows, arguing that such flows increase storage yield, that users may have a right to make withdrawals from such flows under state law, or that crediting return such flows could create incentives for improved water conservation. Others oppose such crediting, on the grounds that it could impinge upon other project purposes, or upon other users' rights. Virtually all parties agree that more clarity is needed with respect to the amount of water that can be withdrawn under water supply storage agreements, and the Corps acknowledges these concerns.

The proposed rule would address issues regarding storage allocation, storage accounting, and return flows in several ways. First, the proposed rule would require the Corps to more accurately and consistently consider return flows or other made inflows when determining storage allocations for water supply, and the effects on operations for authorized purposes, and on the environment, of including such storage for water supply. Thus, to the extent that return flows or other made inflows could reasonably be anticipated and expected to affect operations, the Corps would take those effects into account. Second, the proposed rule would require the Corps to incorporate storage accounting in all new WSA storage agreements, to make clear to all parties how the availability of water for withdrawal from storage, as well as return flows, will be measured. This would eliminate uncertainty and reduce the potential for disputes about water supply usage over time. Third, the proposed rule would codify the Corps' generally prevailing practice of accounting for return flows and other made inflows in the same manner as all other inflows, that is, establish that, in utilizing storage accounting, the Corps will credit return flows proportionally to all storage accounts, rather than crediting them fully to the particular entity that might provide the inflows, where those inflows have been artificially made and can be reliably measured. We would like to solicit public comment on including made inflows, and net accounting, in the water supply storage agreements and storage accounting.

Thus, under the proposed rule, both the initial allocation of storage to water supply and the accounting of storage usage under a WSA storage agreement would be based on the principles that Corps reservoirs are operated to serve multiple purposes; that the Corps makes storage available, but does not allocate, measure or determine any user's water rights under State law; and that storage usage over time should remain generally proportional to the share of costs and benefits that are allocated among the authorized purposes, consistent with Congressional intent. The Corps seeks public input on the proposed storage accounting policies.

The policies that are proposed in this rulemaking are intended to clarify, improve, and make more transparent the Corps' implementation of Section 6 and the WSA. In pursuing this rulemaking, the Corps hopes to invite a thoughtful and positive dialogue with the public. The development of water supply policies is a matter of broad national interest. As such, the Corps invites and welcomes the public's input on the subjects covered in the proposed rule. The Corps looks forward to this exchange of views and appreciates the opportunity to develop these policies in cooperation with the public.

C. Rationale for Proposed Rule

1. Authority To Use Corps Reservoirs for Water Supply

The Corps operates its water resource development projects in accordance with legislation that Congress has enacted pursuant to Article I, § 8, cl. 3 of the U.S. Constitution, ''[t]o regulate Commerce with foreign Nations, and among the several States, and with the

Indian Tribes.'' This Constitutional power has long been recognized to include the power to regulate navigation and navigable waters. *Gibbons* v. *Ogden,* 22 U.S. 1, 193, 6 L. Ed. 23 (1824); *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 405 (1940). Unlike other federal reservoirs that are operated for different purposes under other authority, such as reservoirs operated by the Department of the Interior pursuant to the federal reclamation laws, Congress has typically authorized the Corps to operate projects, through River and Harbors Acts and Flood Control Acts, for nonconsumptive purposes such as navigation, flood control, and hydropower generation. The operations of Corps projects for those purposes are not expected to interfere with the prerogatives of the States to allocate waters within their borders for consumptive use. Indeed, Congress has expressed its intent, in several legislative provisions of general application, ''to recognize . . . the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.'' Flood Control Act of 1944, Public Law 78–534, 1, 58 Stat. 888 (Dec. 22, 1944), 33 U.S.C. 701–1. In addition, Congress has recognized and expressly enacted into law the expectation that the Corps will adjust the operation of its water resource development projects for federally authorized purposes, to the maximum extent practicable, to effectuate water allocation formulas developed through interstate Compacts.[5]

In accordance with this Congressional intent, the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities. The Corps develops water control plans and manuals through a public process, affording all interested parties the opportunity to present information regarding uses that may be affected by Corps operations, and the Corps takes that information into account in determining operations for authorized purposes of its projects. See 33 U.S.C. 709 (statute directing the Secretary of the Army to prescribe regulations for the use of storage for flood control or navigation at certain reservoirs); 33 CFR 222.5; ER 1110–2–240 (policies and procedures for establishment and updating water control plans for Corps and non-Corps projects). Because purposes such as flood control, navigation, and hydropower at Corps reservoirs are carried out pursuant to the Commerce power, and are non-consumptive in nature, the Corps does not secure water rights for those operations.

Section 6 and the WSA also do not involve consumptive uses by the Corps. Rather, Section 6 and the WSA authorize the Corps to make its reservoirs available for water supply use by others. Congress did not intend for the Corps to secure water rights under those authorities, or to interfere with State, Federal, or Tribal allocations of water when exercising its discretion under Section 6 or the WSA. Section 6 provides that ''no contracts for [the use of surplus] water shall adversely affect then existing lawful uses of such water,'' 33 U.S.C. 708, and the WSA expressly ''recognize[s] the primary responsibility of the States and local interests in developing water supplies,'' while reaffirming the general statement of intent to recognize the interests and rights of States in the development of waters, expressed in 33 U.S.C. 701–1. 43 U.S.C. 390b(a), (e).

Thus, when exercising its authority under Section 6 or the WSA, the Corps does not determine how water supply needs should be satisfied within a region, allocate water rights, or sell water. Nor does the Corps take on the role of a water distributer, treating or actually delivering water to end users. Instead, the Corps facilitates the exercise of water rights held by others, and the efforts of States and local interests to develop their own water supplies through nonfederal conveyance systems, in connection with the operation of Corps reservoir projects. Under Section 6, the Corps enters into contracts with non-federal entities for the withdrawal of ''surplus water,'' for so long as it has been determined to be available at a Corps reservoir. Such contracts reflect the Corps' determination that the withdrawal of the surplus water will not interfere with any then existing lawful use of the water during the term of the contract. Under the WSA, the Corps has broader discretion to construct additional storage at a reservoir, or to change reservoir operations to allow additional uses of existing storage, in order to facilitate water supply withdrawals or releases from reservoir storage. The Corps does not construct or operate water supply treatment or delivery systems under the WSA. Under either statute, it remains the sole responsibility of the water supply users to construct works for the withdrawal, treatment, and/or distribution of water from a Corps reservoir, and to obtain whatever water rights may be necessary towards that end. The Corps' authorities under both Section 6 and the WSA relate to the use of the Corps reservoir facility as a source of that water.

2. Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708 (Section 6)

Section 6, as codified at 33 U.S.C. 708, provides as follows:

> The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

Congress's intent in enacting Section 6 was to provide a means of enabling water to be withdrawn from a Corps reservoir so that it may be put to beneficial use by those who hold the rights to the use of that water, when that use would not interfere with the authorized purposes of the Corps project. In deliberations regarding the 1944 Flood Control Act, Congress recognized that Corps reservoirs, when operated to store waters for non-consumptive authorized purposes such as flood control, navigation, or hydropower generation, may at times contain water not needed in order to accomplish those purposes. Congress intended to give authority to the Secretary of the Army to facilitate uses of that ''surplus water'' by others,

[5] *See, e.g.,* WRRDA 2014, § 1051(b)(1) (finding that ''States and local interests have primary responsibility for developing water supplies for domestic, municipal, industrial, and other purposes,'' and expressing the sense of Congress that the Secretary of the Army ''should adopt policies and implement procedures for the operation of reservoirs of the Corps of Engineers that are consistent with interstate water agreements and compacts.''). *See also* Apalachicola-Chattahoochee-Flint River Basin Compact, Public Law 105–104, arts. VII, X, 111 Stat. 2219 (Nov. 20, 1997) (recording intent of the United States to comply with water allocation formula to be worked out among the States of the Apalachicola-Chattahoochee-Flint River Basin, and to exercise authorities in a manner consistent with that formula, to the extent not in conflict with federal law); WRRDA 2014, § 1051(a), codified at 43 U.S.C. 390b(f) (expressing sense of Congressional Committees of jurisdiction that interstate water disputes should be resolved ''through interstate water agreements that take into consideration the concerns of all affected States including impacts to other authorized uses of the [federal] projects,'' and pledging Committees' ''commitment to work with the affected States to ensure prompt consideration and approval of'' possible new Apalachicola-Chattahoochee-Flint and Alabama-Coosa-Tallapoosa River System compacts).

pursuant to water rights they held or would separately obtain.[6] Under applicable law at that time, 33 U.S.C. 701h, the Secretary of War was only authorized ''to provide additional storage capacity for domestic water supply or other conservation storage'' by modifying the ''plans'' for a Corps reservoir—*i.e.,* by identifying water supply needs prior to construction—and only if local agencies contributed funds to pay for the cost of ''such increased storage capacity.''[7] That authority does not authorize the Corps to meet water supply needs from its reservoirs unless additional storage capacity has been added at non-federal expense, and in 1944, Congress recognized that it was not practical for many communities to contribute funds in advance of construction, and that there would be water supply needs that would develop only after construction. See H.R. Rep. 78–1309 at 7 (Mar. 29, 1944) (noting that ''small communities have experienced difficulty in providing the large lump-sum contributions prior to construction required by existing law,'' or have requested water supply storage only ''after a dam reservoir project has been completed''). Congress responded to these concerns in 1944, not by authorizing the construction of additional storage capacity in an existing reservoir, but rather, by authorizing the Corps to make water in its reservoirs available for withdrawal, when that could be done without interfering with authorized purposes (*i.e.,* if the water is ''surplus'' to those purposes), for existing, lawful uses of the water, ''at such prices and on such terms as [the Secretary] may deem reasonable.''

The authority conferred under Section 6 does not involve the sale of water, nor the issuance of water rights.[8] To the contrary, the language of Section 6 was carefully crafted to respond to concerns of representatives of western States and others that by contemplating that the Corps would ''sell water,'' the proposed legislation could impair water rights granted under state law, interfere with the prerogatives of the States to exercise control over water resources within their boundaries, or undermine the principles of the federal reclamation laws, as implemented by the Department of the Interior.[9] Earlier drafts of Section 6 did include the phrase ''sale of [surplus] water,'' but this language was changed after it was pointed out that the Army, in the operation of its projects—in contrast to the Department of the Interior, in the operation of its projects pursuant to federal reclamation laws—does not take title to the water itself, and ''does not engage in the business of selling stored water.''[10] Accordingly, the text of the draft Section 6 was modified to authorize the Secretary of the Army to dispose of surplus water by entering into ''contracts'' for its use, rather than by ''selling'' the water itself.[11]

Recognizing that the Corps does not own or obtain consumptive use rights for the water it impounds for Commerce Clause purposes in its reservoirs, Congress included language in Section 6 to ensure that ''no contracts for such water shall adversely affect then existing lawful uses of such water,'' 33 U.S.C. 708. This protected the existing lawful uses of that water, and also recognized ''the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.'' Flood Control Act of 1944, § 1, 33 U.S.C. 701–1; see also 90 Cong. Rec. 8231 (Nov. 21, 1944) (statement of Sen. Overton that the proposed Section 6 ''protects the existing lawful uses of the water''). Congress also understood that the Corps exercises operational control over its reservoirs, and therefore must give approval for water supply withdrawals from those reservoirs, by persons with lawful rights to the use of the water. The purpose of Section 6 was to give the Secretary of the Army that authority to issue such approvals. See 90 Cong. Rec. 8231 (Nov. 21, 1944) (statement of Sen. Overton that ''when a dam is constructed and water is impounded in it and there is nearby a lawful user of that water, we do not want to deprive him of his rights. Therefore, he is permitted to take water from the dam, but of course, he does it under the direction of the Secretary of War.''). Thus, in enacting Section 6, Congress provided a new authority to the Secretary of the Army to enable individuals or entities to access water to which they hold the lawful water rights, when that water is available at an existing Corps reservoir and could be withdrawn without interfering with the authorized federal purposes of that reservoir, with then existing lawful uses, or with the federal reclamation laws.

In summary, Section 6 authorizes the Secretary of the Army to enter into contracts for the use of surplus water, when it may be available at a Corps reservoir, without requiring that users pay in advance of construction for the cost of including storage in the reservoir. It does not authorize the Corps to ''sell water,'' or to interfere with lawful uses of water, or to construct systems for the delivery of irrigation water that would impinge upon the authority of the Secretary of the Interior under the Reclamation laws. In enacting Section 6, Congress did not define the statutory terms ''surplus water,'' ''reservoir,'' or ''domestic and industrial uses,'' and the proposed rule provides the Corps' interpretations of those terms. The proposed rule also gives meaning to the phrase ''then existing lawful uses'' and set forth a proposed methodology for determining ''reasonable'' pricing and other contract terms, as provided in Section 6.

a) Definition of ''Surplus Water''

The Corps' interpretation of the statutory term ''surplus water'' has evolved over time. Prior to 1986, internal Corps guidance recognized that Section 6 provides an independent source of authority for contracts for the use of surplus water. However, that

[6] *See* 90 Cong. Rec. 8548 (Nov. 29, 1944) (statement of Sen. O'Mahoney that ''if [Corps reservoirs] store surplus waters, such waters should be made available for any purpose, domestic irrigation or otherwise, which residents in the neighborhood or in the vicinity affected may desire'').

[7] War Department Civil Appropriations Act of 1938, ch. 511, 50 Stat. 518 § 1 (July 19, 1937), codified at 33 U.S.C. 701h (authorizing the Secretary of the Army to modify the plans for any Corps reservoir to include additional storage capacity for water supply, but only ''on condition that the cost of such increased storage capacity is contributed by local agencies and that the local agencies agree to utilize such additional storage capacity in a manner consistent with Federal uses and purposes.'').

[8] The heading of 33 U.S.C. 708 reads ''Sale of surplus waters for domestic and industrial uses; disposition of moneys.'' However, the phrase ''sale of surplus waters'' does not appear in the text of Section 6. Compare S. Rep. No. 82–1348, Reviving and Reenacting Section 6 of the Flood Control Act, Approved December 22, 1944 at 1 (Mar. 24, 1952) (''The bill would revive legislation concerning the *disposal* of surplus water from dams constructed by the Corps of Engineers.'') (emphasis added).

[9] *Id.* at 1–2 (''Section 6 was carefully developed by Congress in 1944 in order to provide a means of permitting the disposal of surplus water for domestic and industrial uses with the specific limitation that no contracts for such water shall adversely affect then existing lawful uses of water. This language met with the approval of groups in the West where water rights and the conservation and use of water is of the greatest importance. All of those who are interested in this matter have requested prompt restoration of the original legislation.'').

[10] *See* 90 Cong. Rec. 4126 (May 8, 1944); 90 Cong. Rec. 8231 (Nov. 21, 1944) (statements of Sens. Overton, White, and Milliken).

[11] *See* S. Rep. No. 82–1348 at 1–2 (Mar. 24, 1952) (noting that Section 6 was inadvertently repealed along with obsolete Government property laws, ''apparently upon the understanding that [Section 6] dealt with a matter of surplus property of the Corps of Engineers,'' and that ''[s]ubsequently, information has come to the attention of the Congress that [S]ection 6 is not a matter of surplus property of the Corps of Engineers since the Corps of Engineers has no title to the surplus water which may be impounded by these dams.'').

guidance did not define the term ''surplus water,'' or distinguish that authority substantially from the WSA. In practice, the clear preference in policy and in practice was to utilize the latter authority, and not Section 6, to accommodate requests for municipal and industrial water supply from Corps reservoirs. In 1986, the General Counsel of the Department of the Army issued a legal opinion analyzing the statutory text and legislative history of Section 6, and concluded that Congress intended to confer broad discretion to make surplus water available to individual users, even if that water might otherwise be used for authorized purposes, so long as surplus water withdrawals would not impair the efficiency of the project for its authorized purposes. Citing the Congressional debates on Section 6, the Army General Counsel concluded that Congress intended to confer upon the Secretary of the Army a degree of discretion comparable to that of the Secretary of the Interior under certain provisions of Reclamation law to make water available at a reservoir when doing so ''will not impair the efficiency of the project'' for its authorized purposes. Susan Crawford, General Counsel, Department of the Army, Memorandum for the Assistant Secretary of the Army (Civil Works), Subject: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs 4 (Mar. 13, 1986) (1986 Army General Counsel Legal Opinion) (citing 43 U.S.C. 485h(c)); see also *ETSI Pipeline Project* v. *Missouri et al.,* 484 U.S. 495, 506 & n.3 (1988) (citing and commenting favorably on Army General Counsel interpretation of ''surplus water'' under Section 6).

Since the late 1980s, the Corps has interpreted the term ''surplus water'' to mean, for purposes of Section 6:

(1) water stored in a Department of the Army reservoir that is not required because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction; or

(2) water that would be more beneficially used as municipal and industrial water than for the authorized purpose and which, when withdrawn, would not significantly affect authorized purposes over some specified time period.

ER 1105–2–100 at E–214.

This definition is derived from the 1986 Army General Counsel Legal Opinion, which was quoted favorably by the Supreme Court in its *ETSI Pipeline Project* decision, and we believe it is fundamentally sound. It reflects the fact that Congress has entrusted the Secretary of the Army with the authority to ''control'' Corps reservoirs, as well as the discretion to approve withdrawals from them, in consideration of the reservoirs' operation for federal purposes. See *ETSI Pipeline Project,* 484 U.S. at 505–06 (citing Flood Control Act of 1944, §§ 4–6, 8). However, the wording in the Corps' guidance contains certain terms that may unintentionally cause confusion, and that are not essential to the concept of ''surplus water.'' The Corps' current definition refers to ''stored'' water, which some have claimed is distinguishable from water that would have been available from the natural flow of the river prior to construction of the Corps dam (see discussion on relationship between ''natural flows'' and ''surplus water,'' below). This in turn has led to criticism of the Corps' proposals in the past to impose a fee for surplus water agreements that is based on the cost of reservoir storage, when surplus water withdrawals may not depend upon storage above and beyond the natural flow. In response to these pricing concerns, the Corps proposes to change the pricing methodology under Section 6 to avoid charging surplus water users for storage costs of Corps reservoirs (see the discussion of Section 6 pricing, below).

With regard to the definition of ''surplus water'' under Section 6, the Corps acknowledges that nothing in the text of Section 6 expressly refers to ''storage'' or ''stored water.'' The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage. The absence of the term ''storage'' in Section 6 is a significant distinction from the WSA, which expressly authorizes the Corps to include storage for water supply (on the condition that water supply users agree to pay for the cost of including storage in the reservoir). Instead, Section 6 refers only to ''surplus water that may be available at any [Corps] reservoir.''

We believe that Congress intended, in enacting Section 6, that the Corps would authorize withdrawals for domestic or industrial uses of *any* amounts of water, if such withdrawals could be made in accordance with the terms of Section 6. Congress expected that the Corps would use this authority to authorize withdrawals, consistent with state allocations of water for beneficial uses, by persons or entities that had not previously agreed to pay for storage in a Corps reservoir (as required under applicable law, 33 U.S.C. 701h, that preceded enactment of Section 6). We believe that narrowly interpreting the term ''surplus water'' to enable the Corps to authorize only those withdrawals from its reservoirs that may be determined to utilize storage, as opposed to those withdrawals that could potentially have been accommodated from the natural flow of the river had the reservoir never been constructed, would frustrate Congress's intent that the Corps should make surplus water available when doing so would not impair operations for authorized purposes or interfere with then existing lawful uses including the CWA, the ESA, and other federal statutes. Thus, we believe the appropriate inquiry under Section 6 is whether the amount of water to be withdrawn is ''available at'' a Corps reservoir, and whether that water is not needed in order to accomplish an authorized purpose of the reservoir. In considering whether water is ''needed'' for a purpose, the touchstone for analysis depends in each case upon the specific legislation by which Congress authorized the project in question, and the Congressional expectations, with regard to the purposes set forth in the documents that Congress incorporated or approved in the authorizing legislation. Under the proposed rule, if the amount of water considered as ''surplus water'' could be withdrawn without impairing operations for authorized purposes—that is, if the water is not needed in order to accomplish the authorized purposes, consistent with Congressional expectations set forth in the authorizing legislation—then the water may be considered ''surplus water,'' and the Corps is authorized to exercise its discretion under Section 6 to approve the withdrawal of that water for domestic and industrial use.

Additionally, the phrase ''more beneficially used'' in the definition contained in the current Corps guidance is also unnecessary, and may contribute to misunderstandings about the Corps' surplus water authority. When exercising its authority under Section 6, the Corps does not make judgments about beneficial uses of water, as that is a prerogative of the States. (The proposed rule recognizes this, and would more clearly provide for coordination of surplus water determinations with other federal agencies, States, Tribes, and the public, to respect their prerogatives and to ensure that proposed surplus water withdrawals will not interfere with any then existing lawful uses.) The phrase ''more beneficially used'' in the existing

guidance was intended to mean that the Corps may exercise its judgment when determining whether water is needed in order to accomplish an authorized federal purpose, and, if not, whether it should be made available for domestic and industrial use as ''surplus water'' within the meaning of Section 6. It was not intended to suggest that the Corps would determine the relative priority that should be assigned to individuals' requests for surplus water for different beneficial uses.

The Corps proposes to offer a new definition of ''surplus water'' in order to correct these potential misunderstandings, to more clearly distinguish uses of surplus water under Section 6 from the inclusion of storage under the WSA, and to reaffirm the Corps' intention not to interfere with State, Tribal, or other federal reserved water rights when it provides for surplus water uses by others. The proposed rule would define ''surplus water'' to mean water, available at any Corps reservoir, that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir, for any of the following reasons—

(i) because the authorized purpose or purposes for which such water was originally intended have not fully developed; or

(ii) because the need for water to accomplish such authorized purpose or purposes has lessened; or

(iii) because the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.

This proposed definition would focus more closely on the precise language of Section 6, beginning with the term ''surplus'' itself. Defining ''surplus water'' to mean water that is not required in order to accomplish an authorized purpose is a reasonable construction of the statutory language, in light of its ordinary meaning as well as the legislative history that indicates Congressional intent. The term ''surplus'' has a common meaning of ''the amount that remains when use or need is satisfied.'' Merriam-Webster Online Dictionary (2013), *available at http://www.merriam-webster.com/dictionary/surplus.* The U.S. Supreme Court found the meaning of ''surplus water'' in Section 6 ''plain enough'' on its face, *i.e.,* referring to ''all water that can be made available from the reservoir without adversely affecting other lawful uses of the water.'' *ETSI Pipeline Project,* 484 U.S. at 506 & n.3. Under that reasoning, even though certain water might currently be used to benefit other authorized purposes—*e.g.,* increased recreational opportunities or greater hydroelectric generation—if it is not needed in order to accomplish those purposes, it may reasonably be considered ''surplus'' within the meaning of Section 6. The proposed definition of ''surplus water'' recognizes that water might not be needed under several different circumstances. As previously mentioned, the Corps would like to solicit comment on whether there could be a minimum or *de minimis* threshold amount of water that could be removed from a reservoir and defined as having virtually no effect on reservoir operations, *i.e.,* surplus water.

Water may be available because a Corps reservoir was intended to serve a purpose that has not yet fully developed; in the meantime, water is not needed for that purpose. Similarly, if the need for water to accomplish an authorized purpose or purposes decreases over time, water might be available for withdrawal without impairing any authorized purpose. Under these circumstances, while the water may not be needed in order to accomplish authorized purposes, it is conceivable that water has been used to provide additional benefits for authorized purposes, and making the water available for domestic and industrial use could result in certain reductions in benefits (including revenues or benefits foregone) or for other authorized purposes. But so long as the water is not needed in order to accomplish the authorized purposes, consistent with Congressional expectations set forth in the authorizing legislation, the water may still be considered ''surplus water.'' See 1986 Army General Counsel Opinion. And as the U.S. Supreme Court noted in *ETSI Pipeline Project* v. *Missouri,* ''[t]his view is consistent with the language of the Act, for if the term 'surplus water' could never include any of the water stored in the reservoirs themselves, then the caveat Congress enacted in § 6—that this grant of authority shall not 'adversely affect then existing lawful uses of such water'—would have been irrelevant because this grant of authority could never adversely affect any existing or projected uses of such water.'' [12]

In other circumstances, the amount of withdrawals for domestic or industrial use that are proposed might be so small, both individually and collectively, that the withdrawals would have virtually no effect on any authorized purpose; in that sense too, the water would not be ''needed'' for an authorized purpose, and could be considered ''surplus.'' In any of these examples, the withdrawal of the water for domestic or industrial use would not impair the efficiency of the project for its authorized purposes, nor would the grant of provisional authority to withdraw the water require a permanent reallocation of storage, as under the WSA.[13] If, on the other hand, water proposed to be withdrawn under Section 6 is determined to be needed for an authorized federal purpose, such as hydropower generation, or releases to comply with downstream flow requirements that may be necessary to comply with federal law such as the CWA or ESA, the water would not be ''surplus'' within the meaning of Section 6. The proposed rule would require that surplus water determinations specify the time period in which an amount of surplus water has been determined to be available, taking into account the requirements of authorized project purposes. The Corps solicits comments on monitoring procedures that the Corps might implement to assess whether withdrawals under a surplus water contract either cause an exceedance of the amount of water determined to be surplus or utilize reservoir storage that is allocated to another active purpose.

In addition, the newly proposed definition of ''surplus water'' would clarify the Corps' authority to accommodate certain categories of withdrawals by non-federal parties that the Corps has previously allowed under other authorities, or has simply facilitated without citing any specific authority. A 2012 review of withdrawals from Corps reservoirs suggested that many water withdrawals are occurring without a formal water supply agreement, clear statement of authority for the withdrawals, or reimbursement to the Treasury for costs incurred by the Government in accommodating those uses. In the past, the Corps sometimes accommodated such uses under

[12] *ETSI Pipeline Project* v. *Missouri et al.,* 484 U.S. 495, 506 n.3 (1988). As noted, the proposed rule would include provisions for coordination with federal Power Marketing Administrations when determining surplus water and evaluating impacts to the authorized hydropower purpose.

[13] The Corps' authority under Section 6 to determine whether water is not needed for an authorized purpose and is therefore ''surplus water'' within the meaning of Section 6 is also consistent with Congress's longstanding recognition that the Corps has inherent discretion to determine how its projects should be operated for their authorized purposes, and to make certain adjustments in the operation of projects over time, provided that the Corps does not add or delete authorized purposes, or change any other requirements imposed by law. *See Environmental Defense Fund* v. *Alexander,* 467 F. Supp. 885, 900–01 (D. Miss. 1979) (citing Report on the Civil Functions Program of the Corps of Engineers, United States Army, 82d Cong., 2d Sess. 1 (1952)).

authorities such as the Independent Offices Appropriations Act (IOAA), charging an amount that was considered appropriate to offset the federal cost in providing the water service. ER 1165–2–105, Change 10 (February 18, 1972). That practice ended after a 1986 Army General Counsel opinion called into question whether the IOAA was truly intended to serve as a water marketing statute. Susan Crawford, General Counsel, Department of the Army, Memorandum for the Assistant Secretary of the Army (Civil Works), Subject: Proposal to Withdraw Water from Dworshak Dam for Use by the City of Orofino (23 May 1986); ER 1105–2–100 at 3–34, ¶ 3–8.b(7); E–212, ¶ E–56(d). In other cases, the Corps simply granted easements to water users to make withdrawals from Corps reservoirs, without requiring a separate water supply agreement or charging any fee in connection with the water supply use. See ER 1165–2–105 (September 18, 1961); (ER) 1165–2–119 at ¶ 8.d (Sept. 20, 1982); and Major General William F. Cassidy, Assistant Chief of Engineers for Civil Works, to Major General Frank M. Albrecht, U.S. Army Engineer Division, South Atlantic, Dec. 29, 1959 (opining that it was not practical at that time to enter into contractual agreements for small withdrawals, but recognizing that over time, such withdrawals could aggregate and ''get out of hand''). In 2008, the Corps updated its real estate policies to clarify that easements supporting water supply agreements should not be issued before a water supply agreement has been executed; but that guidance did not determine the circumstances in which a water supply agreement is required, or what specific authority would apply to a particular withdrawal. To the extent that water may be withdrawn from a Corps reservoir without affecting operations for authorized purposes, for any of the reasons set forth in the proposed definition, Section 6 provides an appropriate authority for the Corps to approve the withdrawal.

Finally, the proposed definition of surplus water would omit the phrase ''water that would be more beneficially used as municipal and industrial water than for [another] authorized purpose,'' which appears in the existing ER 1105–2–100 definition of ''surplus water.'' The Corps does not determine beneficial uses; such determinations are made through water rights allocation systems, and the Corps operates its reservoirs for federal purposes in a manner that does not interfere with beneficial uses of water under those systems. Nor does the Corps trade off authorized federal purposes against beneficial uses when it makes surplus water available under Section 6: Instead, the determination that water is ''surplus'' rests on the premise that the water can be withdrawn for beneficial use without interfering with the accomplishment of the authorized federal purposes of the reservoir and applicable federal laws such as the CWA and ESA. The proposed rule would recognize that surplus water determinations require both technical and legal analysis of the circumstances and project authorization. The proposed rule would require that before making surplus water determinations, the Corps will coordinate with States, Tribes, and federal agencies, and will provide notice and opportunity for public comment. At projects with a hydropower purpose, under the proposed rule, the Corps would coordinate surplus water determinations in advance with the applicable Federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone. To the extent that water is determined to be required for a federal purpose, it would not be considered ''surplus'' under the proposed rule.

(1) Alternative Definition of ''Surplus Water'' Excluding ''Natural Flows'' (Missouri River Basin Views)

In response to proposed Corps actions in the Missouri River basin, representatives of a number of States have expressed their views that the ''natural flows'' (*i.e.,* waters which would have been available even without the Corps' reservoirs) of the Missouri River remain subject to the States' authority to allocate for beneficial use; that the Corps should not deny access to such ''natural flows'' within Corps reservoirs; and that the Corps should not charge storage fees to users who are making withdrawals of ''natural flows.'' *See* U.S. Army Corps of Engineers, Omaha District, Final Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report, Vol. 2, App. B (March 2011) (finalized July 13, 2012), available at *http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/37.* (comments submitted by representatives of Montana, North Dakota, and South Dakota); *see also* Letter from the Western States Water Council to the Assistant Secretary of the Army (Civil Works) (August 6, 2013) (on file). These stakeholders have advocated that the Corps should adopt a policy that distinguishes between ''stored water'' and ''storage capacity'' and ensures that the ''natural flows'' are not considered to be stored water. Accordingly, these stakeholders believe that the Corps' definition of ''surplus water'' should be limited to waters that are stored in a Corps reservoir, and should exclude the natural flows that would be available absent the reservoir. They believe that citizens of the Missouri River basin States should have unlimited access to the ''natural flows'' of the Missouri River, and not be required to enter into a water supply contract or charged a fee for the water allocated from the ''natural flows.'' They cite to state and federal law in support of the alternative definition, including their State constitutions and Section 1 of the 1944 Flood Control Act. *See generally* The Law of the Missouri, 30 S.D. L. Rev. 346 (1984–1985).

Although the Corps has considered these views, it is not convinced that the alternative definition suggested by upper-basin stakeholders is the most supportable reading of the 1944 Flood Control Act and its pertinent amendments. Rather, the Corps is proposing clarifications and changes to the agency's interpretation of the statutory term ''surplus water'' and the pricing methodology for contracts under Section 6 (discussed below). The Corps acknowledges that the allocation of waters for beneficial use is a prerogative of the States, and the Corps may not deviate from Congressional direction—in its existing practice, or under the proposed rule—by interfering with beneficial uses authorized by the States when it makes contracts for surplus water uses from Corps reservoirs. Section 6 refers to water that is ''available at'' a Corps reservoir, and does not distinguish between flows that would exist with or without the reservoir. Accordingly, the Corps' proposed definition of ''surplus water'' would no longer refer to ''stored'' water, and the Corps' pricing methodology under Section 6 would no longer include charges associated with the cost of providing or maintaining reservoir storage. Under the proposed rule, as long as surplus water is available at a Corps reservoir, and its withdrawal would not interfere with any then-existing beneficial use (including water uses determined under state law), the Corps may authorize its withdrawal under Section 6, and will not require the user to enter into a separate water supply agreement or pay for reservoir storage costs. Instead, under the proposed rule, the Section 6 authorization would be incorporated into the real estate easement that is already required, and there would be no additional cost for surplus water storage (see section I.C.2(e), below).

As further discussed below, the Corps believes that its implementation of Section 6 under the proposed rule would enable the Corps to more easily authorize uses of surplus water where it is available, without interfering with state prerogatives to determine beneficial uses, and without requiring

users to pay for storage costs if they do not need or desire reservoir storage. Additionally, the proposed changes are intended to clearly distinguish the Corps' accommodation of surplus water uses under Section 6 from the Corps' inclusion of storage for water supply uses under the WSA. For those reasons, the Corps believes that its proposed definitions and policies under Section 6 are consistent with the statutory text and Congressional intent behind Section 6.

The Corps specifically invites all interested parties to comment on the proposed definition of ''surplus water,'' as well as an alternative definition of ''surplus water'' that would exclude the ''natural flows'' from stored water in the Missouri River mainstem reservoirs thereby precluding the ''natural flows'' from being considered surplus waters for purposes of Section 6.

b) Definition of ''Reservoir'' Under Section 6

Section 6 applies to ''any reservoir under the control of the Department of the Army.'' In Section 6, Congress did not specifically define the term ''reservoir,'' but was evidently concerned with Corps impoundments of water that might be made available to States, municipalities, private concerns, or individuals for domestic and industrial use, a concept that is consistent with common understandings of the term ''reservoir''—*e.g.,* ''a usually artificial lake that is used to store a large supply of water for use in people's homes, in businesses, etc.'' [14] Thus, the Corps interprets the term ''reservoir'' in Section 6 broadly to include any facility, under the operational control of the Corps, that impounds water and is capable of being operated for multiple purposes and objectives. Any other Corps water resource development facility that does *not* impound water, or that may *not* be operated for multiple purposes and objectives, could not reasonably be expected to serve as a source of water supply for others, and therefore would not be included within the proposed definition of ''reservoir'' under Section 6. A similar definition has been proposed for projects subject to the WSA.

c) Definition of ''Domestic and Industrial Uses'' under Section 6

As discussed above, Congress deliberately employed the phrase ''make contracts . . . for domestic and industrial uses for surplus water'' in Section 6 in place of other language that could have suggested that the Corps owned, and was literally selling, the water in its reservoirs. Congress did not define the phrase ''domestic and industrial uses.'' However, the structure of the Flood Control Act of 1944 (including comparison of Sections 6 and 8), and the legislative history, support the conclusion that the phrase was intended to distinguish beneficial uses that could be accommodated by the Secretary of the Army under Section 6 from ''irrigation purposes'' that could be accommodated under the Reclamation laws, through a different process involving the Secretary of the Interior and Congress, under Section 8. In enacting Section 6, the Senate considered and ultimately settled on the phrase ''make contracts . . . for domestic and industrial uses for surplus water'' in order to clarify that the authorization to the Secretary of Army to make contracts for surplus water uses would neither modify the federal reclamation laws, including the repayment provisions under those laws, nor interfere with the authority of the Secretary of the Interior under the federal reclamation laws.[15] Section 6 was enacted at the same time as Section 8 of the Flood Control Act of 1944, which authorizes the Secretary of the Interior to ''construct, operate, and maintain, under the provisions of the Federal reclamation laws,'' ''additional works . . . for irrigation purposes'' at Corps reservoirs, with the approval of the Secretary of the Army, and after specific authorization by Congress of the additional works. Public Law 78–534 § 8, 58 Stat. 891 (Dec. 22, 1944) (codified as amended at 43 U.S.C. 390). Section 8 further provided that Corps reservoirs ''may be utilized after December 22, 1944, for irrigation purposes only in conformity with the provisions of this section.'' *Id.*

Read together, in the context of the Flood Control Act of 1944, Sections 6 and 8 make clear that Congress assigned different authorities and responsibilities to the Department of the Interior and the Department of the Army. The Secretary of the Interior was authorized under Section 8 to construct and operate federal irrigation works, in accordance with the federal reclamation laws, pursuant to specific authorizations by Congress. The reclamation laws, like the WSA, generally provide for the recovery of federal investment costs by end users. The Secretary of the Army was given a different authority under Section 6, to enter into contracts for surplus water for domestic and industrial uses, when surplus water is available at a Corps reservoir. Section 6 does not require the recovery of federal investment costs, but rather, authorizes the Secretary of the Army to establish a ''reasonable'' price. If Section 6 had been interpreted to authorize the Secretary of the Army to store and deliver irrigation water to users for whom Congress had authorized the Secretary of the Interior to construct separate irrigation works, the potential would have existed for the Corps to dispose of ''surplus water'' in a manner that would defeat the purpose of the separate, federal irrigation works.[16] Moreover, because Section 6 grants broad discretion to the Secretary of the Army to establish prices for contracts for uses of surplus water at Corps reservoirs, members of Congress expressed concern that those prices could undermine the objective under the federal reclamation laws of reimbursing the Treasury for the cost of constructing federal irrigation works, if both Secretaries were selling water for the same purposes on different terms.[17]

These problems may be avoided, and the two sections harmonized, by an interpretation of the ''domestic and industrial uses'' under Section 6 that clearly distinguishes those uses from irrigation uses under the federal reclamation laws. The definition of

[14] *See http://www.merriam-webster.com/dictionary/reservoir.*

[15] *See* 90 Cong. Rec. 8545–8549 (Nov. 29, 1944); *id.* at 8548 (text of proposed amendment by Sen. O'Mahoney that would authorize the Secretary of War ''to contract for water storage for any beneficial uses or purposes''; statement of Sen. O'Mahoney that proposed amendment would enable the Secretary to make surplus waters ''available for any purpose, domestic irrigation or otherwise, which residents in the neighborhood or in the vicinity affected may desire,'' but would also require the Secretary ''to take into account the fundamental principles which have governed the distribution and use of water in the West,'' *i.e.,* the Reclamation laws); *id.* (statement of Sen. Hayden that to enable ''the Secretary of War also to sell water for irrigation uses on such terms and conditions as he may prescribe'' would ''change the basis of the reclamation law''); *id.* at 8548–49 (statement of Sen. Hatch expressing concern that proposed O'Mahoney amendment could authorize the Secretary of the Army to ''construct dams and reservoirs, and to supply water for purposes which would be entirely removed from the reimbursable features, as well as the acreage limitations and the other basic foundations of our irrigation law''); *id* at 8549 (statement of Sen. Millikin that ''section 4 [*i.e.,* the later renumbered Section 6], the [O'Mahoney] amendment we have been considering, and the succeeding amendment [Section 8] to be offered have the combined purpose of not subjecting all of the detail of the reclamation law to projects where the Army engineers have a reservoir in the middle of an existing privately owned irrigation system, where those who have that private irrigation system are in independent position to take the water and therefore should not be required to go through all the incidents of a reclamation project started from grass roots'').

[16] *See* 90 Cong. Rec. 8549 (Nov. 29, 1944) (statement of Interior Secretary Harold Ickes and ensuing debate).

[17] *Id.*

''domestic and industrial uses'' in the proposed rule therefore excludes irrigation uses that Congress intended to be provided for pursuant to the federal reclamation laws under 43 U.S.C. 390. The phrase does not, however, clearly exclude other uses of water for agricultural or other purposes in accordance with State law, in circumstances where Congress did not intend those particular uses to be provided for through the construction of federal irrigation works. Given Congress's clear concern that uses of surplus water should not adversely affect any then existing lawful use, it does not seem reasonable to interpret the term ''domestic and industrial uses'' in a manner that would preclude a user from exercising a lawful right to use water for agricultural purposes, when that right could be facilitated through withdrawals of surplus water from a Corps reservoir in the absence of federal irrigation works, or to exclude all uses for activities that might be deemed commercial and therefore not encompassed within the phrase ''domestic and industrial uses.''

Accordingly, the Corps proposes to define the term ''domestic and industrial uses'' under Section 6 to mean ''any beneficial use under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390.'' We believe this definition is consistent with the plain text of Sections 6 and 8, their relationship in the Flood Control Act of 1944 and its legislative history, and the Congressional intent manifested therein that the authority of the Secretary of the Army to make contracts for surplus water uses under Section 6 should remain distinct from the authority of the Secretary of the Interior under Section 8 to provide for irrigation uses of Corps reservoirs pursuant to the reclamation laws and subsequent Congressional authorizations. To interpret the phrase otherwise, as excluding all agricultural uses of surplus water, is not mandated by the plain language of the statute and would, in the Corps' view, be inconsistent with Congress's intent that persons holding valid water rights should be able to withdraw surplus water from a Corps reservoir, when doing so would not interfere with authorized federal purposes or with any then existing lawful use, and when no federal irrigation works of the Department of the Interior are available to accommodate the particular use of surplus water. Under this proposed definition of ''domestic and industrial uses,'' certain agricultural uses of surplus water could be accommodated under Section 6. However, if a potential surplus water need could be satisfied through authorized irrigation works of the Department of the Interior, pursuant to 43 U.S.C. 390, the Corps would not consider that water need to constitute a ''domestic [or] industrial use,'' and would not enter into a surplus water agreement for direct withdrawals by a nonfederal entity from a Corps reservoir to satisfy that need. Under such circumstances, the use would constitute an ''irrigation use'' within the meaning of 43 U.S.C. 390, and that provision of law, not Section 6, would be the appropriate vehicle for the federal government to accommodate the water need.[18]

In proposing this definition, the Corps recognizes that today, water is used for many purposes, and hence questions can arise as to what uses are covered by the phrase ''domestic and industrial uses.'' For example, the Corps recognizes that water has been withdrawn by private individuals and entities from the Corps' Missouri River mainstem reservoirs for a variety of uses, and that this has generated questions about whether these uses should be classified as ''domestic'' or ''industrial.'' Some of the withdrawals are for domestic household uses, and some in furtherance of activities which more aptly might be characterized as commercial in nature. Other withdrawals are in aid of agricultural activities that are taking place in areas where no other irrigation delivery system exists. Previous Corps guidance suggests that ''crop irrigation'' is not a use that can be accommodated under Section 6 (or the WSA), but does not define that term or elaborate on its meaning.[19] The Corps considers a definition of ''domestic and industrial uses'' that would exclude all agricultural and commercial uses of water to be unduly rigid and undesirable from practical and policy perspectives. Interpreting ''domestic and industrial uses'' in a manner that would preclude the Corps from making surplus water available to an individual who is entitled under an applicable water rights system to use that water for commercial or domestic agricultural needs, in circumstances where the user would not otherwise be able to access that water, does not seem reasonable. In addition, federal reclamation projects and facilities exist only in the Western States, and it is unreasonable to assume that Congress intended to preclude any agricultural or commercial uses of water from a Corps reservoir in other States, where no federal irrigation works have been constructed pursuant to the federal reclamation laws.[20] The Corps believes that some agricultural and commercial uses can be accommodated within ''domestic and industrial uses'' of surplus water, provided that those uses do not conflict with the meaning of ''irrigation purposes'' under 43 U.S.C. 390.

Moreover, the Corps recognizes that States define beneficial uses and water rights differently, and what might constitute an irrigation use under the water rights allocation system of one State might be considered a public or domestic use under applicable systems in another State. When it exercises its authority under Section 6, the Corps does not determine water supply needs, or allocate consumptive water use rights. Instead, the Corps is simply making a determination that a particular amount of water is not required for an authorized federal purpose. Upon making that determination, the Corps may enter into an agreement with a surplus water user to enable that user to withdraw that water, provided that the user has a valid water right. The determination and approval of beneficial uses is made separately, under an applicable water rights allocation system, not by the Corps itself. By defining ''domestic and industrial uses'' under Section 6 to mean ''any beneficial use under an applicable water rights allocation system, other than irrigation uses under 43 U.S.C. 390,'' the Corps would respect

[18] 43 U.S.C. 390 also provides for the interim irrigation use of storage that has been allocated to municipal and industrial water supply in a Corps reservoir but is not under contract for delivery. *See* Water Resources Development Act of 1986, Public Law 99–662, § 931, 100 Stat. 4082 (Nov. 17, 1986) (codified at 43 U.S.C. 390). Under such circumstances, which do not involve any determination of ''surplus water'' pursuant to Section 6, the Corps may enter into interim contracts for irrigation uses under 43 U.S.C. 390, not Section 6. As of 2012, three such interim irrigation agreements were in effect at Corps reservoirs. *See* 2011 M&I Water Supply Database at 4.

[19] *See* ER 1105–2–100 at E–214 (Section 6 agreements ''may be for domestic, municipal, and industrial uses, but not for crop irrigation.'').

[20] This provision is reinforced by Congress's enactment of separate legislation in 1982, 43 U.S.C. 390ll, which makes clear that provisions of federal reclamation law apply only to Corps reservoirs where ''(1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or (2) the Secretary, pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.'' *See also* S. Rep. No. 97–373 at 16 (April 29, 1982) (noting that ''court decisions and sporadic efforts . . . have served to create a shadow extending over all agricultural lands involved with Corps projects,'' and that purpose of 43 U.S.C. 390ll is to clarify that reclamation laws shall apply to Corps reservoirs only where Congress has expressly so provided).

the States' ability to define and allocate lawful uses within their boundaries, and would be able to make surplus water in its reservoirs available for the broadest possible extent of such uses, while respecting Congressional intent and avoiding interference with federal irrigation works or other activities of the Department of the Interior pursuant to the federal reclamation laws.[21]

d) Avoiding Adverse Effects on ''Then Existing Lawful Uses''

The proposed rule defines the term ''then existing lawful uses'' in Section 6 to mean ''uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.'' The Corps has not previously defined this statutory term, but has recognized that in order to avoid interference with then existing lawful uses (including the CWA and the ESA), individuals or entities entering into surplus water agreements with the Corps must obtain and defend all necessary water rights. See ER 1105–2–100 at 3–32, E–202. The reference to ''Tribal or other uses pursuant to federal law'' is intended to recognize and protect Tribal reserved water rights, including reserved water rights that have not yet been quantified, or any other federal reserved water rights, such as those associated with military installations, or withdrawals pursuant to interstate compacts or other provisions of federal law (including the CWA and ESA).[22]

The proposed rule would require that before making surplus water determinations, the Corps will coordinate with States, Tribes, and federal agencies, and will provide notice and opportunity for public comment, to ensure that surplus water uses during the period under consideration will not interfere with any water rights that are already in place, or are expected to be in place during that period. This early coordination will enable responsible water resource agencies to verify that the proposed surplus water withdrawals are consistent with applicable water rights. The Corps is not authorized under Section 6 to enter into any contracts for surplus water uses that would interfere with any then existing lawful use. In addition, the proposed rule recognizes that it is the responsibility of private water supply users to secure any state water rights necessary to use water withdrawn from a Corps reservoir, further ensuring that there will be no tension between a contract for surplus water uses under Section 6 and any lawful use of water that may occur during the period of the Corps' surplus water determination.

e) Determining ''Reasonable'' Prices for Section 6 Agreements

Section 6 affords wide latitude to the Secretary of the Army to establish the terms of surplus water agreements, requiring only that the Secretary determine ''such prices and . . . such terms as [the Secretary] may deem reasonable.'' The term ''reasonable'' is not defined in Section 6, and Congress has provided no specific guidance on how the Secretary should make that determination. Congress has expressed its sense that when an agency provides ''a service or thing of value . . . to a person,'' that provision ''is to be self-sustaining to the extent possible.'' 31 U.S.C. 9701(a). And it is federal government policy that ''[w]hen a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public, a charge will be imposed (to recover the full cost to the Federal Government for providing the special benefit, or the market price).'' Office of Management and Budget (OMB) Circular No. A–25 Revised (July 8, 1993), *available at https://www.whitehouse.gov/omb/circulars_a025* (OMB Circular A–25).

Past Army guidance has suggested different approaches to determining reasonable prices for surplus water agreements, including the possibility of a standard minimum charge or a unit charge for relatively small amounts of surplus water. Since 1977, the Corps' internal guidance has indicated that surplus water agreements should include an annual charge that is equivalent to the cost that would be assessed annually in a long-term WSA agreement, that is, an annual charge equivalent to the cost of providing the amount of storage calculated to yield the desired withdrawals, amortized over a multi-year term, plus a share of operation and maintenance costs, and a share of any repair, rehabilitation, or replacement costs. See Engineer Regulation (ER) 1165–2–105, Change 15 (March 1, 1977); ER 1105–2–100, app. E and E–215 (April 22, 2000). This annual charge would be applied to each year of the contract term. Since the cost allocated to water supply in a WSA storage agreement is typically repaid over a thirty-year period, with interest, and since Section 6 contracts are typically for a shorter period, the cost of storage paid under a Section 6 agreement under this policy would be less than the total cost of storage that would be recovered under a WSA agreement. Current Corps policy provides that Section 6 agreements shall normally be limited to five years, although in practice, some Section 6 contracts have lasted longer than that. The Corps does not have an established practice of applying the ER pricing methodology, as the few surplus water contracts currently in existence that cite Section 6 (nine contracts, as of July 2016) do not fully apply that methodology, and only one involves annual fees.

In response to concerns raised by stakeholders in the Missouri River basin associated with surplus water reports at the Corps' mainstem reservoirs, and upon further consideration of the statutory text of both Section 6 and the WSA, the Corps has reconsidered its pricing methodology under Section 6. The current pricing policy set forth in the ER effectively conflates the provision of surplus water under Section 6 with the inclusion of storage under the WSA, and the Corps recognizes that this may not result in the most appropriate price for surplus water agreements, given the Congressional intent behind Section 6. The WSA authorizes the Corps to include storage in a reservoir project for water supply uses, making water supply an authorized purpose of the project, on the condition that State or local interests agree to pay the of share of project

[21] The Corps' proposed definition is also consistent with the definitions of the term ''irrigation water'' in 43 U.S.C. 390bb (''water made available for agricultural purposes from the operation of reclamation project facilities pursuant to a contract with the Secretary [of Interior]'') and in U.S. Department of the Interior, Bureau of Reclamation regulations at 43 CFR 426.2 (''water made available for agricultural purposes from the operation of Reclamation project facilities pursuant to a contract with Reclamation''). The use of ''irrigation water,'' as defined in those provisions, would not be a ''domestic [or] industrial use'' of surplus water under the Corps' proposed definition in these regulations.

[22] The definition and quantification of Tribal reserved water rights are beyond the scope of the proposed regulations. However, the Corps recognizes that Tribal reserved water rights enjoy a unique status under federal law, and that the exercise of such rights does not require the exercise of discretion by the Department of the Army to include storage in a reservoir under the WSA, or to make surplus water available under Section 6. The Department of the Interior is the federal agency charged with implementing the trust obligations of the United States with respect to Native American reservations. The Corps will coordinate surplus water determinations with the Department of the Interior and Tribal water resource agencies in order to identify any potential issues regarding lawful uses involving Tribes. Further, the Corps will grant access across federal lands controlled by the Corps when necessary to facilitate the exercise of Tribal reserved rights, without requiring a Section 6 or WSA agreement.

construction and operation costs allocated to that purpose. Under Section 6, water supply is not made an authorized purpose of the project, the Corps does not need to include storage in the project in order to allow surplus water withdrawals, and the statute does not require that surplus water users reimburse the Corps for a share of project construction and operation costs. Section 6 requires only that the Secretary determine a ''reasonable'' price, with no indication that Congress intended that price to include reimbursement of project costs in the same manner as water supply storage under the WSA.

Moreover, many stakeholders have questioned whether current or projected withdrawals from the Missouri River mainstem reservoirs utilize ''storage'' at all, and have objected to proposals to charge for surplus water withdrawals under Section 6 based on a share of the updated cost of storage. In the 1980s, the Assistant Secretary of the Army (Civil Works) considered changes to the Corps' then-existing Section 6 pricing policy, and expressed the view that ''withdrawals from the mainstem Missouri River reservoirs for municipal and industrial uses that do not depend upon storage for the level of dependability necessary to satisfy municipal and industrial demands should not require that a charge be assessed for such storage.'' [23] Those changes were never formally adopted, and the Corps' internal guidance has continued to indicate that surplus water agreements should be priced on the same annual basis as WSA storage agreements. Meanwhile, the Corps has continued to allow withdrawals from the Missouri River mainstem reservoirs without entering into surplus water contracts or charging for surplus water withdrawals.

In 2012, in connection with the Corps' final Surplus Water Report for Lake Sakakawea, the Assistant Secretary of the Army (Civil Works) determined that no charge should be made for surplus water uses proposed in that report, pending the outcome of notice and comment rulemaking to establish a nationwide Section 6 pricing methodology, with input from all interested stakeholders. In 2014, Congress enacted legislation precluding the Corps from charging for surplus water uses from its Missouri River mainstem reservoirs for a ten-year period beginning June 10, 2014. WRRDA 2014, § 1046(c). The legislation is expressly limited to the ten-year period and to the Missouri River mainstem reservoirs, and does not affect the application of Section 6 to surplus water stored elsewhere.

In reviewing the statutory language of Section 6, more recent legislation and legislative proposals, and in considering comments that have been offered on the Missouri River Surplus Water Reports, the Corps acknowledges that charging for Section 6 agreements on the same basis as WSA storage agreements (*i.e.,* by charging users an annual fee based on the higher of benefits foregone, revenues foregone, or the updated cost of constructing reservoir storage) is neither required by the statute, nor the best approach in all circumstances. The principles that make such charges reasonable under the WSA—statutory language requiring users to pay for storage costs, the physical inclusion of storage for water supply, and the addition of water supply as a new, long-term authorized purpose of the federal project—do not apply in the case of surplus water withdrawals that are provisionally approved for limited time periods under Section 6. The Corps has no statutory duty under Section 6, as it does under the WSA, to recover storage costs, and the Corps is not foregoing benefits that Congress expected the Corps to deliver for other authorized purposes when it authorizes surplus water withdrawals, if the surplus water has been determined not to be required in order to accomplish those purposes, or to comply with responsibilities under other federal law, such as the CWA or ESA.. Thus, the statutory text of Section 6 does not require that a ''reasonable'' price under Section 6 must include charges for benefits foregone, revenues foregone, or the updated cost of storage.

Moreover, the Corps is aware of the observations by some in the Upper Missouri River Basin that many existing and proposed withdrawals from mainstem reservoirs do not rely upon reservoir storage, and could be satisfied by the natural flow of the Missouri River absent the flow regulation and storage capacity afforded by the Corps' mainstem system. The Corps has previously acknowledged the principle that users should not be required to pay for benefits that they do not receive. While it may be technically possible, as the Assistant Secretary of the Army (Civil Works) observed in 1986, to evaluate whether particular surplus water withdrawals do or do not rely upon storage, Section 6 does not require the Corps to undertake such an analysis, and the time and cost required to perform such an analysis on a continuing basis may be considerable. Further, the federal government requires information about the quantity and volume of such withdrawals, in order to best manage the reservoirs. As discussed below, the proposed rule would clarify the Corps' view that long-term and permanent water supply needs that require the dependability afforded by storage should be accommodated by including storage as an authorized project purpose, as provided in the WSA, and not by making contracts for surplus water. When storage is allocated under the WSA to water supply, at the expense of other authorized purposes, the proposed rule would provide for appropriate allocation of storage costs to water supply. For withdrawals that are (individually or cumulatively) utilizing surplus water, as defined in the proposed rule, without any reallocation of storage from other purposes to water supply, a pricing methodology that seeks to recover only the costs incurred by the Corps in authorizing those withdrawals would be simpler to implement than determining a hypothetical cost of storage, and would be fully consistent with the statutory language of Section 6.

Accordingly, the proposed rule provides a new pricing policy to establish a ''reasonable'' price under Section 6, which would apply to all surplus water uses unless specific federal law provides otherwise (*i.e.,* the Water Resources Reform and Development Act of 2014 (WRRDA 2014), for Missouri River mainstem reservoirs until June 2024). For new Section 6 agreements at Corps reservoirs, prices for Section 6 surplus water contracts would include only the full, separable costs incurred by the

[23] Assistant Secretary of the Army for Civil Works Robert K. Dawson to Senator Quentin Burdick, March 5, 1986; S. Rep. No. 99–126 at 30 (July 16, 1985). The ASA(CW) made these observations at a time when Congress considered, but ultimately rejected, legislative proposals that would have precluded ''any payment for waters withdrawn by a State, or its political subdivisions, or by a nonprofit entity, for municipal or industrial uses . . . from a [Corps] Missouri River mainstem reservoir . . . if the existence of the reservoir involved will not enhance the dependability of the withdrawal under conditions of one hundred year, seven day low flow in the Missouri River.'' 99th Congress, 1st Session, S. 1567, sec. 236 (Jan. 8, 1986); S. Rep. No. 99–126 at 30. The ASA(CW) further observed, in a letter to Sen. Burdick, that a successful legislative proposal would have to (1) clarify the Corps' authority to allow water supply withdrawals from Corps reservoirs (2) provide a ''fair and equitable formula for allowing natural flows of the Missouri River to be withdrawn at no charge,'' and (3) recognize and protect the Corps' continuing obligation to operate for authorized project purposes. The ASA(CW) reiterated in this correspondence that ''we continue to be guided by the principle that beneficiaries of Federal water resources development projects should share in the costs of such projects in accordance with the guidance of Congress, [but] agree strongly with [Sen. Burdick's] position that there should be no payments where no benefit is received.'' ASA(CW) Dawson to Sen. Burdick, March 5, 1986.

Government in making surplus water available during the term of the surplus water agreement. These costs would be measured by estimating the full, separable costs that the Corps may incur by accommodating the surplus water withdrawals, such as expenses associated with administering and monitoring the contract, or by making temporary changes to reservoir operations to accommodate the surplus water withdrawals. Separable costs are those attributable solely to making the surplus water available. Congress has used separable cost pricing when Corps operations for water supply do not amount to a right to water storage. See, *e.g.,* Section 308 of the Water Resources Development Act of 1996 (Pub. L. 104–303); Section 110 of the Energy and Water Development Appropriations Act, 2005 (Division I of Pub. L. 108–447). The proposed rule adapts this concept to the criterion of ''full cost,'' as defined in OMB Circular A–25, to meet the Section 6 requirement for reasonable pricing of surplus water as follows. ''Full cost,'' as defined in OMB Circular A–25, ''includes all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service'':

> These costs include, but are not limited to, an appropriate share of: (a) Direct and indirect personnel costs [. . .][;] (b) Physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment [. . .][;] (c) [M]anagement and supervisory costs [ ][;] and (d) the costs of enforcement, collection, research, establishment of standards, and regulation, including any required environmental impact statements. (e) Full cost shall be determined or estimated from the best available records of the agency, and new cost accounting systems need not be established solely for this purpose.[24]

Based on the available information from existing surplus water contracts and estimated surplus water uses, the Corps expects that full costs incurred in connection with surplus water withdrawals would ordinarily be insubstantial. The service being provided when the Corps makes surplus water available pursuant to Section 6 is not (in contrast to storage included under the WSA) the allocation or reallocation of storage from another purpose or purposes to water supply, but rather, the authorization to withdraw, for a limited time period, surplus water that is already available at a reservoir. Because ''surplus water'' would be defined under the proposed rule as water that is not required during a specified time period to accomplish any authorized purpose of the project, and because the withdrawal infrastructure is provided by the non-federal water supply user, at no cost to the Government, the Corps does not expect to incur additional, direct or indirect personnel costs, physical overhead or other indirect costs, management and supervisory costs, or enforcement costs, associated with the withdrawals themselves. Certain of these costs may be incurred by the Corps when it makes determinations related to, but distinct from, the surplus water withdrawals, such as granting real estate easements to access a Corps reservoir, or evaluating and issuing regulatory permits for intake construction. Those costs, and those separate actions, would not be affected by this proposed rule, and would not be assessed in connection with the surplus water contract itself. Only the additional costs, if any, that the Government incurs as a result of the surplus water withdrawals—the full, separable costs of making surplus water available—would be included in the full cost charged in connection with surplus water contracts.

To the extent that such costs do occur, we consider it eminently reasonable, and consistent with OMB Circular A–25 and 31 U.S.C. 9701, that costs that the Government incurs in exercising its discretion should be borne by the users for whom the changes are being made. Any other costs directly attributable to surplus water withdrawals, such as construction and operation of intake facilities and pipelines, would continue to be the responsibility of the user, not the Corps, as provided under existing guidance. This proposed pricing methodology is intended to ensure that surplus water users pay only for costs that the Government incurs in making surplus water available, and to distinguish that pricing methodology from the methodology that is used for WSA agreements to conform to statutory requirements of the WSA. In most cases, the Corps expects that the amount charged for surplus water agreements under this methodology would be small, as surplus water withdrawals generally are not expected to involve significant costs to the Government.

The proposed rule would not apply retroactively to current contracts or to other uses that are currently authorized under separate authority. For current contract holders, any new contract following expiration of the current contract would adopt the new pricing criteria included in the final rule. Current surplus water withdrawals that are occurring pursuant to easements only, without a surplus water contract, would be reassessed when the easements expire, or within five years after the effective date of the final rule, whichever is earlier. Continued withdrawals after that time would need to be authorized under a combined easement and contract document. This will ensure that all uses of surplus water at Corps reservoirs, and any impacts from such uses on reservoir operations, are formally evaluated; and that all surplus water withdrawals are properly documented and authorized under Section 6. For surplus water uses where the Corps has been prohibited from charging a few for surplus water contracts, *e.g.,* the Missouri River mainstem reservoirs until June 2024, the Corps will not charge for surplus water contracts. Study costs associated with Section 6 surplus water reports would continue to be addressed in accordance with applicable law, which would not be affected by this proposed rulemaking; however, where consistent with applicable law, if water supply users are concerned about expediting a surplus water determination, they may opt to contribute funds to complete a study, similar to water supply storage reallocations.

The proposed Section 6 pricing methodology, while different from the methodology currently set forth in ER 1105–2–100, would not result in significant costs to surplus water users or to the United States Treasury. ER 1105–2–100 currently indicates that surplus water contracts should include charges equivalent to the annual price that a water supply user would pay if the Corps had permanently reallocated storage to water supply at that project under the WSA. That WSA price is based upon the cost that the Government would incur in constructing equivalent storage, or the revenues or benefits that the Government would forego by permanently reallocating the storage from another authorized purpose to water supply. However, in entering into contracts for surplus water, as defined in the proposed rule, the Corps would not be permanently reallocating storage to water supply, and would not be incurring the costs that would accompany such a reallocation under the WSA, or foregoing long-term revenues or benefits that would otherwise be realized in connection with authorized purposes. Instead, the Corps would only be entering into contracts allowing entities to withdraw water already available at a Corps

[24] Office of Management and Budget (OMB) Circular No. A–25 Revised ¶ 6.d(1) (July 8, 1993), *available at https://www.whitehouse.gov/omb/circulars_a025.*

reservoir, and not required in order to fulfill any authorized project purpose, for a limited time period. Under the proposed rule, surplus water users would be charged only the full, separable cost to the Government of making the surplus water available during that period.

The proposed rule would recognize the need for both technical and legal analysis of the circumstances and project authorization to determine whether water is required for an authorized purpose or to meet the requirements of the CWA, ESA or other federal mandates. Additionally, for projects with a federal hydropower purpose, the Corps would coordinate surplus water determinations in advance with the applicable Federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose, including revenues and benefits foregone. As provided in the proposed definition of ''surplus water,'' to the extent that water is determined to be required to fulfill the hydropower purpose, or any other authorized purpose, it would not be considered ''surplus'' under the proposed rule.

We believe that the proposed pricing methodology is both objectively reasonable and consistent with Congressional intent, given the differences between Section 6 and the WSA. It is also consistent with the policy that user charges will be sufficient to recover the full cost to Federal Government of providing service, resource, or good when the Government is acting in its capacity as sovereign, in this case, operating and maintaining the reservoir and adjacent lands where the water supply withdrawals are occurring. With regard to the Missouri River mainstem reservoirs in particular, we believe that the proposed rule would be consistent with past practice in authorizing surplus water withdrawals without charges, responsive to concerns that have been raised, and would avoid disruption and costs in connection with existing and anticipated withdrawals. Specifically, we anticipate that the proposed pricing methodology, and the proposed incorporation of Section 6 authorizations with real estate instruments required for reservoir access under separate law, would result in withdrawals continuing to occur from Missouri River mainstem reservoirs at no cost before June 2024, and at minimal or no cost thereafter. New surplus water users at the Corps' Missouri River mainstem reservoirs, and at any other Corps reservoirs where surplus water may be determined to be available, would not be required to pay for the cost of reservoir storage in connection with surplus water withdrawals. Withdrawals of surplus water as defined in the proposed rule would be unlikely to result in any significant direct costs to the Corps, and so we anticipate that any charges associated with surplus water agreements under the proposed rule would be minimal.[25]

Further, the proposed rule would increase standardization of Corps practice by ensuring that all uses of surplus water at a Corps reservoir are formally evaluated and authorized by the Corps. This would improve the Corps' operations of its reservoirs, by ensuring greater knowledge about the ongoing and potential withdrawals, including withdrawals for which storage is not allocated under the WSA. We invite comments from all interested parties on this pricing proposal.

The Corps acknowledges that in concept, there are multiple benefits conferred to those users making Section 6 withdrawals from Corps reservoirs, including an increased level of dependability to ensure that withdrawals can be made, and there could be a market value associated with such benefits. It is federal policy that user charges will be based on market prices (meaning the price for a good, resource, or service that is based on competition in open markets, and creates neither a shortage nor a surplus of the good, resource, or service) when the Government, not acting in its capacity as sovereign, is leasing or selling goods or resources, or is providing a service. Thus, as an alternative to the proposed pricing methodology, the Corps could incorporate the market price of water supply reliability or other benefits into its surplus water pricing policy. We solicit comments on whether the price of surplus water contracts should include the economic value of the water supply storage benefit these contracts provide (*e.g.,* greater reliability in withdrawing water from a reservoir), or reimbursement of indirect costs such as foregone hydropower revenue

(f) Documentation of Surplus Water Agreements

In response to issues raised by those who have expressed concerns about the requirement to execute multiple documents, the Corps proposes to simplify and streamline administrative processes under Section 6. Currently, ER 1105–2–100 envisions entering into a Section 6 surplus water agreement that is separate from any real estate instrument that is necessary to provide access to the reservoir for the purpose of making withdrawals. The granting of real estate interests occurs pursuant to separate statutes and regulations, and is not governed by Section 6 (or the WSA). The proposed rule would not alter those statutes and regulations, but it would combine the approval to withdraw surplus water (the surplus water contract required under Section 6) with the real estate instrument in a single document that would memorialize the agreement between the Corps and a nonfederal entity for access to a Corps reservoir to withdraw surplus water. That document would include charges pursuant to the proposed Section 6 surplus water pricing policy, and it would also include any applicable charges for the real estate interest. Charges for such real estate instruments are determined under other laws, regulations and policies, and would not be affected by this proposed rule.

By combining the surplus water contractual terms with the real estate instrument, the Corps expects to simplify and streamline the administrative processes associated with surplus water withdrawals, potentially avoiding delays and some transactional costs, compared to a process in which both a surplus water contract and a separate real estate easement would be required. Additionally, combining the two documents ensures greater consistency between them, avoiding past circumstances in which water supply

[25] In its final Surplus Water Report for Lake Sakakawea, for example, the Corps' Omaha District concluded that making 100,000 acre-feet of surplus water available for withdrawal over a ten-year period would not result in any changes to Missouri River mainstem system operations. U.S. Army Corps of Engineers, Omaha District, Final Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report, Vol. 1 at ii (March 2011), available at *http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/37*. Draft surplus water reports prepared for the other five mainstem reservoirs also indicated that no operational changes would be required for the surplus water withdrawals contemplated there. *See http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/PlanningProjects.aspx* (draft surplus water reports for Fort Peck Dam, MT, Oahe Dam, SD, Big Bend Dam, SD, Fort Randall Dam, SD, and Gavins Point Dam, SD). The pricing for surplus water agreements contemplated in those reports has been superseded by Section 1046(c) of the Water Resources Reform and Development Act of 2014, Public Law 113–121, 128 Stat. 1193 (June 10, 2014), which provides that no charges will be assessed under contracts for uses of surplus water stored in the Corps' Upper Missouri River reservoirs for ten years after June 10, 2014. If, under the proposed regulations, charges were imposed for surplus water uses after that ten-year period based on the full, separable costs incurred by the Corps by accommodating the withdrawals, such charges would be expected to be minimal, based on the figures contained in the Surplus Water Reports.

agreements have expired prior to easements, or vice versa. This new policy would also help prevent recurrences of situations where easements to support water supply withdrawals have been granted without execution of an underlying water supply agreement under either Section 6 or the WSA. This will help ensure that all uses of surplus water at Corps reservoirs are documented and authorized, and that any impacts from such uses on reservoir operations are formally evaluated.

(g) Duration of Surplus Water Determinations and Agreements

Finally, the proposed rule addresses the duration of surplus water determinations and surplus water agreements. The current Corps policy guidance does not specify any particular time period for surplus water determinations. The guidance states only that contracts for surplus water uses under Section 6 (surplus water agreements) should be made on a provisional or short-term basis, normally limited to five-year periods, noting that ''[w]hen [a] user desires long term use, a permanent storage reallocation should be performed under the authority of the Water Supply Act.'' ER 1105–2–100, app. E at E–214 to 215. The proposed rule would afford greater flexibility to designate the availability of surplus water based on the particular circumstances, and would conform the terms of surplus water agreements to the duration of the applicable surplus water determination.

Congress did not expressly limit the time period within which surplus water could be utilized under Section 6, leaving that and other contractual terms to the discretion of the Secretary of the Army, ''as [the Secretary] may deem reasonable.'' However, because hydrology, operations for authorized purposes, and other circumstances inevitably change over time, determinations of ''surplus water'' availability are inherently provisional, and the period of availability may vary depending upon the circumstances. Therefore, some time limitations are necessary for contracts for surplus water uses under Section 6.

The proposed rule would acknowledge the inherently provisional nature of surplus water determinations under Section 6, but would not impose any fixed, universally-applicable time limitation on surplus water agreements. Instead, the proposed rule would provide that determinations of the availability of surplus water must specify the time period in which surplus water is determined to be available, and contracts for the use of surplus water shall be for a term not to exceed the duration of the applicable surplus water determination. The Corps envisions that contracts could be for a shorter period than the length of time considered in the surplus water determination, and may, at the discretion of the Assistant Secretary of the Army (Civil Works), be extended or renewed upon request, if a surplus water determination is still applicable, or if a new surplus water determination is made. This would provide flexibility to accommodate surplus water uses for longer periods of time, if that were determined to be appropriate in particular cases, and if surplus water continues to be available.

As noted above, the proposed rule would allow the approvals that would be included in a Section 6 contract for surplus water uses to be incorporated into the real estate instrument that is necessary to provide access to a Corps reservoir for the purpose of making withdrawals. A single document would therefore memorialize the agreement between the Corps and a nonfederal entity for access to a Corps reservoir to withdraw surplus water. The duration of such agreements would be consistent with the duration of the applicable surplus water determination. The rule would continue to express the Corps' view that it is more appropriate to accommodate long-term or permanent water supply needs, such as those of communities that are served by public utilities or wholesale providers, under the WSA.

3. The Water Supply Act of 1958, 43 U.S.C. 390b (WSA)

The WSA authorizes the Secretary of the Army, acting through the Corps, to either add or expand water supply storage as an authorized purpose of a reservoir project, and encourages consideration of current and long-term water supply needs in the planning, design, and operation of federal reservoirs. Whereas Section 6 enabled the Corps to make water available at an existing Corps reservoir during any period in which surplus water is determined to be available, the WSA increased the Corps' flexibility to provide a greater role for water supply at all stages of project development, from planning, design and construction to continuing operations.[26] Congress, while recognizing the ''primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes,'' declared a national policy ''that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple use projects.'' 43 U.S.C. 390b(a). Toward this end, the WSA authorizes the Secretary to make water supply an authorized purpose by including storage at any planned or existing Corps reservoir, for current or future municipal and industrial water supply needs, provided that ''State or local interests'' agree to pay for the cost of providing such storage, ''on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction as determined by the Secretary of the Army.'' 43 U.S.C. 390b(b).

The proposed rule would codify the Corps' interpretation of the ''reservoir projects'' to which the WSA authority applies; the terms ''water supply,'' ''municipal or industrial water,'' and ''municipal and industrial water supply''; the term ''include'' storage; and the limitations on modifications that would involve ''major structural or operational changes'' or that would ''seriously affect authorized purposes.'' In addition, the proposed rule would clarify how the Corps evaluates the effects of including storage for water supply, how the Corps allocates costs to water supply storage, and how the Corps considers return flows in connection with water supply withdrawals pursuant to WSA storage agreements.

(a) Definition of ''Reservoir Project'' and ''Project''

The proposed rule would define the terms ''reservoir project'' and ''project,'' as those terms are used in the WSA with respect to the Corps, to mean any facility surveyed, planned, or constructed, or to be planned, surveyed, constructed, or operated, by the Corps to impound water for multiple purposes and objectives. This definition incorporates the same, broad definition of ''reservoir'' that the Corps is proposing under Section 6, as discussed above. The Corps believes that this is

[26] *See* H.R. Rep. No. 85–1122 at 77 (1957) (recognizing ''need for more comprehensive authority for the inclusion of storage for water supply in reservoirs constructed by the Corps of Engineers''); 104 Cong. Rec. 11497 (June 17, 1958) (statement of Sen. Case that the Water Supply Act ''establishes a sort of new field on water supply''); S. Rep. No. 85–1710 at 133 (1958) (noting that proposed Water Supply Act ''makes possible provision of water-supply storage in reservoirs where it is apparent that there will be a future demand for such storage but where the demand is not pressing at the time of construction'').

the most faithful interpretation of the concept of a ''reservoir project,'' and is consistent with the text of the WSA, which refers to the inclusion of ''storage . . . to impound water,'' and provides that the cost of including water supply ''shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of *multiple purpose construction,*'' 43 U.S.C. 390b(b) (emphasis added).

In addition, the proposed definition of the terms ''reservoir project'' and ''project'' with respect to the Corps under the WSA would encompass either a single dam-and-reservoir facility (*i.e.,* a single ''reservoir'') or a system of improvements, depending on how the improvement or improvements are ultimately authorized by Congress. In this respect, the definition emphasizes the need to consider the Congressional intent for the facility in question, not solely as an isolated facility, but in light of the overall plan of improvement, if any, that Congress approved when authorizing the specific facility. This overall Congressional intent is critical when considering the statutory limitation on modifications under the WSA that would ''seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed,'' 43 U.S.C. 390b(e). The interpretation of the WSA authority to include storage for water supply in multipurpose Corps reservoir projects, including projects that are authorized, constructed, and operated as part of a system, is in conformity with the Corps' practice in implementing the WSA since 1958 and with opinions of the Corps' Chief Counsel.

(b) Definition of ''Water Supply,'' ''Municipal or Industrial Water'' and ''Municipal and Industrial Water Supply''

The WSA specifically authorizes the Corps to include storage to meet demands for ''municipal or industrial water,'' by including ''municipal and industrial water supply storage'' in its reservoirs. These terms and the term ''water supply'' itself are not defined in the WSA or in existing Corps guidance. The Corps proposes to define the terms ''water supply,'' ''municipal or industrial water,'' and ''municipal and industrial water supply'' for purposes of the WSA broadly to encompass all uses of water under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390. This definition is consistent with the proposed definition of ''domestic and industrial uses'' for purposes of Section 6, and with generally accepted definitions of water supply.[27] It has additional support in the declaration of Congressional policy in the WSA that the Corps should cooperate with State and local interests ''in developing water supplies for domestic, municipal, industrial, and other purposes,'' 43 U.S.C. 390b(a). This statement evinces Congressional intent that the Corps should work collaboratively with State and local interests to make storage available for a broad range of water supply needs, and generally recognizes that the Corps does not allocate water rights or determine what beneficial uses are made of water that is withdrawn from its reservoirs.

As with the proposed definition of ''domestic and industrial uses'' under Section 6, the proposed definition of ''water supply,'' ''municipal or industrial water,'' and ''municipal and industrial water supply'' under the WSA excludes irrigation uses provided for under 43 U.S.C. 390, but does not foreclose all agricultural, commercial, or other uses that may be made of water withdrawn from Corps reservoirs. In this respect, the proposed definition recognizes the fact that Congress has placed the responsibility for delivery of irrigation water through federal facilities with the Department of the Interior through the federal reclamation laws. Further, the Corps typically enters into water supply storage agreements with public or private water suppliers, not with individuals or private corporations, and those water suppliers, not the Corps, treat and distribute the water withdrawn from Corps reservoirs to multiple users. The Corps does not regulate the end uses of that water, after it has been withdrawn from the Corps reservoir, and some agricultural water uses may be accommodated from public water supplies, without the construction of federal irrigation works. It is reasonable to conclude that some agricultural uses can be accommodated under the WSA within the definition of ''municipal and industrial water supply,'' provided that direct irrigation withdrawals that could be satisfied through authorized irrigation works of the Department of the Interior, or through an interim allocation of irrigation storage by the Corps, pursuant to 43 U.S.C. 390, are excluded from the definition of ''municipal and industrial water supply'' under the WSA. This ensures that the Corps' exercise of its authority under the WSA, like its exercise of its authority under Section 6, will not interfere with other federal authorities that specifically address irrigation uses.

(c) Meaning of the Phrase ''Storage May Be Included'' for Water Supply

The WSA authorizes the Secretary of the Army to add water supply as a purpose of a Corps project by providing that ''storage may be included in any reservoir project surveyed, planned, constructed, or to be planned, surveyed, and/or constructed'' by the Corps. The proposed rule would clarify and codify the Corps' longstanding interpretation of the term ''storage may be included'' to reflect the broad latitude that Congress afforded the Department of the Army to accommodate water supply needs through the planning, construction and operation of Corps reservoir projects, making water supply an authorized project purpose. Congress understood that storage could be made available for water supply at different stages of the development of a Corps reservoir project, and in different ways: By modifying the plans for an as-yet unconstructed project; by changing the physical structure of an existing project; or by changing the operations of an existing project. The term ''included'' encompasses all of these possibilities, and thus, both structural changes and operational changes to include water supply are expressly contemplated in the text of the WSA.

When the Corps evaluates a water supply request and determines that it can accommodate the request, the Corps considers operational changes that may be necessary, and determines an amount of storage that must be included in the reservoir in order to yield the amount of water to be withdrawn. This evaluation takes into account projected hydrologic conditions over a lengthy period of analysis, including projected inflows and losses from all sources, as well as other constraints such as flow requirements for water quality or other authorized purposes during that period. See ER 1105–2–100, app. E at E–225, tab. E–31 n.2; Engineer Manual (EM) 1110–2–1420, Hydrologic Engineering Requirements for Reservoirs (Oct. 31, 1997) §§ 11–2, 12–13. The storage necessary to yield the requested water supply withdrawals may be included either by adding additional storage capacity, or by changing operations to

[27] *See* U.S. Geological Survey, National Handbook of Recommended Methods for Water Data Acquisition, Ch. 11, sec. 11.C, ''Public Water Supply,'' available at *http://pubs.usgs.gov/chapter11/chapter11C.html* (citing Standard Industrial Classification (SIC) code 4941); *see also* U.S. Geological Survey, National Handbook of Recommended Methods for Water Data Acquisition, Ch. 11, sec. 11.C (defining ''public water supply'' to include water delivered by public and private suppliers ''to domestic, commercial, and industrial users, to facilities generating thermoelectric power, for public use, and *occasionally* for mining and irrigation'').

utilize existing storage differently. When water supply needs are accommodated under the WSA through operational changes, without structural modifications—that is, when the existing storage is used differently to accommodate new or additional water supply withdrawals—the Corps refers to this action as ''reallocating'' storage to water supply, either from storage that was previously designated for a particular purpose, or from a multipurpose, conservation storage pool that serves multiple purposes. The Corps uses the term ''reallocation'' to reflect the fact that storage will be used differently, and that costs associated with that storage, including operational costs, will be reallocated to water supply, and borne by the water supply user.

Thus, the proposed rule would clarify that the authority to ''include'' storage in a Corps reservoir under the WSA means making storage available for water supply by modifying the plans for an as-yet unconstructed project; by changing the physical structure of an existing project; or by changing the operations of an existing project. Whether an amount of storage is physically added for water supply, or is reallocated from within existing storage for water supply, the amount of storage included for water supply reflects the Corps' technical, engineering judgment that the reservoir project, as modified, can satisfy the projected water supply withdrawals during reasonably foreseeable circumstances. The inclusion of storage does not guarantee that water will actually be available to meet a given need at all times (since, for example, droughts more severe than the worst on record could occur). But the amount of storage included for water supply is intended, consistent with the design concept of a reservoir, to provide a dependable water supply, based on available information and reasonable projections of future conditions. The amount of storage included for water supply should be sufficient to yield the gross amount of water to be withdrawn or released, which also approximates the water supply benefit being afforded—the reference point for allocating project costs to water supply under the WSA.

When including storage under the WSA, the Corps does not determine how water supply needs should be satisfied within a region, allocate water rights, or sell water. Nor does the Corps take on the role of a water distributer, treating or actually delivering water through federal facilities to end users. Instead, the Corps facilitates the efforts of States and local interests to develop their own water supplies through nonfederal conveyance systems, in connection with the operation of a Corps reservoir project. Under the WSA, the Corps has broad discretion to make structural or operational changes to a Corps reservoir, in order to facilitate water supply uses of reservoir storage (subject to the limitations within the WSA, and compliance with other applicable laws and regulations). The proposed definition of the statutory phrase ''storage may be included'' for water supply makes clear that the Corps' role under the WSA is limited to making storage available in its reservoir projects, not constructing or operating water treatment or delivery systems, or obtaining water rights or permits on behalf of water supply users. It remains the sole responsibility of the water supply users to withdraw, treat, and deliver water from a Corps reservoir to end users, and to obtain whatever water rights may be required under State law.

(d) Determining the Cost of Including Storage for Water Supply

The WSA requires, as a condition of including storage to make water supply an authorized purpose of a Corps reservoir, that State or local interests must agree to pay for ''the cost of any [such] construction or modification,'' and that such cost ''shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army.'' The WSA enables users to repay the initial cost of including storage over a period of up to thirty years, with interest, and also requires payment of all operation, maintenance, and replacement costs allocated to water supply on an annual basis.[28] To effectuate these statutory requirements, Corps policy currently provides that entities contracting for the use of storage space in a Corps reservoir under the WSA must pay a share of project costs allocated to water supply, as well as a share of annual, joint-use operation, maintenance, repair, rehabilitation, and replacement costs (OMRR&R) for the project. ER 1105–2–100, app. E at E–201 to E–202. The Corps' existing guidance for determining an appropriate share of allocated project costs, including an annual share of OMRR&R, varies depending upon the method by which storage is to be included for water supply.

Where water supply is included in the plans for a reservoir prior to construction of that reservoir, the Corps employs the separable cost-remaining benefit (SCRB) method of cost allocation to determine the share of project costs allocated to water supply. This methodology allocates to each purpose included in a project its separable costs, which are the incremental costs associated with including that purpose in the project, as well as a share of the residual or remaining joint costs, which are equitably apportioned among all purposes in proportion to the share of overall project benefits that are expected to be realized for each purpose. ER 1105–2–100, app. E, app. E at E–239. Thus, a water supply user is required to pay all separable water supply costs (including any direct or specific costs due to water supply features), plus a share of the remaining, joint costs of the project. Water supply users are also required to pay a proportional share of annual OMRR&R costs thereafter. See *id.* at E–201, E–212, E–217–218, E–242, E–246–249.

Where water supply storage is added to an existing project through structural modifications, the non-federal sponsor is responsible for the direct costs of those modifications. In addition, current Corps regulations employ a willingness-to-pay concept, requiring the water supply user to pay an amount equal to fifty percent of the savings compared to the cost of the most likely alternative that could service the water supply need, in lieu of the proposed modification to the Corps reservoir.[29] The user is also required to pay a proportional share of annual OMRR&R costs. ER 1105–2–100 at 3–34, App. E at E–222 to E–223.

In cases where existing storage is to be used for water supply instead of for some purpose for which it was previously used, and no construction or structural modifications are necessary in order to include storage—*i.e.,* when existing storage is reallocated to water

[28] 43 U.S.C. 390b(b). As originally enacted, the WSA allowed the cost of water supply storage to be repaid over a period of up to fifty years, but for Corps of Engineers projects, this repayment period was later reduced to thirty years. *See* Water Resources Development Act of 1986, Public Law 99–662, Title IX, § 932(a), 100 Stat. 4196 (Nov. 17, 1986). *See also* Water Resources Reform and Development Act of 2014, Public Law 113–121, 1046(b) (June 10, 2014) (providing for notification, before each fiscal year, to non-Federal interests of estimated operation and maintenance expenses for that fiscal year and each of the subsequent four fiscal years).

[29] The Corps has identified only one instance in which it made a structural modification to an existing reservoir project under the WSA applying this cost-sharing concept. That modification for water supply was made in connection with modifications for ecosystem restoration at an existing project, and the project modifications and the Chief of Engineer's recommendations were specifically approved by Congress.

supply, without constructing new storage—the Corps determines the cost of storage based on the higher of benefits or revenues foregone, or the updated cost of storage. Revenues foregone consist of actual reductions in revenues to the U.S. Treasury as a result of the proposed action. Benefits foregone reflect any other reductions in benefits that would result from the proposed action, as evaluated in accordance with applicable evaluation criteria.[30] The updated cost of storage consists of a share of the original construction costs, in proportion to the percent of usable storage reallocated to water supply, updated to present day price levels. The water supply user also is responsible for paying the same proportional share of annual OMRR&R expenses.[31]

As a general matter, the Corps considers each of these historically utilized cost methodologies to be a reasonable way of allocating costs to a modification to include storage for water supply under the WSA, consistent with the principle stated in the text of the WSA that project costs should be allocated equitably among the authorized purposes in proportion to the benefits received, and consistent with standard evaluation criteria used for federal water resource development projects. Accordingly, the Corps is not proposing changes to these methodologies for allocating costs to water supply storage under the WSA, and would carry them forward in the proposed rule. At the same time, the Corps acknowledges that it is engaged in continuing discussions with federal PMAs regarding how some of the methodologies are applied in determining the federal hydropower impacts (revenues and benefits foregone) associated with a water supply storage reallocation. The Corps further recognizes the important role that PMAs perform in marketing and distributing hydroelectric power that is generated at Corps reservoir projects, and continuing cooperation between the agencies with respect to the operation of Corps projects for hydropower. Therefore, the proposed rule would expressly provide that whenever the Corps proposes to include storage for water supply under the WSA at a reservoir project (or system of projects, if authorized as a system) that has federal hydropower as an authorized purpose, the Corps will coordinate that proposal in advance with the PMA that is responsible for marketing that federal power. The Corps will utilize in its determinations any information provided by the PMA, including its evaluation of hydropower impacts and cost information regarding revenues foregone and replacement power costs, in determining the impacts of the proposed action, and the cost of storage to be charged to the prospective water supply user. The proposed rule would not address or affect the rates that PMAs may establish for hydroelectric power, nor any credits that might apply to the hydropower purpose for revenues foregone and replacement power costs, as those determinations are made through separate administrative processes.

The Corps solicits comments on the proposal to adopt its existing WSA pricing methodology in this proposed rule. Additionally, the Corps solicits comments on whether the Corps should collect data related to the cost of providing water supply storage, including the market price as defined in OMB Circular A–25 Revised, or the opportunity cost of making storage available for water supply, and whether the Corps should include the market price of water supply storage as an alternative pricing metric. The Corps' current pricing policy for water supply storage under the WSA takes into account revenues and benefits foregone, the cost of constructing reservoir storage, and the costs of operating and maintaining storage reservoirs. Consideration of alternative pricing methodologies, incorporating the market price of water supply storage or the opportunity costs associated with water supply storage, would require collection of additional data. Therefore, the Corps invites comments on whether it should collect such data and take that into account in determining the cost of storage under the WSA.

(e) Limitations on Authority To Modify Projects To Include Water Supply Storage

The WSA authorizes the Secretary of the Army to make changes to the plans, structure, or operations of authorized reservoir projects for the purpose of including water supply storage. Inherently, such changes could affect other authorized project purposes. That was a key purpose of enacting the WSA, as earlier law, including Section 6, did not authorize the inclusion of water supply as a purpose at the expense of other authorized purposes, once a project was constructed. Congress intended to confer a ''more comprehensive authority'' to include water supply storage by enacting the WSA, and delegated to the Secretary the discretion necessary to effectuate such changes, unless the effects on authorized purposes would be ''serious,'' or the degree of structural or operational changes would be ''major'':[32]

> (e) Approval of Congress of modifications of reservoir projects. Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage . . . which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law.

WSA § 301(d), 43 U.S.C. 390b(e) (emphasis added).

The meanings of the key statutory terms ''seriously'' and ''major'' are not defined in the text of the WSA, and the Corps has never promulgated formal regulations interpreting the limitations included in this section. Past policy guidance documents have at times referred to amounts and percentages of usable storage as thresholds for internal, delegated approval authority under the WSA. For example, guidance developed in the mid-1970s indicated that reallocations of less than 50,000 acre-feet or 15 percent of storage ''are considered insignificant'' and do not require Congressional authorization; but that guidance did not address whether reallocations exceeding those thresholds would require Congressional

[30] The currently applicable criteria are set forth in Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (March 10, 1983), available at *http://planning.usace.army.mil/toolbox/library/Guidance/Principles_Guidelines.pdf.*

[31] *See* ER 1105–2–100, app. E at E–216 to E–218. The Corps' current guidance lists ''replacement costs,'' in addition to benefits foregone, revenues foregone, and updated cost of storage, as an additional consideration when determining a price of reallocated storage. *Id.* at E–216 (cost of reallocated water supply storage ''will normally be established as the highest of the benefits or revenues foregone, the replacement cost, or the updated cost of storage in the Federal project.''). Replacement costs as a possible component of revenues or benefits foregone were noted in earlier Corps guidance (ER 1165–2–105, Change 15 (March 1, 1977), ¶ 11.d(1)(a)), but appear to have inadvertently been broken out as a separate category in the Corps' more recent guidance. As noted in the current ER 1105–2–100, replacement costs, to the extent they could be associated with a reallocation of storage within the Corps' discretionary authority at all, would normally be captured within a benefits or revenues foregone analysis. Generally, the updated cost of storage represents the highest of these costs in any event, and therefore serves as the basis for pricing reallocated storage. Accordingly, as a matter of clarification, the proposed regulations would only reference benefits foregone, revenues foregone, and updated cost of storage. To the extent any replacement costs would be incurred, those costs would be captured in the Corps' analysis, consistent with current guidance and practice.

[32] *See* 2012 Chief Counsel Legal Opinion at 34–35 & n. 151 (citing H. Rep. No. 85–1122, at 77 (1957)).

authorization, or how that determination would be made. *See* EM 1165–2–105, Water Supply Storage in Corps of Engineers' Projects (18 Sept. 1961), Change 15, para. 11.e (1 Mar 77)). Current Corps guidance still does not define what constitutes a ''major'' change or a ''serious'' effect on an authorized purpose, such that Congressional approval would be required. ER 1105–2–100 states only that the Assistant Secretary of the Army (Civil Works) has delegated authority to the Chief of Engineers to approve reallocations of up to 50,000 acre-feet or 15 percent of the ''total storage capacity allotted to all authorized purposes,'' and reallocation of lesser amounts are further delegated within the Corps, provided that the criteria of ''major structural or operational changes'' and ''severe [*sic*] effect[s] on other authorized purposes'' are not violated; but the Assistant Secretary retains authority to approve reallocations of greater amounts of storage, again, subject to the (undefined) statutory criteria. *See* ER 1105–2–100 at E–215 to E–216.

The Corps' current interpretation of the meaning of the terms ''seriously affect [authorized] purposes'' and ''major structural or operational changes'' has been set forth in two recent legal opinions issued by the Corps' Chief Counsel in 2009 and 2012. *See* Earl H. Stockdale, Chief Counsel to the Chief of Engineers, Subject: Authority to Reallocate Storage for Municipal & Industrial Water Supply under the Water Supply Act of 1958 at 7 (Jan. 9, 2009) (2009 Chief Counsel Legal Opinion); 2012 Chief Counsel Legal Opinion. In those opinions, the Chief Counsel examined the statutory language and Congressional intent behind those phrases, and concluded that Congress intended to confer broad authority on the Corps to modify reservoir projects to include storage for water supply, so long as the changes did not fundamentally depart from Congressional intent in authorizing the construction and operation of the project for other purposes. As those legal opinions explain, when Congress authorizes a Corps project for construction, it does so based on an understanding of the Corps' proposal for the construction and operation of the project, and of the purposes that the project would serve. These proposals, set forth in reports of the Chief of Engineers, are incorporated into the authorizing legislation for a project, and serve to define the ''authorized purposes'' of the project. See, *e.g., In re MDL–1824 Tri-State Water Rights Litig.,* 644 F.3d at 1187; 2012 Chief Counsel Legal Opinion at 10. Longstanding Congressional understanding, legal opinions, and caselaw have established that while the Corps has considerable discretion to exercise its engineering judgment to design and operate its projects, the Corps may not add or delete an authorized project purpose, nor materially alter the relative importance of authorized purposes, without the approval of Congress. See *Environmental Defense Fund* v. *Alexander,* 467 F. Supp. 885, 900–02 (D. Miss. 1979) (citing Report on the Civil Functions Program of the Corps of Engineers, United States Army, 82d Cong., 2d Sess. 1 (1952), and legal opinions of the Corps' General Counsel).

However, beyond this long-recognized, general discretion to adjust the design and operations of Corps projects for their authorized purposes, the WSA specifically authorizes the Corps to make structural or operational changes to include water supply as a new or expanded purpose, and to affect existing, authorized project purposes in so doing. Congress did not delegate to the Corps the authority to abandon the original, Congressionally-approved purposes of a project in favor of water supply, but Congress also did not set specific, numerical limits on the Corps' discretion to add water supply at the partial expense of other authorized purposes, or otherwise define the terms ''major'' and ''serious.'' Instead, Congress left the evaluation of what constitutes a ''major structural or operational change,'' or a ''serious'' effect upon an authorized purpose, to the judgment of the Corps. The Corps' definitive interpretation of those statutory terms is that they require the Corps, in each instance where it considers including storage for water supply, to consider whether any necessary structural or operational changes, and the effect of such changes on authorized purposes, would fundamentally depart from what Congress intended when it authorized the project for construction. The touchstone for this analysis depends in each case upon the specific legislation by which Congress authorized the project in question, and the expectations with regard to the project's purposes, design, and operations, that are set forth in the reports and other documents that Congress incorporated or approved in the authorizing legislation. Under the proposed rule, the governing standard for determining whether proposed changes ''would seriously affect the purposes for which the project was authorized, surveyed, planned or constructed,'' or ''involve major structural or operational changes,'' would be whether the proposed changes would fundamentally depart from what Congress expected when it approved the reports and authorized the project for construction. Modifications that cross this threshold would interfere with legislative prerogatives, and would require Congressional approval.

The Corps is not proposing in this rule to adopt fixed percentages or amounts of storage as threshold amounts as a per se rule for determining whether a proposed modification involves ''serious'' effects or ''major'' changes, for several reasons. First, it is unclear on what basis numerical thresholds could be established, and whether the same thresholds would make sense universally, given the wide disparities in the size and function of Corps multipurpose reservoirs nationwide. Earlier Corps guidance that indicated that reallocations of less than 15 percent or 50,000 acre-foot threshold would be considered per se *insignificant,* and therefore within the Corps' authority, was apparently based upon the fact that prior to that date, no discretionary reallocation exceeding those amounts had been carried out by the Corps. *See* 2009 Chief Counsel Legal Opinion at 7; 2012 Chief Counsel Legal Opinion at 38 n. 166. That guidance did not explain what analysis had gone into the prior reallocation decisions, or indicate how future reallocations should be evaluated with respect to the WSA limitations.

Second, the Corps' past statements regarding 15 percent or 50,000 acre-foot thresholds have often been misunderstood and misapplied in a manner that calls into question the usefulness of such thresholds. As noted, the previous guidance stating that reallocations below those amounts are *insignificant* has been misread to suggest that reallocations above those amounts are significant, and therefore ''major'' or ''serious.'' The Corps' current ER 1105–2–100 makes neither determination, but does reference a delegation of authority, from the Assistant Secretary of the Army (Civil Works) to the Chief of Engineers and below, for reallocations not exceeding 15 percent of total usable storage, or 50,000 acre-feet, ''provided that the [statutory] criteria are not violated.'' That delegation threshold, which is plainly not a determination of the statutory criteria (which apply above or below that threshold), has been misinterpreted frequently enough that the Corps' Civil Works Directorate found it necessary to issue further guidance in 2007 clarifying that the

delegation threshold is not a requirement for Congressional approval.[33] And a U.S. Court of Appeals decision, while not applying the ER 1105–2–100 threshold specifically, concluded that a particular, proposed reallocation of storage at one Corps reservoir constituted a ''major operational change'' based on the Court's findings regarding the percent of storage reallocated, but the decision itself cited multiple, conflicting figures to describe the percentage at issue, and did not relate that percent or amount of storage to any actual structural or operational changes, or any effects on authorized purposes.[34] A percentage limitation, particularly if misconstrued or misapplied, could result in arbitrary limits on the authority Congress intended to confer under the WSA.

Finally, it is significant that Congress has enacted fixed, numerical limitations for some purposes, including estimated costs allocated to future water supply under the WSA, but chose not to establish such numerical limitations to define the bounds of the Secretary's authority to make structural or operational changes or affect authorized purposes when including storage under the WSA.[35] Instead, Congress limited the Corps' authority to effects that are not ''serious,'' and changes that are not ''major,'' and left it to the Corps' discretion to interpret those terms, in light of Congressional intent, and the particular circumstances involved. In summary, the Corps has never issued guidance or adopted an absolute rule that allocations of storage in amounts greater than 15 percent of total storage or 50,000 acre-feet, or any other specific amounts, would result in serious effects to authorized purposes, or involve major structural or operational changes. Rather, such determinations have been made based upon technical and legal analysis of the particular circumstances involved, in light of Congressional intent as expressed in the original authorizing legislation and subsequent statutory enactments relevant to that project or system of projects. The relevant inquiry would include an assessment of what structural and operational changes would actually be involved, how these changes would affect authorized purposes, and the extent to which these changes and their effects depart from Congressional understandings when Congress authorized the project or system of projects involved. A simple amount or percent of storage may not be dispositive of any of these considerations.

Therefore, the proposed rule would, consistent with the Corps' legal opinions, interpret the statutory terms ''major'' and ''seriously'' in § 390b(e) to mean changes and impacts that fundamentally depart from Congressional intent for the particular reservoir project, as expressed through the authorizing legislation relevant to that project. If a project was authorized as part of a system of improvements, to achieve multiple purposes throughout that system, Congressional intent regarding the authorized purposes must be interpreted in this light. With respect to effects on authorized purposes, the Corps would need to consider, in light of the factual circumstances and the project authorizing documents, whether a proposed action would adversely affect any authorized purpose of the project, by materially diminishing the benefits that Congress expected to be realized in connection with that purposes. With respect to major structural or operational changes, the Corps would have to consider the degree of change from both a technical and a legal perspective, in light of project operations and Congressional intent for the project in question. The proposed rule would require that the Corps undertake both legal and technical analysis to determine whether a proposed storage reallocation constitutes a ''major structural or operational change'' and whether it ''seriously affects'' an authorized purpose of that project.

The Corps invites comments on the proposed interpretation of the statutory limitations on modifications that would ''seriously affect'' authorized purposes or involve ''major structural or operational changes.'' We also invite comments on whether it may be appropriate to adopt in the proposed rule a maximum threshold percentage or amount of storage that may be reallocated within the limits stipulated by the WSA.

For a project (or a system of projects, if authorized as a system) that has federal hydropower as an authorized purpose, the Corps recognizes the important role that PMAs perform in marketing and distributing hydroelectric power that is generated at Corps reservoir projects, and the need for continuing cooperation between the agencies with respect to the operation of Corps projects for hydropower. Therefore, the proposed rule would expressly provide that whenever the Corps proposes to include storage for water supply under the WSA at a reservoir project (or system of projects, if authorized as a system) that has federal hydropower as an authorized purpose, the Corps will coordinate that proposal in advance with the PMA that is responsible for marketing the federal power from the project. The Corps will utilize in its determinations any information provided by the PMA, including its evaluation and determination of the impacts to the hydropower purpose (revenues and benefits foregone), in determining whether those impacts would ''seriously affect'' the hydropower purpose or involve a ''major structural or operational change'' under the WSA. The proposed rule would not address or affect the rates that PMAs may establish for hydroelectric power, nor any credits that might apply to the hydropower purpose for revenues foregone and replacement power costs, as those determinations are made through separate administrative processes.

In cases where the Corps operates its reservoirs in coordination with the U.S. Department of Interior, Bureau of Reclamation (Reclamation) reservoirs or projects on the same river system, it is understood that whenever the Corps proposes to include storage for water supply under the WSA at a reservoir project or system of projects, the Corps will coordinate its evaluation of that proposal with Reclamation, and consider relevant information provided by Reclamation, including potential

[33] *See* Thomas W. Waters, Chief, Policy and Policy Compliance Division, Directorate of Civil Works, Headquarters, U.S. Army Corps of Engineers, Memorandum, Subject: Water Supply Reallocation Policy (August 30, 2007) (on file); *see also In re MDL–1824 Tri-State Water Rights Litigation,* 644 F.3d 1160, 1173 n.9 (11th Cir. 2011) (''Internal policies required the Corps to obtain the approval of the Secretary of the Army for all storage allocations exceeding 15% of total storage capacity or 50,000 acre-feet, whichever is less. The parties have not made this Court aware of any internal regulations that set a threshold for allocations above which Congressional approval is required.'').

[34] *See Southeastern Federal Power Customers, Inc.* v. *Geren,* 514 F.3d 1316 (D.C. Cir. 2008). In that case, which was subsequently remanded, consolidated, and resolved by the Eleventh Circuit's decision in the case *In re MDL–1824 Tri-State Water Rights Litigation,* 644 F.3d 1160 (11th Cir. 2011), the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion concluding that a settlement agreement that would have allocated 240,878 acre-feet in the Corps' Lake Lanier project would have involved a ''major operational change'' requiring Congressional approval under the WSA. However, the D.C. Circuit opinion alternately describing the 240,878 figure as comprising 22 or 22.9 percent of ''total storage'' in Lake Lanier, and a 9 percent increase over storage previously used for water supply, whereas 240,878 acre-feet actually comprises just 12.6 percent of the 2,554,000 total acre-feet of storage in Lake Lanier. Nothing in the D.C. Circuit opinion indicates why any of these figures would generally constitute ''serious'' effects or ''major'' changes within the meaning of the WSA. *See* 2012 Chief Counsel Legal Opinion at 18–19 & n. 72, 36–38 & nn. 164, 166.

[35] The WSA expressly limits the share of total estimated cost of any project that can be allocated to anticipated future water supply demands to 30 percent. WSA § 301(b), 43 U.S.C. 390b(b).

impacts on coordinated or co-managed reservoir operations.

(f) Storage Accounting, ''Return Flows,'' and Water Supply Storage Agreements

The Corps acknowledges that important questions have been raised regarding how much water may be withdrawn under many existing WSA water supply storage agreements and the relationship of ''return flows'' or other inflows to those withdrawals. Generally, the Corps' WSA storage agreements authorize the use of a particular amount of reservoir storage, sufficient to provide a firm or dependable yield during drought, but without specifying how much water may be withdrawn pursuant to the agreement under different hydrologic conditions, and without addressing return flows. This practice is consistent with the Corps' authority to include storage as an authorized purpose under the WSA, recognizing that reservoir storage is used for multiple authorized purposes, and that storage yields, project operations, and water supply withdrawal amounts can change over time. Without a clear methodology for determining how much water may be withdrawn under the agreement, however, this has led some to question the extent of withdrawals that are occurring, or to propose different methods of accounting for storage use. When broader disputes have arisen over water uses in a multistate river basin, for example in the ACT–ACF basins, some water supply users have requested that WSA agreements provide ''credit'' for return flows, or other ''made inflows'' directed into a reservoir by a particular entity from a source outside the reservoir. These users maintain that such flows should be credited to the water supply users who provide the flows, either in the sense of including less storage than would otherwise be required for the projected withdrawals, or in the sense of increasing the yield of storage previously included for water supply. They contend that crediting return flows could provide incentives for greater water conservation, as water returned to the reservoirs could enhance water supply use. Others have objected to ''crediting'' return flows or other inflows to particular water supply users, fearing that doing so could impinge upon project purposes or other users' rights. The parties expressing views on these matters have all desired greater certainty with regard to how the Corps accounts for water supply storage usage in its reservoirs.

The Corps does not have a universal policy or practice regarding return flows or the accounting of storage use under water supply storage agreements (''storage accounting''). Generally, the Corps has based its WSA storage agreements upon an amount of storage expected to yield the gross amount of water to be withdrawn or released, without clearly addressing the relationship of return flows to the use of storage allocated to water supply, and without specifying how storage availability and usage are to be measured over time. In some cases, Corps Districts have developed storage accounting systems that treat water supply storage allocations as ''accounts,'' and attribute a share of all inflows to and losses from the reservoir to each account, in proportion to each account's share of storage in the reservoir. Under such accounting systems, water supply withdrawals by an individual water supply user are charged fully and directly to that user's water supply storage account; but return flows or other inflows, regardless of their source, are credited to each user's account in proportion to the amount of storage allocated to that account. Under these accounting systems, return flows are not reserved or credited fully to specific users' accounts; but to the extent that return flows are provided, they increase the amount of water available in the reservoir for all users and purposes, including water supply. In accounting for flows in this manner, the Corps is not determining beneficial use rights to any water—as that is a prerogative of the States—but rather, is accounting for the use of storage in a Corps reservoir.

This practice is consistent with the Corps' operation of its reservoir projects for multiple purposes, in which ''commingled or joint-use conservation storage'' is typically used to achieve multiple purposes simultaneously, ''with operational criteria to maximize the complementary effects and minimize the competitive effects'' of the different purposes, providing greater operational flexibility and better service for all purposes.[36]

The Corps recognizes, however, that return flows and other made inflows are important to consider in connection with water supply storage. As explained in the 2012 Chief Counsel's Legal Opinion, return flows, to the extent they occur, are relevant to the Corps' authority to accommodate a proposed request for water supply storage under the WSA, because both withdrawals and returns, like all other inflows and losses, affect operations for authorized purposes. To the extent that they can be ascertained and are reasonably foreseeable, these impacts must be considered for the purpose of determining the agency's authority to accommodate the request, as well as to evaluate environmental impacts as required by NEPA. Thus, when evaluating a request to make water supply withdrawals from a reservoir, the amount, if any, of return flows associated with that request must be taken into account. See 2012 Chief Counsel Legal Opinion at 37–38. In addition, the Corps recognizes that State systems for administering water rights may address return flows or other inflows in different ways, that interstate Compacts, equitable apportionments, or other acts of Congress may allocate flows to specific entities, and that it must adapt its operations for federal purposes to effectuate water allocation formulas developed under such authorities, in accordance with Congressional intent.[37] However, because the Corps does not determine or allocate water rights, the Corps has generally refrained from adopting storage accounting systems that designate particular inflows for the sole use by particular entities, or crediting those inflows solely to particular storage accounts. Instead, the Corps has considered return flows and other additive inflows in the same manner as it considers all inflows to a reservoir: All inflows are assimilated into reservoir storage, and, for purposes of the WSA, a user may withdraw water

[36] Engineer Manual (EM) 1110–2–1420, Hydrologic Engineering Requirements for Reservoirs at 2–2, 3–2 (Oct. 31, 1997). These operations are recorded in water control plans and manuals that are developed in concert with potentially affected interests, with public participation, and which are revised as necessary to conform to changing conditions and requirements. *See* 33 U.S.C. 709; 33 CFR 222.5(f); Engineer Regulation (ER) 1110–2–240, Water Control Management (May 30, 2016). *See also South Dakota* v. *Ubbelohde,* 330 F.3d 1014, 1018, 1027–28 (8th Cir. 2003) (in carrying out statutory charge to manage Missouri River reservoirs, ''the Corps must strike a balance among many interests, including flood control, navigation, and recreation''); Earl H. Stockdale, Chief Counsel, Memorandum for the Chief of Engineers, Subject: Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia at 28 (June 25, 2012) (''2012 Chief Counsel Legal Opinion'').

[37] *See, e.g.,* Apalachicola-Chattahoochee-Flint River Basin Compact, Public Law 105–104, arts. VII, X, 111 Stat. 2219 (Nov. 20, 1997) (recording intent of the United States to comply with water allocation formula to worked out among the States of the Apalachicola-Chattahoochee-Flint River Basin, and exercise authorities in a manner consistent with that formula, to the extent not in conflict with federal law); *see also* Water Resources Reform and Development Act of 2014, Public Law 113–121, 1051(b)(1) (June 10, 2014) (expressing the sense of Congress that the Secretary of the Army ''should adopt policies and implement procedures for the operation of reservoirs of the Corps of Engineers that are consistent with interstate water agreements and compacts.'').

from its allocated water supply storage, consistent with a State water right, so long as water is available within that allocated storage. In concept, these practices enable users to fully utilize their State-recognized water rights by withdrawing water from storage, while also ensuring that uses of water supply storage—that is, withdrawals up to but not exceeding the actual yield of the reallocated storage, under different hydrologic conditions—do not unduly impact the other authorized purposes of the project.

The proposed rule would continue and formalize many of these general practices, and would include new provisions that would clarify and improve the administration of water supply storage agreements, while continuing to provide for proportional crediting of made inflows. The rule would provide that storage will be included for water supply in an amount sufficient to yield the gross amount of water to be withdrawn (or released) under projected hydrologic conditions, taking into account both the projected withdrawals and the projected return flows, if any. Additionally, the rule would require that WSA agreements incorporate a storage accounting methodology that will track the use of that storage and determine how much water is available for withdrawal over time. The proposed rule would not prescribe, in technical detail, any specific storage accounting methodology, as it is expected that different methodologies may need to be adapted to the particular circumstances of each reservoir, or system of reservoirs, where storage is included for water supply. However, the rule would specify that any storage accounting procedures that are adopted in a Corps WSA storage agreement shall be based on the principle that all inflows, regardless of source, will be credited to water supply storage accounts in proportion to their share of storage in the reservoir. Direct water supply withdrawals would continue to be charged to the account of the user making the withdrawal. In this manner, water supply storage agreements would effectively limit withdrawals to the actual yield of the reallocated storage over time, accounting for return flows that actually occur, and changing hydrologic conditions. These storage accounting practices would be set forth in the proposed water supply storage agreement, and in other documents that would be made available for public comment prior to including storage under the WSA, providing notice to prospective water supply users and all other interested parties of the principles that would govern the projected use of water supply storage.

These provisions are intended to make storage accounting practices more transparent, and to reduce the possibility of uncertainty or dispute over how much water may be withdrawn under WSA storage agreements, thereby promoting more efficient administration of such agreements, in concert with operations for all other authorized purposes. These provisions also reflect the basic principle that the Corps does not acquire, adjudicate, or allocate water rights when it accommodates water supply uses from its reservoirs; the Corps merely makes its reservoir storage space available, based on an estimate of the amount of storage necessary to accommodate a gross amount of water to be withdrawn or released, taking into account operations for other authorized purposes, and hydrologic conditions. This does not preclude the ability of a state to determine whether to provide water rights on a gross or net basis, and encourages greater water conservation.

The Corps believes that these proposed policies best reflect the water supply benefits that are being provided: The inclusion of storage with a sufficient dependable yield to meet a projected water supply demand during reasonably foreseeable conditions (such as the drought of record), and the use of that storage consistent with project operations for authorized federal purposes. The proposed rule would not afford a one-to-one credit for return flows to the accounts of particular water supply users, but they would ensure that appropriate consideration is given to return flows in determining the extent of the Corps' authority to accommodate a water supply request and in evaluating the effects of accommodating that request. Under the proposed rule, when return flows do in fact occur, they would benefit the water supply user, by making it even more certain that the user's water supply need will be satisfied from the water supply storage that has been included. Thus, the proposed rule would provide an incentive under many circumstances to conserve water, without disrupting the operation of Corps reservoirs for multiple authorized purposes. In declining to give a credit through storage accounting to an individual user for return flows that such user may provide, the Corps would not deprive that user of any water rights under state law, nor create disincentives for water conservation; the Corps would merely be ensuring, on terms that would be made clear at the outset, that the use of storage for water supply pursuant to a WSA agreement would not be disproportionate to the amount of storage allocated to water supply.

In summary, the Corps' proposed policies on storage accounting and return flows would take into account return flows when they are reasonably projected and do actually occur, provide greater certainty for all interested parties as to the amount of withdrawals that may be made under the agreement, and would promote more efficient administration of water supply storage agreements, in concert with operations for all other authorized purposes. The Corps invites comments on these proposed policies.

Additionally, the Corps solicits comment on an alternative approach to return flows, in which users would receive full credit for ''made inflows.'' Specifically, the Corps solicits comment as to the merits of providing that return flows or other ''made inflows,'' defined as inflows provided by an entity that could choose whether or not to discharge such flows into a Corps reservoir, should be fully credited to the water supply storage account holder responsible for such flows, provided that the flows can be reliably measured. Under this alternative proposal, the proposed rule would be identical in all respects, except that instead of receiving proportional credit for made inflows (in proportion to a user's share of storage allocated under a water supply agreement), the user would receive full credit for made inflows. The Corps is not proposing this approach in the draft rule, but invites comments on this alternative proposal, including whether and under what circumstances it could be appropriate to directly credit made inflows.

4. Policies for Complementary Administration of Section 6 and the WSA

The proposed rule reflects the Corps' view that long-term and permanent water supply needs that require the dependability afforded by storage should be accommodated by including storage as an authorized project purpose, as provided in the WSA. It also reflects the Corps' view that Section 6 should be used to address water supply needs provisionally, for as long as surplus water is determined to be available. This interpretation reflects the different terminology, structure, and intent behind Section 6 and the WSA.

The WSA authorizes the Corps to include water supply storage as a purpose of a Corps reservoir project, provided that State or local interests agree to pay for the costs allocated to

that storage. The WSA by its terms does not limit or define the time period for which water supply storage may be used, but Congress has expressly provided in separate legislation that when State or local interests have contributed to or contracted to pay for the cost of providing water supply storage space in Corps reservoirs, their use may continue during the remaining existence of the facility.[38]

Section 6, by contrast, authorizes the Corps to enter into contracts for uses of surplus water, when surplus water is determined to be available, and on such terms as the Secretary considers reasonable, provided such contracts do not adversely affect then existing lawful uses of such water. The proposed rule would define ''surplus water'' to mean water that may be provisionally available at a Corps reservoir, because it is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir. Section 6 does not make water supply storage an authorized purpose of a project, and the proposed rule would not require users to pay for storage.

Congress provided two separate, discretionary authorities under Section 6 and the WSA, and expected the Corps to exercise its discretion to use those authorities to accommodate different needs. Consistent with that Congressional intent, the Corps' view is that the WSA should be used to accommodate long-term water supply needs by including storage for that purpose, and Section 6 should be used to accommodate water supply needs provisionally, when surplus water is available at a Corps reservoir.

Finally, the proposed rule would clarify that in implementing either Section 6 or the WSA, the Corps does not sell water or allocate water rights. In taking action pursuant to either statute, the Corps will respect State prerogatives regarding allocation of water resources, and ensure consistency with any applicable interstate water agreements or compacts.

II. Scope of This Proposed Rule

The proposed rule would apply prospectively to actions that the Corps may take at Corps reservoir projects to accommodate uses of surplus water pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708, or uses of storage pursuant to the WSA of 1958, 43 U.S.C. 390b. It would not alter the terms of existing water supply agreements with the Corps, but would apply to all water storage agreements, including new agreements for users with expiring agreements, finalized after the effective date of the final rule. Current water supply withdrawals that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. If those withdrawals are found to require a Section 6 surplus water contract or a WSA storage agreement, the appropriate agreement shall be required in order for the withdrawals to continue.

The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities. It would not apply to uses of water or storage that may be authorized by other federal laws or implementing regulations, or to the exercise of Tribal reserved water rights. It would not establish or determine any consumptive water rights.

Nor would the proposed rule itself result in any physical changes or changes to operations at Corps reservoirs. The proposed rule would bring greater clarity and consistency to the Corps' implementation of Section 6 and the WSA, but would not itself cause particular decisions to be made or actions to be taken at particular projects. Such decisions would be made only after subsequent reports and documentation pursuant to other laws and regulations that are not within the scope of this proposed rule.

III. Administrative Requirements

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

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), the Corps must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Orders. The Executive Orders define ''significant regulatory action'' as one 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, 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 the Executive Order.

The Corps has determined that the proposed action is a ''significant regulatory action,'' because it raises novel legal or policy issues. The Corps' water supply practices and lack of formal regulations in this area have resulted in litigation regarding its authority to make operational changes to accommodate water supply under the WSA, and have frustrated the finalization of contractual arrangements for the withdrawal of surplus water from Corps reservoirs under Section 6. In proposing this rule, the Corps seeks to establish a uniform understanding of Section 6 and the WSA and the range of activity that is authorized under each statute. These matters involve novel legal and policy issues. Because the Corps has determined that this proposal involves a ''significant regulatory action,'' we have submitted this action to OMB for review, and any changes made in response to OMB recommendations have been documented in the docket for this action.

The proposed rule does not meet the other tests for a ''significant regulatory action.'' With respect to the first test, the rule is not expected to have an annual effect on the economy of $100 million or more. The proposed rule would not cause any physical changes or changes to operations at any Corps reservoir. With respect to future actions that could be undertaken pursuant to the WSA, the proposed rule largely clarifies existing interpretations, definitions and policies, and would not modify the terms of existing storage agreements, although it would establish requirements for future agreements and require agreements for water supply users currently operating without a contract, if continuing uses are subsequently determined to fall within the authority of either Section 6 or the WSA. It would not change the Corps' current pricing policies for the inclusion of storage under the WSA, and would not impose additional costs on others or affect the payment of revenues to the Treasury for water supply storage under the WSA. The proposed rule is

[38] See Public Law 88–140, § 1–4, 77 Stat. 249 (Oct. 16, 1963) (codified at 43 U.S.C. 390c–390f), providing that when State or local interests have ''contributed to the Government, or . . . contracted to pay to the Government over a specified period of years, money equivalent to the cost of providing for them water storage space at Government-owned dams and reservoirs, constructed by the Corps of Engineers,'' those State or local interests may continue their use of such storage ''during the existence of the facility,'' subject to performance of contractual obligations, including annual operation and maintenance payments.

intended to clarify and adopt the Corps' customary practices with regard to storage accounting and accounting for return flows, and to make storage accounting methodologies more transparent, without disrupting current practice or creating new incentives or disincentives for utilizing Corps reservoirs for water supply. While the proposed rule would formally codify the Corps' practice of seeking comment from other agencies and the public on proposed reallocations of storage under the WSA, the proposed rule would not significantly change that existing practice, and would not impose additional requirements on any other entity. Rather, the rule is expected to improve clarity and coordination, providing unquantified benefits by reducing misunderstanding and litigation risk. In the case of Section 6 and WSA actions at projects that include federal hydropower, the Corps would coordinate in advance with the applicable federal PMA, and utilize in its determinations any information that the PMA provides regarding potential impacts to the federal hydropower purpose.

With respect to Section 6, the proposed rule would clarify and modify existing interpretations, definitions and policies applicable to future surplus water contracts, without affecting the terms of existing contracts. The proposed rule would establish a new methodology for determining a ''reasonable'' price for surplus water contracts, clarify the definitions of the terms ''surplus water'' and ''domestic and industrial uses,'' and simplify the processes for granting the approvals associated with surplus water determinations under Section 6. These provisions are expected to provide unquantified benefits by reducing misunderstanding and litigation risk, and also to increase the number of surplus water contracts that the Corps will enter into pursuant to Section 6, to accommodate some uses that have previously occurred without formal water supply agreements.

The proposed rule will bring the Corps' interpretation of a ''reasonable'' price into conformity with the provisions of WRRDA 2014 relating to charges for surplus water uses at the Missouri River mainstem reservoirs. In accordance with that Act, the proposed rule would acknowledge that the Corps will not charge for surplus water uses at its Missouri River mainstem reservoirs for a ten-year period ending June 10, 2024. For new Section 6 agreements at all other Corps reservoirs, and for any new Section 6 agreements at the Missouri River mainstem reservoirs after June 10, 2024, the Corps is proposing to determine the ''reasonable'' price of surplus water based upon the full, separable costs the Corps incurs in accommodating the surplus water request. The Corps does not expect it ordinarily will incur significant costs in making surplus water available, or that, to the extent such costs are incurred, they would be significant. The cost implications of these provisions fall far short of the Executive Orders' $100 million threshold, because the few surplus water contracts that do exist involve total costs in the thousands, not millions, of dollars; most current uses of surplus water are occurring only by virtue of an easement across Corps lands, without surplus water contracts and without charges for surplus water use; and most uses of surplus water under the proposed rule would involve little or no charge for the new surplus water contract that would be required. Transactional costs associated with the execution of new surplus water agreements, where presently only easements have been issued to facilitate surplus water withdrawals, are expected to be small, because the proposed rule would combine the surplus water contract approval with the easement approval process that already exists.

The Corps has only rarely entered into surplus water contracts pursuant to Section 6. As of July 2016, nine contracts relying on Section 6 were currently in effect, two of which involved no cost at all, and only one of which involves a total cost greater than $1039; the proposed rule would not affect the terms of any of these existing contracts. Apart from those few existing contracts, internal audits have identified approximately 1,600 real estate instruments that have been issued to grant access across Corps project lands for water intakes at Corps reservoirs: 400 easements at the 6 Missouri River mainstem reservoirs, and 1,200 real estate instruments at non-Missouri River projects.[39] Approximately 2,300 individual withdrawals are associated with these easements, for purposes variously described as municipal and industrial, domestic, irrigation, and unspecified. Specific details as to the purpose, amount, and authority for most of these withdrawals are not available. However, based on information provided by the Corps' District and Division offices, it is believed that the great majority of the 1,600 real estate instruments support relatively small-scale withdrawals, associated with State-administered water rights, for limited time periods, which have no known effect on project operations. Some of the uses associated with the 1,600 real estate instruments, including approximately 400 real estate easements for water withdrawal intakes at the Missouri River mainstem reservoirs, have previously been identified as potential candidates for Section 6 surplus water contracts, even though no contracts are presently associated with the withdrawals. Analysis of Missouri River withdrawals, and the limited information available with respect to non-contractual water supply withdrawals elsewhere, has not identified any inference with project operations from withdrawals associated with the 1,600 real estate easements. Thus, the Corps believes that under the proposed rule, which would clarify and refine the definitions of ''surplus water'' (generally, water that is not required to fulfill an authorized purpose of a project) and ''domestic and industrial uses'' (beneficial uses other than irrigation uses under 43 U.S.C. 390, *i.e.,* the federal Reclamation laws), most of the approximately 2,300 current withdrawals, associated with the approximately 1,600 real estate instruments, could be accommodated under the authority of Section 6.

For purposes of evaluating the economic effects of the proposed rule, the Corps assumes that an equivalent number of withdrawals could, in the future, be accommodated on an annual basis through surplus water contracts pursuant to Section 6. The proposed rule provides that surplus water contracts would be combined with the real estate instrument necessary to provide access for the withdrawals. Thus, the Corps estimates that under the proposed rule, it would enter into approximately 1,600 limited-term surplus water authorizations (combined contract and easement documents), renewable for as long as surplus water remains available. Without the proposed rule, the Corps would not enter into most or all of these contracts, because the authority for the withdrawals, and the Corps' policies for documenting and applying Section 6 to such withdrawals, would remain unclear. Under the proposed rule, the Corps would continue to issue and charge for real estate instruments in accordance with other applicable law and regulation, and would charge for the surplus water

[39] *See* CECW–P, Memorandum for Assistant Secretary of the Army (Civil Works), Subject: Audit of Water Withdrawals from the U.S. Army Corps of Engineers Reservoirs and Projects Nationwide 11–13 (Mar. 30, 2012) (on file); CECW–P, Memorandum for Assistant Secretary of the Army (Civil Works), Subject: Audit of Water Withdrawals from the Missouri River Mainstem Reservoirs, Encl. 1 at 3 (Feb. 3, 2012) (on file).

contracts based on the full, separable costs, if any, that the Government incurs in making surplus water available.

At the Corps' Missouri River projects, where 400 of the 1,600 current water intake easements are located, the Corps would not assess any charge for the surplus water use before June 2024, pursuant to WRRDA 2014. The proposed rule would no effect on the price of such surplus water contracts, and no effect on the amount that such users pay ($0), or the revenues accruing to the U.S. Treasury ($0).

At reservoir projects outside the Missouri River mainstem system—and at the Missouri River projects, after June 2024—the proposed rule would provide for charges for surplus water contracts based only on the full, separable costs incurred by the Government in making the surplus water available, which is expected to result in no more than minimal cost to the user for future surplus water contracts. Of the few surplus water contracts that currently exist outside the Missouri River basin, most (6 out of 7) involve a total cost to the user of about $1000 over a 5-year contract period. The costs for these contracts have included a $1000 administrative charge, plus additional costs based on estimated revenues or benefits foregone, or a share of OMRR&R expenses, ranging from $9 in one case (for a total contact cost of $1009 over 5 years) to $71,780 (for a total contract cost of $72,780 over 5 years). For the great majority of the estimated 1,600 current surplus water uses that are presently being made at no cost, there would be a minor cost difference under the proposed rule, unless the surplus water withdrawals involve a significant cost to the Government. Without the proposed rule, these withdrawals would be expected to continue without surplus water contracts, and therefore without cost to the user, and without revenues to the United States Treasury associated with the withdrawals. Under the proposed rule, the Corps could would enter into surplus water agreements in the future authorizing such uses, charging only the full, separable costs to the Government, which are expected to be small, or non-existent. Considering that the few surplus water contracts currently in effect charge approximately $1000 per contract, without identifying significant separable costs to the Government, and assuming that the full, separable costs of making surplus water available in most cases would be minimal, the cost difference under the proposed rule would amount to a reduction in cost to users of approximately $1000 per contract, and a reduction in revenues to the Treasury of approximately $1000 per contract. If the full, separable costs for new surplus water contracts averaged $1,000 per surplus water contract—similar to the price currently paid under existing surplus water contracts, and likely more than the cost that would be assessed under the proposed rule—the additional cost charged to users, and the additional revenue received by the U.S. Treasury, for 1,600 surplus water contracts would amount to a total of $1,600,000.

The cost implications of the proposed rule for determining ''reasonable'' prices under Section 6 would likely be even less than $1,600,000, because 400 of the 1,600 easements are associated with withdrawals from the Missouri River mainstem reservoirs, where all charges for surplus water uses are precluded by statute (WRRDA 2014) until 2024, with or without the proposed rule. Thus, for purposes of evaluating the economic impacts of the proposed rule, the Corps has assumed that there would be no charge for those 400 surplus water uses at the Missouri River projects.[40] Assuming that only 1,200 of 1,600 new surplus water contracts under the proposed rule would involve charges of up to $1000 per contract, the total cost to users of such contracts would be $1,200,000 (see Table 1 below). In any event, the annual effect on the economy from the proposed pricing policy under Section 6 would be far less than $100 million.

TABLE 1—EASEMENTS AND ESTIMATED CONTRACT COSTS WITH AND WITHOUT PROPOSED RULE

Easement location	Approximate number of easements	Approximate cost for surplus water (without proposed rule)	Estimated cost for surplus water (under proposed rule)	Total cost difference—with and without rule
Missouri River Mainstem System	400	$0	[41] $0	$0
Nationwide (Non-Missouri River)	1200	$0	≤ $1000	≤ $1,200,000

The provisions streamlining the processes for evaluating and granting the approvals associated with surplus water determinations are expected to reduce the administrative requirements associated with individual surplus water requests and eliminate former practices that have frustrated the finalization of contracts for uses of surplus water at Corps reservoirs. They will result in some unquantified cost savings to the Government and the party making the request for use of the surplus water; however, those savings (which are discussed in Part III.C. of the proposed rule) do not approach the monetary threshold specified in the Executive Orders.

As to the other matters to be considered under the first test for a ''significant regulatory action'' under

[40] In draft surplus water reports recently prepared for the six Missouri River mainstem reservoirs, prior to the enactment of WRRDA 2014, the Corps had estimated that the total annual cost of storage for all current and projected surplus water uses at those six reservoirs would be approximately $10,000,000, with an annual cost per acre-foot of surplus water of $53.77. See U.S. Army Corps of Engineers, Omaha District, Final Garrison Dam/Lake Sakakawea Project, North Dakota, Surplus Water Report Vol. 1 at 3–46 to 3–55 (March 2011) (finalized July 13, 2012); Final Fort Peck Dam/Fort Peck Lake Project, Montana, Surplus Water Report Vol. 1 at 3–29 to 3–35 (September 2014) (draft); Final Oahe Dam/Lake Oahe Project, South Dakota and North Dakota, Surplus Water Report Vol. 1 at 3–29 to 3–36 (September 2014) (draft); Final Big Bend Dam/Lake Sharpe Project, South Dakota, Surplus Water Report Vol. 1 at 3–27 to 3–34 (September 2014) (draft); Final Fort Randall Dam/Lake Francis Case Project, South Dakota, Surplus Water Report Vol. 1 at 3–27 to 3–34 (September 2014) (draft); Final Gavins Point Dam/Lewis and Clark Lake Project, Nebraska and South Dakota, Surplus Water Report Vol. 1 at 3–28 to 3–35 (September 2014) (draft), *available at http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/PlanningProjects.aspx.* The reports, which addressed potential surplus water uses during a 10-year period of analysis, originally calculated approximate prices for those uses according to the pricing methodology set forth in ER 1105–2–100. The reports did not specifically identify or discuss any full, separable costs to the Government associated with the projected surplus water withdrawals. As acknowledged in each of the surplus water reports, WRRDA 2014, § 1046(c) precludes any charges for surplus water contracts during the ten-year period contemplated in the reports, and thus it is not reasonably foreseeable that the pricing for storage as originally described in the draft reports would be implemented, with or without the proposed rule.

[41] Until June 2024, per WRRDA 2014 § 1046(c).

Executive Orders 12866 and 13563, the proposed rule would not adversely affect in a material way, the economy, productivity, competition, jobs, public health or safety, of state, local, or Tribal governments or communities. The proposed rule clarifies the Corps' interpretation of its authority under the WSA and Section 6. The proposed rule is intended to bring transparency and certainty to the Corps' contract practices under those authorities and to ensure those practices align with Congressional intent. Their goal is to enhance the Corps' ability to cooperate with State, Tribal, Federal, and local interests in facilitating water supply uses at Corps' reservoirs in a manner that is consistent with the authorized purposes of those reservoirs, and does not interfere with lawful uses of water. The proposed rule would apply prospectively and would not alter the terms of any existing water supply agreements. The proposed rule would not impose any unfunded mandates on others, or result in any on the ground changes in reservoir operations. Those changes are determined through separate administrative processes.

With respect to the second and third definitional tests for determining whether the proposal constitutes a ''significant regulatory action'', this proposal will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. The proposed rule would apply only to reservoir projects operated by the Corps, not to projects operated by other federal or non-federal entities.

B. Unfunded Mandates Reform Act (Pub. L. 104–4, § 202)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, requires 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 agencies 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, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. The proposed rule would clarify the Corps' interpretation of its authority under Section 6 and the WSA and establish more consistent policies for the Corps' exercise of those authorities. The proposed rule does not require any non-federal entity to take any action under these authorities and does not impose any unfunded requirements for State, local, and Tribal governments, or for the private sector.

C. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking 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 this rule on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (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; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

With respect to future actions that could be undertaken pursuant to the WSA, the proposed rule largely clarifies existing interpretations, definitions and policies, and would not modify the terms of existing storage agreements with small entities or others. The proposed rule would not change the Corps' pricing policies for the inclusion of storage under the WSA, and would not impose additional costs on others or affect the payment of revenues to the Treasury for water supply storage under the WSA. It would clarify and adopt the Corps' customary practices with regard to storage accounting and accounting for return flows, and would make storage accounting methodologies more transparent, without disrupting current practice or creating new incentives or disincentives for utilizing Corps reservoirs for water supply. While the proposed rule would formally codify the Corps' practice of seeking comment from the public on proposed reallocations of storage under the WSA, the proposed rule would not significantly change that existing practice, and would not impose additional requirements on small entities, or any other entity. Thus, the proposed rule with respect to the WSA will not have a significant economic impact on a substantial number of small entities.

The proposed rule for implementing Section 6 also will not have a significant impact on a substantial number of small entities; while surplus water users making withdrawals without a contract would need to obtain one in order to continue those withdrawals, the cost of the contract is anticipated to be minimal. Under the proposed rule, the Corps would no longer charge surplus water users, including small entities, for the cost of reservoir storage under Section 6. Should a potential user, including a small entity, elect to enter into a surplus water contract with the Corps, the price charged under that contract would be based only upon the full, separable costs that the Government may incur in making surplus water available. The Corps does not expect that it ordinarily will incur any direct significant costs in making surplus water available, or that such costs would be substantial, given the proposed definition of ''surplus water'' as water that is not required during a specified time period to accomplish any authorized purpose of the project. The proposed rule would also implement recently enacted law by providing, in accordance with WRRDA 2014, § 1046(c), that no charge will be assessed for surplus water uses at the Corps' Missouri River mainstem reservoirs for ten years after June 10, 2014.

The new pricing policy under the proposed rule would result in an increased number of contracts for surplus water, since some existing surplus water uses are not currently under contract, but this is not expected to have a significant economic impact on a substantial number of small entities. Issues surrounding the Corps' existing pricing policies and implementation practices under Section 6 have frustrated the finalization of contractual understandings regarding current and prospective water withdrawals. As a result, most surplus water withdrawals are occurring without contracts and without payment to the United States Treasury. The Corps has identified nine current contracts that identify Section 6 as a source of authority, of which seven provide for some payment to the United States Treasury in connection with the surplus water withdrawals. Only one of these agreements involves a total payment greater than $1,000, and annual payments of any amount. Six of these agreements are for a total amount of approximately $1,000, with no annual charges, and two of the agreements are at no cost, because they are for surplus

water at Lake Sakakawea, a Missouri River mainstem reservoir subject to the no-charge provision of WRRDA 2014. Taking this experience into account, the new pricing policy for surplus water is not expected to have a significant economic effect on a substantial number of small entities. Of the nine current users with surplus water contracts, two (at Missouri River projects) would pay nothing, and the remaining seven would pay approximately the same, or less, under the proposed rule. For those users currently making withdrawals, assuming the withdrawals continue with new surplus water contracts, the cost under the proposed rule would not be substantial. Surplus water users at the Missouri River mainstem reservoirs would not be charged for surplus water contracts until at least 2024, and charges after that date under the proposed rule would likely not be substantial under the proposed rule.

The proposed rule would streamline administrative processes and reduce transactional costs associated with surplus water contracts under current policy and practice. Instead of setting forth the understandings surrounding surplus water withdrawals in two documents (a real estate easement and a surplus water agreement), the Corps is proposing in this rule to combine the approvals that would be required to provide access to, and the authorization for the withdrawals, in one document. Virtually all entities withdrawing water from Corps reservoirs hold separate grants of real estate instruments (typically easements) allowing access across federal project lands. Clarifying the definition of ''surplus water,'' and simplifying and streamlining the administrative processes associated with authorizing surplus water withdrawals, should promote the finalization of contracts for surplus water and facilitate a small entity's access to that water. It also should result in some cost savings to small entities, because the administrative costs associated with one document (a contract and easement) can be expected to be less than the administrative costs associated with two documents (an easement and a separate contract). These cost savings, while beneficial to small entities, are not expected to be significant, given the relatively small costs involved.

In general, the Corps' practices for recovering the costs associated with such agreements are guided by the principle that the services the Corps provides should be self-sustaining. However, for several reasons, it is not possible to arrive at a firm figure for the savings a small entity can expect to reap from the administrative simplification proposed in this rule. First, the Corps has entered into a very small number of Section 6 agreements, and it does not have reliable information on the costs that could be associated with such agreements, although those costs are expected to be low. As noted above, of the 9 contracts relying on Section 6 in effect as of August 2016, 2 involve no cost at all, and 6 involve a total cost of approximately $1000, based on estimated administrative costs, and revenues and benefits foregone. The Corps lacks cost information for other withdrawals, believed to be utilizing surplus water, that are occurring in connection with approximately 1,600 easements, without contracts. Second, the charges that the Corps imposes for providing the easements traversing Federal lands are governed by separate laws and policies unrelated to surplus water, and they vary according to the complexity of the transaction and the amount of information gathering required, as well as the value of the real estate interest being conveyed.

In general, the fees for real estate easements vary from approximately $300 to $1,000 depending on the complexity of the transaction involved. Extrapolating from these real estate related costs and assuming they bear some similarity to the administrative costs a user may be charged for the expense to the Government of preparing and administering a separate surplus water contract, it is reasonable to conclude that small entities may expect to save similar, or slightly smaller amounts, per each transaction, because the Government would be authorizing the surplus water withdrawals through a single real estate easement, rather than two separate documents and transactions. The Corps estimates that a total of approximately 1,600 uses of surplus water, pursuant to easements but without contracts, are occurring at Corps reservoirs and could potentially be authorized under Section 6. As shown on Table 1, above, the total cost charged to all users for surplus water uses, if 1,600 new contracts were executed pursuant to the proposed rule, is expected to be equal to or less than $1,200,000. The impact on small entities associated with the savings in administrative costs under the proposed rule would not be significant, even if one assumes the Corps grants approvals to such entities for 1,600 surplus water withdrawals each year, through a combined easement and authorization document, rather than through separate documents.

D. Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

This proposed rule does not impose any new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* As before, parties seeking to make use of Corps reservoirs for water supply must submit a request to the Corps, and provide information regarding the amount of withdrawals requested. However, the Corps has not previously analyzed the information collection burden associated with water supply requests from Corps reservoirs, or solicited public comments or secured OMB approval for information collection requests specific to the Corps' water supply program. Accordingly, the Corps is separately developing a new form that could be used by applicants seeking to make use of Corps reservoirs for water supply. This new, proposed form, and the Corps' evaluation of the information burden associated with it, will be submitted to OMB for review and made available for public comment. This proposed rule governing the use of Corps reservoirs for water supply may be finalized prior to final approval of the associated information collection request, but no party will be required to complete the form or submit information related to a water supply request until an information collection request has been approved, and an OMB control number has been assigned.

Because this action is still under development, the Corps has not evaluated the information collection burden associated with the proposal, but the Corps does not expect that the burden would be significant. Preliminarily, based on other survey forms that the Corps has used with OMB approval, the Corps expects that the burden would involve approximately 1 hour per user to complete the form. The Corps expects to enter into as many as 1600 contracts initially, to reflect ongoing surplus water uses that are not presently under contract; but over time, the Corps expects that water supply requests would be received at the present rate. Between 1986 and 2014, the Corps entered into an average of 5 water supply agreements per year.

Additionally, the Corps recognizes that water supply requests typically require separate approvals from the Corps, under its regulatory (*e.g.,* Clean Water Act or Rivers and Harbors Act) or real estate authorities. The proposed water supply information collection request would reference, but would not duplicate or add to, the information collection requests associated with these separate activities. Parties seeking to

make use of Corps reservoirs would, as before the proposed rule, be required to submit the information necessary to process those applications.

E. Executive Order 13132, ''Federalism''

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.'' The phrase ''policies that have Federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

We do not believe that the proposed rule has Federalism implications. The Corps operates its water resource development projects in accordance with federal legislation that Congress has enacted. In accordance with this Congressional intent, the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State authorities. The Corps develops water control plans and manuals through a public process, affording all interested parties the opportunity to present information regarding uses that may be affected by Corps operations, and the Corps takes that information into account in determining operations for authorized purposes of its projects. The proposed rule acknowledges, but would not change, these authorities, operations pursuant to these authorities, or the processes for updating operating manuals.

Section 6 and the WSA authorize the Corps to make its reservoirs available for water supply use by others, even where water supply is not otherwise a specifically authorized purpose of those projects. Congress did not intend for the Corps to interfere with State allocations of water when exercising its discretion under Section 6 or the WSA. The proposed rule recognizes this and would not interfere with State prerogatives. The proposed rule would apply only to Corps reservoirs, not to reservoir operated by non-federal entities, and it would not establish or determine any consumptive water rights. Nor would the proposed rule itself result in any physical changes or changes to operations at Corps reservoirs. The proposed rule does include provisions intended to improve coordination with States, when the Corps takes action pursuant to Section 6 or the WSA, but it would not change the relationship between the federal government and the States.

Rather, the rule would reinforce the Corps' current practice of recognizing the interests and rights of States in the development of waters, as provided in existing law. The proposed rule would provide that, when the Corps does proposed to take action pursuant to its authority under Section 6 or the WSA, such action shall not adversely affect any then-existing, State-recognized water right. The proposed rule would improve the ability of the Corps to exercise its authority under Section 6 and the WSA to facilitate the exercise of water rights held by others. The proposed rule would also improve the ability of the Corps to accommodate the efforts of States and local interests to develop their own water supplies through nonfederal conveyance systems, in connection with the operation of Corps reservoir projects. The proposed rule would not apply to uses of water or storage that may be authorized by other federal laws or implementing regulations. It would not establish or determine any consumptive water rights.

Finalization of the proposed rule would not impose any substantive obligations on State or local governments. We do not believe that clarifying and improving the Corps' ability to exercise its statutory authorities under Section 6 and the WSA will have substantial direct effects on the States, the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we do not believe that Executive Order 13132 applies to this proposed rule.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires the agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

We do not believe that the proposed rule has tribal implications. The Corps operates its water resource development projects in accordance with federal legislation that Congress has enacted. In accordance with this Congressional intent, the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with lawful uses pursuant to Tribal authorities. The Corps develops water control plans and manuals through a public process, affording all interested parties the opportunity to present information regarding uses that may be affected by Corps operations, and the Corps takes that information into account in determining operations for authorized purposes of its projects. The proposed rule acknowledges, but would not change, these authorities, operations pursuant to these authorities, or the processes for updating operating manuals. The proposed rule would not itself result in any physical changes or changes to operations at Corps reservoirs.

In proposing this rule, we recognize that Tribal reserved water rights enjoy a unique status under federal law, and that the exercise of such rights is not dependent upon the Corps' discretionary actions pursuant to Section 6 or the WSA. The proposed rule would not apply to uses of water or storage that may be authorized by other federal laws or implementing regulations, or to the exercise of Tribal reserved water rights. It would not establish, define, or quantify any Tribal water rights. The proposed rule would clarify that the Corps' exercise of its authority under Section 6 or the WSA shall not adversely affect any Tribal or other federal reserved water right, including reserved water rights that have not yet been quantified. It contains provisions that are intended to ensure proper coordination before decisions are made, to foster more effective communication with Tribes, and to ensure that reserved water rights of Tribes are protected.

The proposed rule does not impose new substantive requirements on Indian tribal governments. We do not believe that clarifying and improving the Corps' ability to exercise its statutory authorities under Section 6 and the WSA will have substantial direct effects on tribal governments, the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, we do not believe that

Executive Order 13175 applies to this proposed rule.

G. Congressional Review Act, 5 U.S.C. 801 et seq.

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. We 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. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This proposed rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (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. This proposed rule relates to the use of Corps reservoirs for water supply under Section 6 or the WSA. The proposed rule does not by itself affect operations at any Corps reservoir. Moreover, subsequent actions that the Corps may take to accommodate water supply uses at a Corps reservoir project would have to be consistent with the authorized purposes of that reservoir project. The proposed rule is consistent with current agency practice, does not impose new substantive requirements, and therefore will not have a significant adverse effect on the supply, distribution, or use of energy.

I. Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998 (63 FR 31855), regarding plain language, this preamble is written using plain language. The use of ''we'' in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

J. Environmental Documentation

The Corps has prepared a draft Environmental Assessment (EA) in accordance with the National Environmental Policy Act (NEPA). The proposed rule is procedural in nature, in that it proposes to establish an accepted legal interpretation of the authority conferred under Section 6 and the WSA, and to set forth the processes that will be followed when taking action under these authorities. The clarifications of policies governing the Corps' implementation of Section 6 and the WSA would not, in and of themselves, significantly affect the quality of the human environment. Only subsequent, specific actions that the Corps might consider taking at particular Corps reservoir projects, consistent with the principles set forth in the proposed rule, may affect the environment. The environmental effects of any such subsequent actions, such as a decision to enter into an agreement with a nonfederal entity for surplus water uses of water at a particular Corps reservoir pursuant to Section 6, or to include storage in a particular reservoir project for water supply pursuant to the WSA, will be separately evaluated in accordance with NEPA before any final decisions are rendered. Any such environmental effects would be dependent on the circumstances of the particular reservoir project, and of the particular action that may be proposed. Thus, the Corps has made a preliminary determination that preparation of an Environmental Impact Statement (EIS) will not be required for publication of this proposed rule. A copy of the draft EA is available at *http://www.regulations.gov* in docket number COE–2016–0016.

List of Subjects in 33 CFR Part 209

Electric power, Mississippi River, Navigation (water), Sunshine Act, Surplus water, Water supply storage, Waterways.

Dated: December 8, 2016.

Jo-Ellen Darcy,

Assistant Secretary of the Army (Civil Works), Department of the Army.

33 CFR PART 209 [AMENDED]

■ 1. The authority citation for part 209 is revised to read as follows:

Authority: 5 U.S.C. 301; 33 U.S.C. 1; 10 U.S.C. 3012; 33 U.S.C. 708; 43 U.S.C. 390b

■ 2. Add § 209.231 to read as follows:

§ 209.231 Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, municipal, and industrial water supply.

(a) *Definitions.* For purposes of the Water Supply Act, 43 U.S.C. 390b, when applied to a U.S. Army Corps of Engineers reservoir project:

(1) The terms ''reservoir project'' and ''project'' mean any facility surveyed, planned, or constructed, or to be planned, surveyed, or constructed, and under the operational control of the U.S. Army Corps of Engineers, to impound water for multiple purposes and objectives. The terms ''reservoir project'' and ''project'' may comprise a single dam-and-reservoir facility or a system of improvements, depending on how the facility or system is authorized and funded by Congress.

(2) The terms ''water supply,'' ''municipal or industrial water'' and ''municipal and industrial water supply'' mean water that is or may be put to any beneficial use under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390.

(3) The term ''storage may be included'' means making storage available for water supply by modifying the plans for an as-yet unconstructed reservoir project; by changing the physical structure of an existing reservoir project; or by changing the operations of an existing reservoir project.

(4) The term ''seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed'' means to adversely affect the Congressionally-authorized purposes of a project or reservoir project in a manner that would fundamentally depart from Congressional intent, as expressed through the relevant authorizing legislation. Evaluation of effects on authorized purposes requires both technical and legal analysis of the proposed action, in light of that Congressional intent.

(5) The term ''major structural or operational change'' means a change, to the physical structure or operations of a project or reservoir project, that would fundamentally depart from Congressional intent, as expressed through the relevant authorizing legislation. Evaluation of structural and operational changes requires both technical and legal analysis of the proposed changes, in light of that Congressional intent.

(b) *For purposes of section 6 of the Flood Control Act of 1944, 33 U.S.C. 708:*

(1) The term ''reservoir,'' as used in this section, means any facility, under the operational control of the U.S. Army Corps of Engineers, that impounds water and is capable of being operated for multiple purposes and objectives. The term ''reservoir'' may comprise a single dam-and-reservoir facility or a system of improvements, depending on the Congressional intent for the project,

as expressed through the authorizing legislation relevant to that reservoir project or system of projects.

(2) The term ''surplus water'' means water, available at any reservoir defined in paragraph (b)(1) of this section, that the Assistant Secretary of the Army (Civil Works) determines is not required during a specified time period to accomplish an authorized federal purpose or purposes of that reservoir, for any of the following reasons—

(i) Because the authorized purpose or purposes for which such water was originally intended have not fully developed; or

(ii) Because the need for water to accomplish such authorized purpose or purposes has lessened; or

(iii) Because the amount of water to be withdrawn, in combination with any other such withdrawals during the specified time period, would have virtually no effect on operations for authorized purposes.

(3) The term ''domestic and industrial uses'' means any beneficial use under an applicable water rights allocation system, other than irrigation uses as provided under 43 U.S.C. 390.

(4) The term ''then existing lawful uses'' means uses authorized under a State water rights allocation system, or Tribal or other uses pursuant to federal law, that are occurring at the time of the surplus water determination, or that are reasonably expected to occur during the period for which surplus water has been determined to be available.

Policies.

(c) *Determinations; Approval Authority.* (1) *Public participation; coordination with federal agencies, States and Tribes:* Prior to making a final determination that storage may be included in a Corps reservoir pursuant to 43 U.S.C. 390b, or that surplus water within the meaning of 33 U.S.C. 708 is available at a Corps reservoir, a written report shall be prepared explaining and documenting the basis for such determination. That report shall include an evaluation of any operational changes and impacts to authorized project purposes, and shall be coordinated with interested Federal, State, and Tribal water resource agencies. Public notice and opportunity for comment on the report shall be provided.

(2) The inclusion of storage at any Corps reservoir for municipal and industrial water supply pursuant to 43 U.S.C. 390b shall require the approval of the Assistant Secretary of the Army (Civil Works).

(3) Determinations of the availability of surplus water pursuant to 33 U.S.C. 708 shall require the approval of the Assistant Secretary of the Army (Civil Works), and shall specify the time period in which surplus water is determined to be available.

(4) *Federal hydropower projects:* At any Corps reservoir that has federal hydropower as an authorized purpose, where the Corps is considering a proposal to include storage for water supply, or to enter into contracts for surplus water, the Corps will coordinate that proposal in advance with the federal Power Marketing Administration that is responsible for marketing that federal power. The Corps will utilize in its determinations any information provided by the Power Marketing Administration, including its evaluation of hydropower impacts and cost information regarding revenues foregone and replacement power costs, in determining the impacts of the proposed action (including whether the proposed action would ''seriously affect'' the hydropower purpose or involve a ''major structural or operational change'' under 43 U.S.C. 390b, or the determination of whether ''surplus water'' is available under 33 U.S.C. 708), and the cost of storage, if applicable, to be charged to the prospective water supply user.

(d) *Storage agreements pursuant to the Water Supply Act, 43 U.S.C. 390b.* (1) *General:* Agreements for the inclusion of storage for water supply in a Corps reservoir (water supply storage agreements) pursuant to 43 U.S.C. 390b shall be executed by the Assistant Secretary of the Army (Civil Works) or that official's designee, and shall identify an amount of storage estimated to reliably provide a gross amount of water supply withdrawals or releases, and the costs allocated to that water supply storage. Agreements that would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes, shall not be executed without Congressional approval.

(2) *Water supply storage accounting:* Before including storage for water supply, the Corps shall include in the report prescribed under paragraph (c)(1) of this section reasonable projections of withdrawals, return flows, and any other flows directly attributable to the proposed water supply storage use. Water supply storage agreements shall include, or incorporate by reference, appropriate mechanisms for accounting for actual storage usage and available water supply storage on a continuing basis, and withdrawals pursuant to those agreements shall be limited to the actual yield of the reallocated storage, as measured by that storage accounting. Such storage accounting mechanisms shall be based on the principle that all inflows to and losses from the Corps reservoir are credited or charged proportionally to each water supply storage account, except that direct water supply withdrawals from the reservoir shall be charged to the storage account of the entity making the withdrawal.

(3) *Pricing:* Water supply storage agreements pursuant to 43 U.S.C. 390b shall include provisions for repayment by the water supply user of all project costs allocated to water supply, as provided in paragraphs (d)(3)(i) through (d)(3)(iii) of this section, including an annual charge for an appropriate share of the joint-use operation, maintenance, repair, rehabilitation, and replacement (OMRR&R) costs, as follows:

(i) In the case of projects where water supply storage is to be included through new construction, project costs allocated to water supply shall include all direct costs directly attributable to water supply; a share of the remaining first cost (construction cost) of the project, to be allocated based on the water supply share of the estimated benefits to be realized from the project; and an appropriate share of annual OMRR&R costs of the project.

(ii) Where water supply storage is added to an existing project through structural modifications, project costs allocated to water supply shall include the direct costs of those modifications; an amount equal to fifty percent of the savings compared to the cost of the most likely alternative that could service the water supply need, in lieu of the proposed modification to the Corps reservoir; and an appropriate share of annual OMRR&R costs of the project.

(iii) In the case of projects where no new construction costs are incurred in including storage for water supply, the project costs allocated to water supply shall be determined based upon the higher of quantified benefits foregone, revenues foregone, or the updated cost of storage allocated to water supply. The amount of storage allocated to water supply shall reflect an amount of storage estimated to reliably provide an individual user's requested, gross water supply withdrawals (dependable yield). The water supply user shall be responsible for an appropriate share of annual OMRR&R costs of the project.

(iv) *Other charges:* Any charges for water supply storage agreements under paragraph (d)(3) of this section are in addition to any costs associated with any real property transactions or regulatory permits as may be necessary to facilitate the withdrawals.

(e) *Surplus water agreements pursuant to Section 6, 33 U.S.C. 708.* (1) *General:* Contracts for the use of surplus water pursuant to 33 U.S.C. 708 may be executed by the Assistant Secretary of the Army (Civil Works) or that official's designee, shall identify the amount of surplus water to be withdrawn, and shall be for a term not to exceed the duration of the applicable surplus water determination, as provided in paragraph (c)(3) of this section. The terms of such contracts and of any necessary easements may be incorporated into a single instrument, as provided in paragraph (g) of this section.

(2) *Pricing:* Except as provided in paragraph (e)(2)(i) of this section, or by applicable federal law, surplus water agreements pursuant to 33 U.S.C. 708 shall include an annual charge to reflect only the full, separable costs, if any, to the Government associated with the surplus water withdrawals.

(i) *Upper Missouri River Mainstem Reservoirs:* For the period ending ten years after June 10, 2014, no fee will be charged for surplus water agreements pursuant to 33 U.S.C. 708 for surplus water withdrawn from the Upper Missouri River Mainstem Reservoirs.

(ii) *Other charges:* Any charges for surplus water uses of reservoirs under paragraph (e)(2) of this section are in addition to any costs associated with any real property transactions or regulatory permits as may be necessary to facilitate the withdrawals.

(f) *Exercise of Discretion and Choice of Authority; Transition Period.* (1) The authorities of the Secretary of the Army as set forth in 33 U.S.C. 708 and 43 U.S.C. 390b are discretionary. The authority conferred under 33 U.S.C. 708 should be used, at the Secretary's discretion, to accommodate water supply needs provisionally, for limited time periods, so long as surplus water remains available, and provided that contracts for surplus water do not adversely affect then existing lawful uses of such water. The authority provided in 43 U.S.C. 390b should be used, at the Secretary's discretion, to accommodate long-term and permanent water supply needs that require the dependability afforded by storage in a Corps reservoir.

(2) *Transition period.* All new agreements entered into pursuant to 33 U.S.C. 708 and 43 U.S.C. 390b after the effective date of the final rule, including new agreements for users with expiring agreements, shall comply with the policies set forth in this section. Current water supply withdrawals that are occurring pursuant to easements only, without water supply agreements, will be reassessed when the easements expire, or within five years of the effective date of the final rule, whichever is earlier. If those withdrawals are found to require a Section 6 surplus water contract or a WSA storage agreement, the appropriate agreement shall be required in order for the withdrawals to continue.

(g) *Real Estate Instruments.* The Corps will issue any easements necessary to allow the withdrawal of water under either 33 U.S.C. 708 or 43 U.S.C. 390b in accordance with the provisions of 10 U.S.C. 2668. Such easements shall be conditioned on the grantee's continued compliance with the terms and conditions of authorizations for withdrawal pursuant to either 33 U.S.C. 708 or 43 U.S.C. 390b. The pricing policies set forth in paragraphs (d)(3) and (e)(2) of this section shall not alter or substitute for any charge assessed for the granting of an easement pursuant to 10 U.S.C. 2668 and applicable regulations. Easements issued in connection with surplus water agreements under 33 U.S.C. 708 may incorporate all necessary terms in a single instrument.

(h) *Relation to State, Tribal, or other federal reserved water rights:* The exercise by the Corps of authority under 33 U.S.C. 708 or 43 U.S.C. 390b shall not adversely affect any then-existing State water right, or Tribal or other federal reserved water right. It shall be the responsibility of private water supply users to secure and defend any state water rights necessary to use water withdrawn from a Corps reservoir. The Corps shall not obtain water rights on behalf of water supply users, nor shall it become, by virtue of any agreement executed pursuant to 33 U.S.C. 708 or 43 U.S.C. 390b, a party to any water rights dispute.

[FR Doc. 2016–30017 Filed 12–15–16; 8:45 am]

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Part VIII

Environmental Protection Agency

40 CFR Part 751

Trichloroethylene; Regulation of Certain Uses Under TSCA § 6(a); Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2016–0163; FRL–9949–86]

RIN 2070–AK03

Trichloroethylene; Regulation of Certain Uses Under TSCA § 6(a)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Trichloroethylene (TCE) is a volatile organic compound widely used in industrial and commercial processes and has some limited uses in consumer and commercial products. EPA identified significant health risks associated with TCE use in aerosol degreasing and for spot cleaning in dry cleaning facilities. EPA has preliminarily determined that these risks are unreasonable risks. To address these unreasonable risks, EPA is proposing under section 6 of the Toxic Substances Control Act (TSCA) to prohibit the manufacture, processing, and distribution in commerce of TCE for use in aerosol degreasing and for use in spot cleaning in dry cleaning facilities; to prohibit commercial use of TCE for aerosol degreasing and for spot cleaning in dry cleaning facilities; to require manufacturers, processors, and distributors, except for retailers of TCE for any use, to provide downstream notification of these prohibitions throughout the supply chain; and to require limited recordkeeping.

DATES: Comments must be received on or before February 14, 2017.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2016–0163, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods (*e.g.,* mail or hand delivery), the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket. Docket number EPA–HQ–OPPT–2016–0163 contains supporting information used in developing the proposed rule, comments on the proposed rule, and additional supporting information. A public version of the docket is available for inspection and copying between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding federal holidays, at the U.S. Environmental Protection Agency, EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Toni Krasnic, Chemical Control Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–0984; email address: *krasnic.toni@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may potentially be affected by this proposed action if you manufacture (defined under TSCA to include import), process, or distribute in commerce TCE or commercially use TCE in aerosol degreasers or for spot cleaning in dry cleaning facilities. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- All Other Miscellaneous Textile Product Mills (NAICS code 314999).
- Petroleum Refineries (NAICS code 324110).
- Petroleum Lubricating Oil and Grease Manufacturing (NAICS code 324191).
- Petrochemical Manufacturing (NAICS code 325110).
- Industrial Gas Manufacturing (NAICS code 325120).
- Other Basic Inorganic Chemical Manufacturing (NAICS code 325180).
- All Other Basic Organic Chemical Manufacturing (NAICS code 325199).
- Plastics Material and Resin Manufacturing (NAICS code 325211).
- Synthetic Rubber Manufacturing (NAICS code 325212).
- Paint and Coating Manufacturing (NAICS code 325510).
- Adhesive Manufacturing (NAICS code 325520).
- Soap and Other Detergent Manufacturing (NAICS code 325611).
- Polish and Other Sanitation Good Manufacturing (NAICS code 325612).
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS code 325998).
- Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing (NAICS code 326113).
- All Other Plastics Product Manufacturing (NAICS code 326199).
- Rubber and Plastics Hoses and Belting Manufacturing (NAICS code 326220).
- All Other Rubber Product Manufacturing (NAICS code 326299).
- Cement Manufacturing (NAICS code 327310).
- Ground or Treated Mineral and Earth Manufacturing (NAICS code 327992).
- Iron and Steel Pipe and Tube Manufacturing from Purchased Steel (NAICS code 331210).
- Steel Wire Drawing (NAICS code 331222).
- Copper Rolling, Drawing, Extruding, and Alloying (NAICS code 331420)
- Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing, and Extruding (NAICS code 331491).
- Nonferrous Metal Die-Casting Foundries (NAICS code 331523).
- Powder Metallurgy Part Manufacturing (NAICS code 332117).
- Metal Crown, Closure, and Other Metal Stamping (except Automotive) (NAICS code 332119).
- Saw Blade and Hand Tool Manufacturing (NAICS code 332216).
- Metal Window and Door Manufacturing (NAICS code 332321).
- Power Boiler and Heat Exchanger Manufacturing (NAICS code 332410).
- Other Fabricated Wire Product Manufacturing (NAICS code 332618).
- Machine Shops (NAICS code 332710).
- Precision Turned Product Manufacturing (NAICS code 332721).
- Bolt, Nut, Screw, Rivet, and Washer Manufacturing (NAICS code 332722).
- Metal Heat Treating (NAICS code 332811).
- Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers (NAICS code 332812).

• Electroplating, Plating, Polishing, Anodizing, and Coloring (NAICS code 332813).
• Oil and Gas Field Machinery and Equipment Manufacturing (NAICS code 333132).
• Cutting Tool and Machine Tool Accessory Manufacturing (NAICS code 333515).
• Small Arms, Ordnance, and Ordnance Accessories Manufacturing (NAICS code 332994).
• Fluid Power Pump and Motor Manufacturing (NAICS code 333996).
• All Other Miscellaneous Fabricated Metal Product Manufacturing (NAICS code 332999).
• Oil and Gas Field Machinery and Equipment Manufacturing (NAICS code 333132).
• Industrial and Commercial Fan and Blower and Air Purification Equipment Manufacturing (NAICS code 333413).
• Cutting Tool and Machine Tool Accessory Manufacturing (NAICS code 333515).
• Pump and Pumping Equipment Manufacturing (NAICS code 333911).
• Fluid Power Pump and Motor Manufacturing (NAICS code 333996).
• Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing (NAICS code 334511).
• Automatic Environmental Control Manufacturing for Residential, Commercial, and Appliance Use (NAICS code 334512).
• Motor and Generator Manufacturing (NAICS code 335312).
• Primary Battery Manufacturing (NAICS code 335912).
• Carbon and Graphite Product Manufacturing (NAICS code 335991).
• Motor Vehicle Brake System Manufacturing (NAICS code 336340).
• Aircraft Manufacturing (NAICS code 336411).
• Other Aircraft Parts and Auxiliary Equipment Manufacturing (NAICS code 336413).
• Guided Missile and Space Vehicle Manufacturing (NAICS code 336414).
• Ship Building and Repairing (NAICS code 336611).
• Dental Equipment and Supplies Manufacturing (NAICS code 339114).
• Other Chemical and Allied Products Merchant Wholesalers (NAICS code 424690).
• Petroleum Bulk Stations and Terminals (NAICS code 424710).
• Hazardous Waste Treatment and Disposal (NAICS code 562211).
• Solid Waste Combustors and Incinerators (NAICS code 562213).

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Persons who import any chemical substance governed by a final section 6(a) rule are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this proposed rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

If you have any questions regarding the applicability of this proposed action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

B. What is the Agency's authority for taking this action?

Under section 6(a) of TSCA (15 U.S.C. 2605(a)), if EPA determines after risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more requirements to the extent necessary so that the chemical substance or mixture no longer presents such risk. Section 6(b)(4) (15 U.S.C. 2605(b)(4)) specifies that risk evaluations must be conducted without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation, under the conditions of use.

Since the original enactment of TSCA in 1976, EPA has addressed exposure to workers. For example, EPA routinely places restrictions on conditions of manufacturing, processing, distribution and use under the TSCA section 5 (15 U.S.C. 2604) new chemicals program. Further, as defined in TSCA, the term ''potentially exposed or susceptible subpopulation'' specifically includes workers. (15 U.S.C. 2602(12)). Thus, TSCA unambiguously provides EPA with the authority to address chemical risks to workers.

When issuing a rule under TSCA section 6(a), EPA must consider and publish a statement based on reasonably available information on the:

• Health effects of the chemical substance in question, TCE in this case, and the magnitude of human exposure to TCE;
• Environmental effects of TCE and the magnitude of exposure of the environment to TCE;
• Benefits of TCE for various uses; and the
• Reasonably ascertainable economic consequences of the rule, including: The likely effect of the rule on the national economy, small business, technological innovation, the environment, and public health; the costs and benefits of the proposed and final rule and of the one or more primary alternatives that EPA considered; and the cost-effectiveness of the proposed rule and of the one or more primary alternatives that EPA considered.

EPA must also consider, to the extent practicable, whether technically and economically feasible alternatives that benefit health or the environment will be reasonably available as a substitute when the proposed prohibition or other restriction takes effect.

For a chemical substance listed in the 2014 update to the TSCA Work Plan for Chemical Assessments for which a completed risk assessment was published prior to the date of enactment of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, TSCA section 26(l)(4) expressly recognizes that EPA may issue rules under TSCA section 6(a) that are consistent with the scope of the completed risk assessment and consistent with the other applicable requirements of TSCA section 6. TCE is such a chemical substance. It is listed in the 2014 update to the TSCA Work Plan and the completed risk assessment was published on June 25, 2014. The scope of the completed risk assessment includes aerosol degreasing and spot cleaning. The completed risk assessment also evaluated vapor degreasing, which EPA plans to address in a separate proposed rule.

C. What action is the Agency taking?

EPA has preliminarily determined that the use of TCE in aerosol degreasing and for spot cleaning in dry cleaning facilities presents an unreasonable risk of injury to health. Accordingly, EPA is proposing under section 6 of TSCA to prohibit the manufacture, processing, and distribution in commerce of TCE for use in aerosol degreasing and for use in spot cleaning in dry cleaning facilities; to prohibit commercial use of TCE for aerosol degreasing and for spot cleaning in dry cleaning facilities; and to require manufacturers, processors, and distributors, except for retailers, to provide downstream notification of these prohibitions throughout the supply chain (*e.g.,* via a Safety Data Sheet (SDS)) and to keep limited records. The application of this supply

chain approach is necessary so that the chemical substance no longer presents the identified unreasonable risks. EPA is requesting public comment on this proposal.

EPA's analysis of worker and consumer populations' exposures to TCE also preliminarily indicates that the use of TCE in vapor degreasing presents an unreasonable risk of injury to health. EPA intends to issue a separate proposed rule for TCE use in vapor degreasing, but plans to issue one final rule covering both today's proposal and the vapor degreasing proposal.

D. Why is the Agency taking this action?

Based on EPA's analysis of worker and consumer populations' exposures to TCE, EPA has preliminarily determined that the use of TCE in aerosol degreasing and as a spot cleaner in dry cleaning facilities presents an unreasonable risk to human health. More specifically, these uses result in significant non-cancer risks (acute and chronic exposure scenarios) and cancer risks. These adverse health effects include developmental toxicity (*e.g.,* cardiac malformations, developmental immunotoxicity, developmental neurotoxicity, fetal death), toxicity to the kidney (kidney damage and kidney cancer), immunotoxicity (such as systemic autoimmune diseases, *e.g.,* scleroderma, and severe hypersensitivity skin disorder), non-Hodgkin's lymphoma, reproductive and endocrine effects (*e.g.,* decreased libido and potency), neurotoxicity (*e.g.,* trigeminal neuralgia), and toxicity to the liver (impaired functioning and liver cancer) (Ref. 1). TCE may cause fetal cardiac malformations that begin in utero. In addition, fetal death, possibly resulting from cardiac malformation, can be caused by exposure to TCE. Cardiac malformations can be irreversible and impact a person's health for a lifetime. In utero exposure to TCE may cause other effects, such as damage to the developing immune system, which manifest later in adult life and can have long-lasting health impacts. Certain effects that follow adult exposures, such as kidney and liver cancer, may develop many years after initial exposure.

As discussed in Unit I.C, EPA is not proposing to prohibit all manufacturing, processing, distribution in commerce, and use of TCE. The application of this supply chain approach tailored to specific uses that present unreasonable risk to human health is necessary so that the chemical substance no longer presents the identified unreasonable risks.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the potential costs of multiple regulatory options, including the proposed approach of prohibiting the manufacture (including import), processing, and distribution in commerce of TCE for use in aerosol degreasing and for spot cleaning in dry cleaning facilities; prohibiting the commercial use of TCE for aerosol degreasing and for spot cleaning in dry cleaning facilities; and requiring manufacturers, processors, and distributors, except for retailers, to provide downstream notification of these prohibitions throughout the supply chain as well as associated recordkeeping requirements. This analysis, which is available in the docket, is discussed in Units VI and VII, and is briefly summarized here.

Costs of the proposed approach are discussed in Units VI.C.1 and VII.C.1. Alternatives to TCE are readily available at similar cost and performance. Blenders of TCE aerosol degreasers and spot cleaners are expected to reformulate their products. Reformulation costs are expected to be incurred during the first year and total $286,000 for reformulation of dry cleaning spot remover products and total $416,000 for aerosol degreasing products. Annualized costs of reformulation are approximately $32,000 per year (annualized at 3% over 15 years) and $41,000 (annualized at 7% over 15 years) for aerosol degreasing, and $22,000 per year (annualized at 3% over 15 years) and $28,000 (annualized at 7% over 15 years) for dry cleaning spot removers. Costs to users of aerosol degreasers and dry cleaning spotters are negligible as substitute products of similar performance are currently available on the market and are similarly priced (Ref. 2). Costs of downstream notification and recordkeeping are estimated to cost a total of $51,000 in the first year. On an annualized basis over 15 years are estimated to be approximately $3,900 and $5,000 using 3% and 7% discount rates respectively. Agency costs for enforcement are estimated to be approximately $112,000 and $109,000 annualized over 15 years at 3% and 7% respectively. Total costs of the proposed approach to prohibit manufacturing, processing, distribution in commerce for use of TCE in aerosol degreasing and for spot cleaning in dry cleaning facilities; commercial use of TCE in aerosol degreasing and spot cleaning in dry cleaning facilities; and require downstream notification and recordkeeping are estimated to be approximately $170,000 and $183,000 annualized over 15 years at 3% and 7% respectively. Total first-year costs to industry are estimated to be approximately $874,000 (Ref. 2).

Although TCE causes a wide range of non-cancer adverse effects and cancer, monetized benefits included only benefits associated with reducing cancer risks. The Agency does not have sufficient information to include a quantification or valuation estimate in the overall benefits at this time. The monetized benefits for the proposed approach range from approximately $9.3 million to $25.0 million on an annualized basis over 15 years at 3% and $4.5 million to $12.8 million at 7% (Ref. 2). There are also non-monetized benefits resulting from the prevention of the non-cancer adverse effects associated with TCE exposure from use in aerosol degreasing and spot cleaning for dry cleaning. These include developmental toxicity, toxicity to the kidney, immunotoxicity, reproductive and endocrine effects, neurotoxicity, and toxicity to the liver (Ref. 1). The adverse effects of TCE exposure as identified in the risk assessment include fetal cardiac malformations that begin in utero and fetal death. Cardiac malformations can be irreversible and impact a person's health for a lifetime. Other effects, such as damage to the developing immune system, may first manifest when a person is an adult and can have long-lasting health impacts. Certain effects that follow adult exposures, such as kidney and liver cancer, may develop many years after initial exposure. Also see Unit VIII.

Another alternative regulatory option considered was a respiratory protection program requiring an air-supplied respirator with an APF of 10,000. The costs of implementing a respiratory protection program, including a supplied-air respirator and related equipment, training, fit testing, monitoring, medical surveillance, and related requirements, would far exceed the costs of switching to alternatives, on a per facility basis. The estimated annualized costs of switching to a respiratory protection program requiring personal protective equipment (PPE) of 10,000 are $8,200 at 3% and $9,000 at 7% per dry cleaning facility and $8,300 at 3% and $9,100 at 7% per aerosol degreasing facility over 15 years. In addition, there would be higher EPA administration and enforcement costs with a respiratory protection program than there would be with an enforcement program under the proposed approach. The higher costs of this option render this option a less cost effective option than the proposed

approach at addressing the identified unreasonable risks so TCE no longer presents such risks.

F. Children's Environmental Health

This action is consistent with the 1995 EPA Policy on Evaluating Health Risks to Children (*http://www.epa.gov/children/epas-policy-evaluating-risk-children*). EPA has identified women of childbearing age and the developing fetus as a susceptible subpopulation relevant to its risk assessment for TCE. After evaluating the developmental toxicity literature for TCE, the TCE Integrated Risk Information System (IRIS) assessment concluded that fetal heart malformations are the most sensitive developmental toxicity endpoint associated with TCE inhalation exposure (Ref. 3). In its TSCA Chemical Work Plan Risk Assessment for TCE, EPA identified developmental toxicity as the most sensitive endpoint for TCE inhalation exposure (*i.e.,* fetal heart malformations; Ref. 1) for the most sensitive human life stage (*i.e.,* women of childbearing age between the ages of 16 and 49 years and the developing fetus) (Ref. 1). EPA used developmental toxicity endpoints for both the acute and chronic non-cancer risk assessments based on its developmental toxicity risk assessment policy that a single exposure of a chemical within a critical window of fetal development may produce adverse developmental effects (Ref. 33). While the proposed regulatory action is protective of the fetal heart malformation endpoint and is also protective of cancer risk from chronic exposure, the supporting non-cancer risk analysis of children and women of childbearing age conducted in the TSCA Chemical Work Plan Risk Assessment for TCE (Ref. 1) also meets the 1995 EPA Policy on Evaluating Health Risks to Children. Supporting information on TCE exposures and the health effects of TCE exposure on children are available in the Toxicological Review of Trichloroethylene (Ref. 3) and the TSCA Chemical Work Plan Risk Assessment on Trichloroethylene (Ref. 1), as well as Units VI.B.1.c and VII.B.1.c of this preamble.

II. Overview of TCE and Uses Subject to This Proposed Rule

A. What chemical is included in the proposed rule?

This proposed rule would apply to TCE (Chemical Abstract Services Registry Number 79–01–6) for use in aerosol degreasing and for spot cleaning in dry cleaning facilities.

B. What are the uses of TCE and how can people be exposed?

In 2011, global consumption of TCE was 945 million pounds and consumption in the United States was 255 million pounds. TCE is produced within and imported into the United States. Nine companies, including domestic manufacturers and importers, reported a total production and import of 225 million pounds of TCE in 2011 to EPA pursuant to the Chemical Data Reporting CDR rule (Ref. 1).

Individuals, including workers, consumers and the general population, are exposed to TCE from industrial/commercial, consumer, and environmental sources, in different settings such as homes and workplaces, and through multiple exposure pathways (air, water, soil) and routes (inhalation, ingestion, dermal).

The majority (about 83.6%) of TCE is used as an intermediate chemical for manufacturing refrigerant HFC-134a. This use occurs in a closed system that has low potential for human exposure (Ref. 1). EPA did not assess this use and is not proposing to regulate this use of TCE under TSCA. Much of the remainder, about 14.7 percent, is used as a solvent for degreasing of metals. A relatively small percentage, about 1.7 percent, accounts for all other uses, including TCE use in products, such as aerosol degreasers and spot cleaners.

Based on the Toxics Release Inventory (TRI) data for 2012, 38 companies used TCE as a formulation component, 33 companies processed TCE by repackaging the chemical, 28 companies used TCE as a manufacturing aid, and 1,113 companies used TCE for ancillary uses, such as degreasing (Ref. 1). Based on the latest TRI data from 2014, the number of users of TCE has significantly decreased since 2012: 24 companies use TCE as a formulation component, 20 companies process TCE by repackaging the chemical, 20 companies use TCE as a manufacturing aid, and 97 companies use TCE for ancillary uses, such as degreasing.

The uses assessed by EPA that are the subject of this proposal, the use of TCE in aerosol degreasing and for spot cleaning in dry cleaning facilities, are estimated to represent up to 1.7 percent of total use of TCE. Aerosol degreasing is the use of TCE in aerosol spray products applied from a pressurized can to remove residual contaminants from fabricated parts. Spot cleaning is the use of TCE in dry cleaning facilities to clean stained areas on textiles or clothing. These uses are discussed in detail in Units VI and VII.

C. What are the potential health effects of TCE?

A broad set of relevant studies including epidemiologic studies, animal bioassays, metabolism studies, and mechanistic studies show that TCE exposure is associated with an array of adverse health effects. TCE has the potential to induce developmental toxicity, immunotoxicity, kidney toxicity, reproductive and endocrine effects, neurotoxicity, liver toxicity, and several forms of cancer (Ref. 1).

TCE is fat soluble (lipophilic) and easily crosses biological membranes. TCE has been found in human maternal and fetal blood and in the breast milk of lactating women (Ref. 1). EPA's Integrated Risk Information System (IRIS) assessment (Ref. 3) concluded that TCE poses a potential health hazard for non-cancer toxicity including fetal heart malformations and other developmental effects, immunotoxicity, kidney toxicity, reproductive and endocrine effects, neurotoxicity, and liver effects. The IRIS assessment also evaluated TCE and its metabolites. Based on the results of *in vitro* and *in vivo* tests, TCE metabolites have the potential to bind or induce damage to the structure of deoxyribonucleic acid (DNA) or chromosomes (Ref. 3).

An evaluation of the overall weight of the evidence of the human and animal developmental toxicity data suggests an association between pre- and/or post-natal TCE exposures and potential adverse developmental outcomes. TCE-induced heart malformations and immunotoxicity in animals have been identified as the most sensitive developmental toxicity endpoints for TCE. Human studies examined the possible association of TCE with various prenatal effects. These adverse effects of developmental TCE exposure may include: Fetal death (spontaneous abortion, perinatal death, pre- or post-implantation loss, resorptions); decreased growth (low birth weight, small for gestational age); congenital malformations, in particular heart defects; and postnatal effects such as growth, survival, developmental neurotoxicity, developmental immunotoxicity, and childhood cancers. Some epidemiological studies reported an increased incidence of birth defects in TCE-exposed populations from exposure to contaminated water. As for human developmental neurotoxicity, studies collectively suggest that the developing brain is susceptible to TCE toxicity. These studies have reported an association with TCE exposure and central nervous system birth defects and postnatal effects such as delayed

newborn reflexes, impaired learning or memory, aggressive behavior, hearing impairment, speech impairment, encephalopathy, impaired executive and motor function and attention deficit disorder (Ref. 1).

Immune-related effects following TCE exposures have been observed in adult animal and human studies. In general, these effects were associated with inducing enhanced immune responses as opposed to immunosuppressive effects. Human studies have reported a relationship between systemic autoimmune diseases, such as scleroderma, with occupational exposure to TCE. There have also been a large number of case reports in TCE-exposed workers developing a severe hypersensitivity skin disorder, often accompanied by systemic effects to the lymph nodes and other organs, such as hepatitis (Ref. 1).

Studies in both humans and animals have shown changes in the proximal tubules of the kidney following exposure to TCE (Ref. 1). The TCE IRIS assessment concluded that TCE is carcinogenic to humans based on convincing evidence of a causal relationship between TCE exposure in humans and kidney cancer (Ref. 3). A recent review of TCE by the International Agency for Research on Cancer (IARC) also supported this conclusion (Ref. 4). The 13th report on carcinogens (RoC) by the National Toxicology Program also concluded that TCE is reasonably anticipated to be a human carcinogen 2015 (Ref. 5). These additional recent peer reviews are consistent with EPA's classification that TCE is carcinogenic to humans by all routes of exposure based upon strong epidemiological and animal evidence (Refs. 1 and 3).

TCE metabolites appear to be the causative agents that induce renal toxicity, including cancer. S-dichlorovinyl-L-cysteine (DCVC), and to a lesser extent other metabolites, appears to be responsible for kidney damage and kidney cancer following TCE exposure. Toxicokinetic data suggest that the TCE metabolites derived from glutathione conjugation (in particular DCVC) can be systemically delivered or formed in the kidney. Moreover, DCVC-treated animals showed the same type of kidney damage as those treated with TCE (Ref. 1). The toxicokinetic data and the genotoxicity of DCVC further suggest that a mutagenic mode of action is involved in TCE-induced kidney tumors, although cytotoxicity followed by compensatory cellular proliferation cannot be ruled out. As for the mutagenic mode of action, both genetic polymorphisms (Glutathione transferase (GST) pathway) and mutations to tumor suppressor genes have been hypothesized as possible mechanistic key events in the formation of kidney cancers in humans (Ref. 1).

The toxicological literature provides support for male and female reproductive effects following TCE exposure. Both the epidemiological and animal studies provide evidence of adverse effects to female reproductive outcomes. However, more extensive evidence exists in support of an association between TCE exposures and male reproductive toxicity. There is evidence that metabolism of TCE in male reproductive tract tissues is associated with adverse effects on sperm measures in both humans and animals. Furthermore, human studies support an association between TCE exposure and alterations in sperm density and quality, as well as changes in sexual drive or function and altered serum endocrine levels (Ref. 1).

Neurotoxicity has been demonstrated in animal and human studies under both acute and chronic exposure conditions. Evaluation of multiple human studies revealed TCE-induced neurotoxic effects including alterations in trigeminal nerve and vestibular function, auditory effects, changes in vision, alterations in cognitive function, changes in psychomotor effects, and neurodevelopmental outcomes. These studies in different populations have consistently reported vestibular system-related symptoms such as headaches, dizziness, and nausea following TCE exposure (Ref. 1).

Animals and humans exposed to TCE consistently experience liver toxicity. Specific effects include the following structural changes: Increased liver weight, increase in DNA synthesis (transient), enlarged hepatocytes, enlarged nuclei, and peroxisome proliferation. Several human studies reported an association between TCE exposure and significant changes in serum liver function tests used in diagnosing liver disease, or changes in plasma or serum bile acids. There was also human evidence for hepatitis accompanying immune-related generalized skin diseases, jaundice, hepatomegaly, hepatosplenomegaly, and liver failure in TCE-exposed workers (Ref. 1).

TCE is characterized as carcinogenic to humans by all routes of exposure as documented in EPA's TCE IRIS assessment (Ref. 3). This conclusion is based on strong cancer epidemiological data that reported an association between TCE exposure and the onset of various cancers, primarily in the kidney, liver, and the immune system, *i.e.,* non-Hodgkin's lymphoma (NHL). Further support for TCE's characterization as a carcinogen comes from positive results in multiple rodent cancer bioassays in rats and mice of both sexes, similar toxicokinetics between rodents and humans, mechanistic data supporting a mutagenic mode of action for kidney tumors, and the lack of mechanistic data supporting the conclusion that any of the mode(s) of action for TCE-induced rodent tumors are irrelevant to humans. Additional support comes from the 2014 evaluation of TCE's carcinogenic effects by IARC, which classifies TCE as carcinogenic to humans (Ref. 4). The 13th Report on Carcinogens (RoC) by the National Toxicology Program also concluded that TCE exposure is reasonably anticipated to be a human carcinogen (Ref. 5). These additional recent peer reviewed documents are consistent with EPA's classification that TCE is carcinogenic to humans by all routes of exposure based upon strong epidemiological and animal evidence (Refs. 1 and 3).

D. What are the environmental impacts of TCE?

Pursuant to Section 6(c) of TSCA, EPA in this section describes the effects of TCE on the environment and the magnitude of the exposure of the environment to TCE. The unreasonable risk preliminary determination of this proposal, however, is based solely on risks to human health since these risks are the most serious consequence of use of TCE and are sufficient to support this proposed action.

1. *Environmental effects and impacts.* TCE enters the environment as a result of emissions from metal degreasing facilities, and spills or accidental releases, and historic waste disposal activities. Because of its high vapor pressure and low affinity for organic matter in soil, TCE evaporates fairly rapidly when released to soil; however, where it is released onto land surface or directly into the subsurface, TCE can migrate from soil to groundwater (Ref. 1). Based on TCE's moderate persistence, low bioaccumulation, and low hazard for aquatic toxicity, the magnitude of potential environmental impacts on ecological receptors is judged to be low for the environmental releases associated with the use of TCE for spot cleaning in dry cleaning facilities and in aerosol degreasers. This should not be misinterpreted to mean that the fate and transport properties of TCE suggest that water and soil contamination is likely low or does not pose an environmental concern. EPA is addressing TCE contamination in

groundwater, drinking water, and contaminated soils at a large number of sites. While the primary concern with this contamination has been human health, there is potential for TCE exposures to ecological receptors in some cases (Ref. 1).

2. *What is the global warming potential of TCE?* Global warming potential (GWP) measures the potency of a greenhouse gas over a specific period of time, relative to carbon dioxide, which has a high GWP of 1 regardless of the time period used. Due to high variability in the atmospheric lifetime of greenhouse gases, the 100-year scale (GWP100) is typically used. TCE has relatively low global warming potential at a GWP100 of 140 and thus the impact is low (Ref. 1).

3. *What is the ozone depletion potential of TCE?* TCE is not an ozone-depleting substance and is listed as acceptable under the Significant New Alternatives Policy (SNAP) program for degreasing and aerosols. In 2007, TCE was identified as a substitute for two ozone depleting chemicals, methyl chloroform and CFC–113, for metals, electronics, and precision cleaning (72 FR 30142, May 30, 2007) (FRL–8316–8) (Ref. 6).

4. *Is TCE a volatile organic compound (VOC)?* TCE is a VOC as defined at 40 CFR 51.100(c). A VOC is any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions.

5. *Does TCE persist in the environment and bioaccumulate?* TCE may be persistent, but it is not bioaccumulative. TCE is slowly degraded by sunlight and reactants when released to the atmosphere. Volatilization and microbial biodegradation influence the fate of TCE when released to water, sediment or soil. The biodegradation of TCE in the environment is dependent on a variety of factors and so a wide range of degradation rates have been reported (ranging from days to years). TCE is not expected to bioconcentrate in aquatic organisms based on measured bioconcentration factors of less than 1000 (Ref. 1).

III. Regulatory Actions Pertaining to TCE

Because of its potential health effects, TCE is subject to state, federal, and international regulations restricting and regulating its use, which are summarized in this section. None of these actions addresses the unreasonable risks under TSCA that EPA is seeking to address in this proposed rule.

A. Federal Actions Pertaining to TCE

Since 1979, EPA has issued numerous final rules and notices pertaining to TCE under its various authorities.

- *Safe Drinking Water Act:* EPA issued drinking water standards for TCE pursuant to section 1412 of the Safe Drinking Water Act. EPA promulgated the National Primary Drinking Water Regulation (NPDWR) for TCE in 1987 (52 FR 25690, July 8, 1987). The NPDWR established a non-enforceable maximum contaminant level (MCL) goal of zero mg/L based on classification as a probable human carcinogen. The NPDWR also established an enforceable MCL of 0.005 mg/L based on analytical feasibility. EPA is evaluating revising the TCE drinking water standard as part of a group of carcinogenic volatile organic compounds.
- *Clean Water Act:* EPA identified TCE as a toxic pollutant under section 307(a)(1) of the Clean Water Act (33 U.S.C. 1317(a)(1)) in 1979 (44 FR 44502, July 30, 1979) (FRL–1260–5). In addition, EPA developed recommended TCE ambient water quality criteria for the protection of human health pursuant to section 304(a) of the Clean Water Act.
- *Clean Air Act:* TCE is designated a hazardous air pollutant (HAP) under the Clean Air Act (42 U.S.C. 7412(b)(1)). EPA promulgated National Emission Standards for Hazardous Air Pollutants (NESHAPs) for TCE for several industrial source categories, including halogenated solvent cleaning, fabric printing, coating, and dyeing, and synthetic organic chemical manufacturing.
- *Resource Conservation and Recovery Act (RCRA):* EPA classifies certain wastes containing TCE as hazardous waste subject to Subtitle C of RCRA pursuant to the toxicity characteristics or as a listed waste. RCRA also provides authority to require cleanup of hazardous wastes containing TCE at RCRA facilities.
- *Comprehensive Environmental Response, Compensation and Liability Act (CERCLA):* EPA designated TCE as a hazardous substance with a reportable quantity pursuant to section 102(a) of CERCLA and EPA is actively overseeing cleanup of sites contaminated with TCE pursuant to the National Contingency Plan (NCP).

While many of the statutes that EPA is charged with administering provide statutory authority to address specific sources and routes of TCE exposure, none of these can address the serious human health risks from TCE exposure that EPA is proposing to address under TSCA section 6(a) today.

The Occupational Safety and Health Administration (OSHA) established a permissible exposure limit (PEL) for TCE in 1971. The PEL is an 8-hour time-weighted average (TWA) TCE concentration of 100 ppm. In addition, the TCE PEL requires that exposures to TCE not exceed 200 ppm (ceiling) at any time during an eight hour work shift with the following exception: Exposures may exceed 200 ppm, but not more than 300 ppm (peak), for a single time period up to 5 minutes in any 2 hours (Refs. 7 and 8). OSHA acknowledges that many of its PELs are not protective of worker health. OSHA has noted that ''with few exceptions, OSHA's PELs, which specify the amount of a particular chemical substance allowed in workplace air, have not been updated since they were established in 1971 under expedited procedures available in the short period after the OSH Act's adoption . . . Yet, in many instances, scientific evidence has accumulated suggesting that the current limits are not sufficiently protective.'' (Ref. 9 at p. 61386), including the PEL for TCE (Ref. 65).

To provide employers, workers, and other interested parties with a list of alternate occupational exposure limits that may serve to better protect workers, OSHA's Web page highlights selected occupational exposure limits derived by other organizations. For example, the National Institute for Occupational Safety and Health considers TCE a potential occupational carcinogen and recommended an exposure limit of 25 ppm as a 10-hour TWA in 2003 (Ref. 10). The American Conference of Governmental Industrial Hygienists recommended an 8-hour TWA of 10 ppm and acute, or short-term, exposure limit of 25 ppm in 2004 (Ref. 11).

B. State Actions Pertaining to TCE

Many states have taken actions to reduce risks from TCE use. TCE is listed on California's Safer Consumer Products regulations candidate list of chemicals that exhibit a hazard trait and are on an authoritative list, and is also listed on California's Proposition 65 list of chemicals known to cause cancer or birth defects or other reproductive harm. In addition, the California Code of Regulations, Title 17, Section 94509(a) lists standards for VOCs for consumer products sold, supplied, offered for sale, or manufactured for use in California (Ref. 12). As part of that regulation, use of consumer general purpose degreaser products that contain TCE are banned in California and safer substitutes are in use.

In Massachusetts, TCE is a designated high hazard substance, with an annual reporting threshold of 1,000 pounds (Ref. 13). Minnesota classifies TCE as a chemical of high concern. Many other states have considered TCE for similar chemical listings (Ref. 14). Several additional states have various TCE regulations that range from reporting requirements to product contamination limits to use reduction efforts aimed at limiting or prohibiting TCE content in products.

Most states have set PELs identical to the OSHA 100 ppm 8-hour TWA PEL (Ref. 15). Nine states have PELs of 50 ppm (Ref. 15). California's PEL of 25 ppm is the most stringent (Ref. 12). All of these PELs are significantly higher than the exposures at which EPA identified unreasonable risks for TCE use in aerosol degreasers and for spot cleaning in dry cleaning facilities and would not be protective.

C. International Actions Pertaining to TCE

TCE is also regulated internationally and the international industrial and commercial sectors have moved to alternatives. TCE is prohibited for use in the European Union (EU) as an aerosol degreaser and spotting agent at dry cleaning facilities based on its classification as a carcinogenic substance (Ref. 16). TCE was added to the EU Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) restriction of substances classified as a carcinogen category 1B under the EU Classification and Labeling regulation in 2009 (Ref. 16). The restriction prohibits the placing on the market or use of TCE as a substance, as a constituent of other substances, or in mixtures for supply to the general public when the individual concentration of TCE in the substance or mixture is equal to or greater than 0.1% by weight (Ref. 16). In 2010, TCE was added to the Candidate List of substances for inclusion in Annex XIV of REACH, or the Authorisation List. Annex XIV includes Substances of Very High Concern that are subject to use authorization due to their hazardous properties. TCE meets the criteria for classification as a carcinogen. In 2011, TCE was recommended for inclusion in Annex XIV of REACH due to the very high volumes allocated to uses in the scope of authorization and because at least some of the described uses appeared to result in significant exposure of workers and professionals, and could be considered widely dispersive uses. In 2013, the Commission added TCE to Annex XIV of REACH, making it subject to authorization. As such, entities that wanted to use TCE were required to apply for authorization by October 2014, and those entities without an authorization were required to stop using TCE by April 2016. The European Chemicals Agency (ECHA) received 19 applications for authorization from entities interested in using TCE beyond April 2016. None of the applications were for use of TCE in aerosol degreasers or for spot cleaning in dry cleaning facilities (Ref. 16).

Canada conducted a hazard assessment of TCE in 1993 and concluded that ''trichloroethylene occurs at concentrations that may be harmful to the environment, and that may constitute a danger in Canada to human life or health. It has been concluded that trichloroethylene occurs at concentrations that do not constitute a danger to the environment on which human life depends'' (Ref. 17). In 2003, Canada issued the Solvent Degreasing Regulations (SOR/2003–283) to reduce releases of TCE into the environment from solvent degreasing facilities using more than 1,000 kilograms of TCE per year (Ref. 17). In 2013, Canada added TCE to the Toxic Substances List—Schedule 1 because TCE was found to be toxic under conditions (a) and (c) of Section 64(a) of the Canadian Environmental Protection Act (CEPA) because it ''is entering or may enter the environment in a quantity or concentration or under conditions that: (a) Have or may have an immediate or chronic harmful effect on the environment or its biological diversity, and (c) constitute or may constitute a danger in Canada to human life or health.'' (Ref. 18).

In Japan, the Chemical Substances Control Law considers TCE a Class II substance (substances that may pose a risk of long-term toxicity to humans or to flora and fauna in the human living environment, and that have been, or in the near future are reasonably likely to be, found in considerable amounts over a substantially extensive area of the environment) (Ref. 19). Japan also controls air emissions and water discharges containing TCE, as well as aerosol products for household use and household cleaners containing TCE.

TCE is listed in the Australian National Pollutant Inventory, a program run cooperatively by the Australian, State and Territory governments to monitor common pollutants and their levels of release to the environment. Australia classifies TCE as a health, physicochemical and/or ecotoxicological hazard, according to the Australian National Occupational Health and Safety Commission (Ref. 20).

IV. TCE Risk Assessment

In 2013, EPA identified TCE use as a solvent degreaser (aerosol degreasing and vapor degreasing) and spot remover in dry cleaning operations as a priority for risk assessment under the TSCA Work Plan. This Unit describes the development of the TCE risk assessment and supporting analysis and expert input on the uses that are the subject of this proposed rule. A more detailed discussion of the risks associated with each use subject to today's proposed rule can be found in Units VI and VII.

A. TSCA Work Plan for Chemical Assessments

In 2012, EPA released the TSCA Work Plan Chemicals: Methods Document in which EPA described the process the Agency intended to use to identify potential candidate chemicals for near-term review and assessment under TSCA (Ref. 21). EPA also released the initial list of TSCA Work Plan chemicals identified for further assessment under TSCA as part of its chemical safety program (Ref. 22).

The process for identifying these chemicals for further assessment under TSCA was based on a combination of hazard, exposure, and persistence and bioaccumulation characteristics, and is described in the TSCA Work Plan Chemicals Methods Document (Ref. 21). Using the TSCA Work Plan chemical prioritization criteria, TCE ranked high for health hazards and exposure potential and was included on the initial list of TSCA Work Plan chemicals for assessment.

B. TCE Risk Assessment

EPA finalized a TSCA Work Plan Chemical Risk Assessment for TCE (TCE risk assessment) in June 2014, following the July 2013 peer review of the December 2012 draft TCE risk assessment. All documents from the July 2013 peer review of the draft TCE risk assessment are available in EPA Docket Number EPA–HQ–OPPT–2012–0723. TCE appears in the 2014 update of the TSCA Work Plan for Chemical Assessments and the completed risk assessment is noted therein. The draft TCE risk assessment evaluated commercial and consumer use of TCE as a solvent degreaser (aerosol degreasing and vapor degreasing) and consumer use of TCE as a spray-applied protective coating for arts and crafts (Ref. 1). In response to specific comments and information provided by the peer reviewers, the commercial use of TCE as a spotting agent at dry cleaning facilities was evaluated, using the near-field/far-field mass balance approach, for the

final risk assessment. The use of TCE in commercial/industrial vapor degreasing, and in arts and crafts, is not addressed in today's proposal. EPA intends to issue a separate proposed rule on TCE use in vapor degreasers at commercial/industrial facilities soon. EPA also published a final Significant New Use Rule (SNUR) that would require manufacturers (including importers) and processors of TCE to notify the Agency before starting or resuming any significant new uses of TCE in certain consumer products, including in spray fixatives used to finish arts and crafts (81 FR 20535; April 8, 2016).

The TCE risk assessment evaluated health risks to consumers and workers, including occupational bystanders, from inhalation exposures to TCE. A summary of the peer review and public comments, along with EPA's response, is available in the docket for the risk assessment and can be accessed electronically at *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2012-0723-0039.* While solvent degreasing (both aerosol and vapor) is within the scope of the TCE risk assessment, with respect to aerosol degreasing, the assessment targeted consumer use of specific products. Therefore, using the peer reviewed near-field/far-field mass balance approach that was used in the risk assessment, EPA performed supplemental analyses of worker and bystander inhalation risk from TCE aerosol degreaser use in occupational settings. The TCE risk assessment identified primary uses of TCE and selected uses including aerosol degreasing and spot cleaning in dry cleaning facilities as those that were expected to involve frequent or routine use of TCE in high concentrations and/or have high potential for human exposure (Refs. 1, 23, 24, and 25) and therefore were included in the scope of the risk assessment. However, this does not mean that EPA determined that other uses not included in the TCE risk assessments present low risk.

The TCE risk assessment identified acute non-cancer risks (*i.e.,* developmental effects) for most occupational and consumer exposure scenarios, including commercial vapor degreasing, spot cleaning, and consumer aerosol degreasing exposure scenarios (Ref. 1). For chronic non-cancer risks there is a range of human health effects in both the occupational vapor degreasing and spot cleaning exposure scenarios with the greatest concern for developmental effects (*i.e.,* fetal cardiac defects), as well as kidney effects and immunotoxicity. In addition, there are chronic non-cancer risks for adverse reproductive effects, neurotoxicity, and liver toxicity (Ref. 1).

Margins of exposure (MOEs) were used in this assessment to estimate non-cancer risks for acute and chronic exposures. The MOE is the health point of departure (an approximation of the no-observed adverse effect level (NOAEL) for a specific endpoint divided by the exposure concentration for the specific scenario of concern. The benchmark MOE accounts for the total uncertainty factor based on the following uncertainty factors: Intraspecies, interspecies, subchronic to chronic, and lowest observed adverse effect level (LOAEL) to NOAEL. Uncertainty factors are intended to account for (1) the variation in sensitivity among the members of the human population (*i.e.,* interhuman or intraspecies variability); (2) the uncertainty in extrapolating animal data to humans (*i.e.,* interspecies variability); (3) the uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure to lifetime exposure (*i.e.,* extrapolating from subchronic to chronic exposure); and (4) the uncertainty in extrapolating from a LOAEL rather than from a NOAEL (Ref. 26). MOEs provide a non-cancer risk profile by presenting a range of estimates for different non-cancer health effects for different exposure scenarios, and are a widely recognized method for evaluating a range of potential non-cancer health risks from exposure to a chemical.

The TCE risk assessment estimated acute non-cancer risks for consumers and residential bystanders from the use of TCE-containing aerosol degreasers and spray-applied protective coatings. Exposure scenarios with MOEs below the benchmark MOE have significant risks of concern and typically, non-cancer adverse effects are more likely to result from exposure scenarios with MOEs below the benchmark MOE. For non-cancer effects EPA estimated exposures that are significantly larger than the point of departure. The TCE risk assessment also estimated acute non-cancer risk for workers and occupational bystanders for uses including spot cleaning in dry cleaning facilities.

The TCE risk assessment also estimated chronic non-cancer risk for workers and occupational bystanders for uses including spot cleaning in dry cleaning facilities. These include developmental toxicity, toxicity to the kidney, immunotoxicity, reproductive and endocrine effects, neurotoxicity, and toxicity to the liver.

There are also cancer risks for persons occupationally exposed to TCE when using TCE-containing spot cleaners in dry cleaning facilities. For users of TCE-containing spot cleaning products, these cancer risks are 1.35×10^{-2} for spot cleaning. In the supplemental analysis following the TCE risk assessment, EPA also identified acute and chronic non-cancer and cancer risks for the commercial aerosol degreasing use scenario for workers and occupational bystanders using aerosol degreasers (Ref. 23).

The levels of acute and chronic exposures estimated to present low risk for non-cancer effects also result in low risk for cancer.

Given the risks identified in the TCE risk assessment, the agency undertook further analysis to help determine whether the use of TCE for spot cleaning in dry cleaning facilities and in aerosol degreasers poses an unreasonable risk.

C. Supplemental Analysis Using the Methodology of the TCE Risk Assessment

Because the TCE risk assessment concentrated on consumer use of aerosol degreasers and because the aerosol degreaser products available to consumers are also available to commercial users, following release of the TCE risk assessment, EPA analyzed the risk to workers and occupational bystanders from commercial use of TCE-containing aerosol degreasers and identified short-term and long-term non-cancer and cancer risks for the commercial aerosol degreasing use scenario (Ref. 23). This analysis is consistent with the scope of the TCE risk assessment and was based on the peer-reviewed near-field/far-field mass balance approach that was used in the TCE risk assessment (Ref. 1). EPA also conducted supplemental analyses of various parameters of exposure scenarios, consistent with the methodology used in the risk assessment, on the use of TCE-containing aerosol degreasers by consumers and use of TCE for spot cleaning in dry cleaning facilities. Prior to promulgation of the final rule, EPA will peer review the ''Supplemental Occupational Exposure and Risk Reduction Technical Report in Support of Risk Management Options for Trichloroethylene (TCE) Use in Aerosol Degreasing'' (Ref. 25) and the exposure assessment for TCE use in spot cleaning in dry cleaning facilities in the ''TSCA Work Plan Chemical Risk Assessment. Trichloroethylene: Degreasing, Spot Cleaning and Arts & Crafts Uses'' (Ref. 1).

D. Expert Meeting on TCE

On July 29, 2014, EPA held a 2-day public workshop on TCE degreasing (Ref. 27). The purpose of the workshop was to collect information from users, academics, and other stakeholders on the use of TCE as a degreaser in various applications, *e.g.,* in degreasing metal parts, availability and efficacy of safer alternatives, safer engineering practices and technologies to reduce exposure to TCE, and to discuss possible risk reduction approaches. The workshop included presentations by experts, breakout sessions with case studies, and public comment opportunities (Ref. 27) and informed EPA's assessment of the alternatives to TCE considered in this proposed rule. All documents from the public workshop are available in EPA Docket Number EPA–HQ–OPPT–2014–0327. Informed in part by the workshop and other analysis, including discussion with Toxics Use Reduction Institute at the University of Massachusetts Lowell, EPA has concluded that TCE alternatives are available for all applications subject to this proposed rule (Ref. 2). The discussions of the meeting demonstrated that alternatives are available for aerosol uses that are being addressed in this proposed rulemaking.

V. Regulatory Approach

A. TSCA Section 6 Unreasonable Risk Analysis

Under section 6(a) of TSCA, if the Administrator determines that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the Agency's risk evaluation, under the conditions of use, EPA must by rule apply one or more requirements to the extent necessary so that the chemical substance no longer presents such risk.

The section 6(a) requirements can include one or more, or a combination of, the following actions:

- Prohibit or otherwise restrict the manufacturing, processing, or distribution in commerce of such substances (§ 6(a)(1)).
- Prohibit or otherwise restrict manufacturing, processing, or distribution in commerce of such substances for particular uses or for uses in excess of a specified concentration (§ 6(a)(2)).
- Require minimum warning labels and instructions (§ 6(a)(3)).
- Require record keeping or testing (§ 6(a)(4)).
- Prohibit or regulate any manner or method of commercial use (§ 6(a)(5)).
- Prohibit or otherwise regulate any manner or method of disposal (§ 6(a)(6)).
- Direct manufacturers and processors to give notice of the determination to distributors and the public and replace or repurchase substances (§ 6(a)(7)).

EPA analyzed a wide range of regulatory options under section 6(a) for each use in order to determine the proposed regulatory approach (Refs. 28 and 29). For each use, EPA considered whether a regulatory option (or combination of options) would address the identified unreasonable risks so that it no longer presents such risks. To do so, EPA initially analyzed whether the regulatory options could reduce risks (non-cancer and cancer) so that TCE no longer presents unreasonable risks, based on EPA's technical analysis of exposure scenarios. For the non-cancer risks, EPA determined an option could be protective against the risk if it could achieve the benchmark MOE for the most sensitive non-cancer endpoint. EPA's assessments for these uses indicate that when exposures meet the benchmark MOE for the most sensitive endpoint, they also result in low risk for cancer.

After the technical analysis, which represents EPA's assessment of the potential for the regulatory options to achieve risk benchmarks based on analysis of exposure scenarios, EPA then considered how reliably the regulatory options would actually reach these benchmarks. In determining whether a regulatory option would impose requirements to the extent necessary so that TCE no longer presents the identified unreasonable risks, the Agency considered whether the option could be realistically implemented or whether there were practical limitations on how well the option would mitigate the risks in relation to the benchmarks, as well as whether the option's protectiveness was impacted by environmental justice or children's health concerns.

B. Section 6(c)(2) considerations. As noted previously, TSCA section 6(c)(2) requires EPA to factor in, to the extent practicable, the following considerations in selecting regulatory requirements:

- Health effects of TCE and the magnitude of human exposure to TCE;
- Environmental effects of TCE and the magnitude of exposure of the environment to TCE;
- Benefits of TCE for various uses;
- Reasonably ascertainable economic consequences of the rule, including: The likely effect of the rule on the national economy, small business, technological innovation, the environment, and public health; the costs and benefits of the proposed and final rule and of the one or more primary alternatives that EPA considered; and the cost-effectiveness of the proposed rule and of the one or more primary alternatives that EPA considered.

In deciding whether to prohibit or restrict in a manner that substantially prevents a specific condition of use of a chemical substance or mixture, and in setting an appropriate transition period for such action, EPA must also consider, to the extent practicable, whether technically and economically feasible alternatives that benefit health or the environment will be reasonably available as a substitute when the proposed prohibition or other restriction takes effect.

EPA's analysis of the regulatory options and consideration of the TSCA section 6(c)(2) factors are discussed in more detail in Unit VI for aerosol degreasing and in Unit VII for spot cleaning in dry cleaning facilities.

To the extent information was available, EPA considered the benefits realized from risk reductions (including monetized benefits, non-monetized quantified benefits, and qualitative benefits), offsets to benefits from countervailing risks (*e.g.,* residual risk risks from chemical substitutions and alternative practices), the relative risk for environmental justice populations and children or other susceptible subpopulations (as compared to the general population), and the cost of regulatory requirements for the various options.

EPA considered the estimated costs to regulated entities as well as the cost to administer and enforce the options. For example, an option that includes use of a respirator would include inspections to evaluate compliance with all elements of a respiratory protection program (Ref. 30). EPA took into account the available information about the functionality and performance efficacy of the regulatory options and the ability to implement the use of chemical substitutes or other alternatives (*e.g.,* PPE). Available information included the existence of other Federal, state, or international regulatory requirements associated with each of the regulatory options as well as the commercial history for the options.

C. Regulatory Options Receiving Limited Evaluation

As discussed previously, EPA analyzed a wide range of regulatory options under TSCA section 6(a). Early in the process, EPA identified two

regulatory options under section 6(a) that do not pertain to this action and were therefore not evaluated for this proposed rulemaking. First, EPA determined that the TSCA section 6(a)(1) regulatory option to prohibit the manufacture, processing or distribution in commerce of TCE or limit the amount of TCE which may be manufactured, processed or distributed in commerce is not applicable because the Agency is not proposing to ban or limit the manufacture, processing or distribution in commerce of TCE for uses other than in aerosol degreasing or for spot cleaning in dry cleaning facilities at this time. In addition, EPA determined that the TSCA section 6(a)(6) regulatory option to prohibit or otherwise regulate any manner or method of disposal of the chemical is not applicable since EPA did not assess risks associated with TCE disposal.

Another option EPA evaluated would require warning labels and instructions on TCE-containing aerosol degreasers and for spot cleaning in dry cleaning facilities pursuant to section 6(a)(3) (Refs. 28 and 29). The Agency determined that warning labels and instructions alone could not mitigate the risks to the extent necessary so that TCE no longer presents the identified unreasonable risks to users. The Agency based this determination on an analysis of 48 relevant studies or meta-analyses, which found that consumers and professionals do not consistently pay attention to labels; consumers and professional users often do not understand label information; consumers and professional users often base a decision to follow label information on previous experience and perceptions of risk; even if consumers and professional users have noticed, read, understood, and believed the information on a hazardous chemical product label, they may not be motivated to follow the label information, instructions, or warnings; and consumers and professional users have varying behavioral responses to warning labels, as shown by mixed results in studies (Ref. 37).

These conclusions are based on the weight-of-evidence analysis that EPA conducted of the available literature on the efficacy of labeling and warnings. This analysis indicates that a label's effectiveness at changing user behavior to comply with instructions and warnings depends not only on attributes of the label and the user, but also on the multiple steps required in the processes of attention, comprehension, judgment, and action (Ref. 37).

Numerous studies have found that product labels and warnings are effective to some degree. However, the extent of the effectiveness has varied considerably across studies and some of the perceived effectiveness may not reflect real-world situations. This is because interactions among labels, users, the environment, and other factors greatly influence the degree of a label's effectiveness at changing user behavior (Ref. 37). In addition, while some studies have shown that different components of labels and warnings tend to have some influence, the evidence does not suggest that labels alone would be sufficient to ensure that users take the steps needed to protect themselves.

The Agency further determined that presenting information about TCE on a label would not adequately address the identified unreasonable risks because the nature of the information the user would need to read, understand, and act upon is extremely complex. When the precaution or information is simple or uncomplicated (*e.g.,* do not mix this cleaner with bleach or do not mix this cleaner with ammonia), it is more likely the user will successfully understand and follow the direction. In contrast, it would be challenging to most users to follow the complex product label instructions required to explain how to reduce exposures to the extremely low levels needed to minimize the risk from TCE. Rather than a simple message, the label would need to explain a variety of inter-related factors, including but not limited to the use of local exhaust ventilation, respirators and assigned protection factor, and window periods during pregnancy when the developing fetus is susceptible to adverse effects from acute exposures, as well as effects to bystanders. It is unlikely that label language changes will for this use result in widespread, consistent, and successful adoption of risk reduction measures by users.

Additionally, any use of labels to promote or regulate safe product use should be considered in the context of other potential risk reduction techniques. As highlighted by a 2014 expert report for the Consumer Product Safety Commission (CPSC), ''safety and warnings literature consistently identify warnings as a less effective hazard-control measure than either designing out a hazard or guarding the consumer from a hazard. Warnings are less effective primarily because they do not prevent consumer exposure to the hazard. Instead, they rely on persuading consumers to alter their behavior in some way to avoid the hazard'' (Ref. 38).

While this regulatory option alone does not address the risks, EPA recognizes that the section 6(a)(3) warnings and instruction requirement can be an important component to an approach for addressing unreasonable risks associated with TCE use in aerosol degreasers and for spot cleaning in dry cleaning facilities and has included a very simple downstream notification requirement as part of the proposed rulemaking.

VI. Regulatory Assessment of TCE Use in Aerosol Degreasing

This Unit describes the current use of TCE in aerosol degreasing, the unreasonable risks presented by this use, and how EPA preliminarily determined which regulatory options are necessary to address those unreasonable risks.

A. Description of the Current Use

Aerosol degreasing is a process that uses aerosol spray products, typically applied from a pressurized can, to remove residual contaminants from parts. The aerosol droplets bead up on the fabricated part and then drip off, carrying away any contaminants and leaving behind a clean surface. Components of an item can be cleaned in place or removed from the item for more thorough cleaning. Aerosol degreasers can also be sprayed onto a rag that is used to wipe components clean.

Aerosol degreasers are primarily used for niche industrial or manufacturing uses and some commercial service uses, such as degreasing of metals, degreasing of electrical motors, and electronic cleaners. One example of a commercial setting for the aerosol degreaser use is repair shops, where service items are cleaned to remove any contaminants that would otherwise compromise the item's operation. Internal components may be cleaned in place or removed from the item, cleaned, and then re-installed once dry. EPA identified 16 different aerosol spray degreaser products that contain TCE, blended by 6 different firms. EPA estimates that about 2,200 commercial facilities use TCE aerosol spray degreasers (Ref. 2). EPA requests comment on uses of TCE aerosol degreasers and TCE aerosol degreasing products that the agency did not identify.

Consumer use of TCE in aerosol degreasers is similar to commercial use but occurs in consumer settings. The aerosol products used in consumer settings are the same as those used in commercial settings. TCE use is very limited in products intended for consumers due to existing VOC regulations in California and in a number of northeast, mid-Atlantic, and Midwestern states. Consumer Specialty Products Association (CSPA) member

companies have consistently stated that they do not formulate TCE to be sold into consumer products, and the products are generally only sold in the commercial supply chains (Ref. 31). However, due to the wide availability of products available on the Internet and through various suppliers that serve commercial and consumer customers, consumers are able to purchase aerosol degreasing products containing TCE. As a result, EPA evaluated consumer exposures to aerosol degreasers containing TCE in its TCE risk assessment, and identified potential risks to consumers from aerosol degreasers.

There are currently TCE alternatives available on the market for all of the existing uses of aerosol degreasing that are similar in efficacy and cost (Refs. 2, 32). The most likely substitute products would be products with hydrocarbon/mineral spirits, products that are acetone or terpene based, and some that contain perchloroethylene or 1-bromopropane. All substitutes are expected to be less hazardous than TCE. Substitutes that are hazardous but at dose levels higher than the dose levels at which TCE causes adverse effects include perchloroethylene and 1-bromopropane. EPA does not advocate that perchloroethylene or 1-bromopropane be used as substitutes. EPA released a draft risk assessment for 1-bromopropane on March 3, 2016. The schedule for finalizing the assessment of 1-bromopropane and other chemicals is still under development. Many substitutes are expected to be significantly less hazardous than TCE, based on currently available information. These include formulations that may be categorized as acetone-, citrus terpene-, hydrocarbon-, and water-based degreasers. Several formulations are made with chemicals that are expected to have lower relative exposure potential, compared to TCE, based on currently available information. These include citrus terpenes and water-based degreasers. EPA has not developed risk estimates related to the use of substitutes, however, the benefits analysis incorporates the potential for certain alternatives to result in risks to users by assuming no benefits for TCE users that switch to perchloroethylene or 1-bromopropane alternatives in its lower estimate for benefits. EPA estimates that 25% of TCE users will substitute perchloroethylene or 1-bromopropane, 50% will substitute hydrocarbon/mineral spirits, and 25% will substitute acetone/terpene alternatives (Ref. 2). Although some substitutes, including perchloroethylene and 1-bromopropane, are hazardous, effects from these chemicals are generally seen at levels that are higher than the levels that are associated with TCE toxicity. Thus, considering similar exposure potentials for substitutes, the overall risk potential for the substitutes will be less than for TCE (Ref. 32).

B. Analysis of Regulatory Options

In this section, EPA explains how it determined whether the regulatory options considered would address the unreasonable risks presented by this use. First, EPA characterizes the unreasonable risks associated with the current use of TCE in aerosol degreasing. Then, the Agency describes its initial analysis of which regulatory options have the potential to reach the protective non-cancer and cancer benchmarks. The levels of acute and chronic exposures estimated to present low risk for non-cancer effects also result in low risk for cancer. Lastly, this section evaluates how well those regulatory options would address the identified unreasonable risks in practice.

1. *Risks associated with the current use. a. General impacts.* The TCE risk assessment identified acute non-cancer risks for consumers and residential bystanders from the use of TCE-containing aerosol degreasers (Ref. 1). EPA performed supplemental analysis consistent with the methodology used for the consumer use scenario included in the TCE risk assessment (Ref. 24), and identified acute and chronic non-cancer risks and cancer risks for the commercial aerosol degreasing use scenario (Ref. 23). EPA estimates that there are approximately 10,800 workers and occupational bystanders at commercial aerosol degreasing operations, and approximately 22,000 consumers and bystanders exposed to TCE during the consumer use of aerosol degreasers (Ref. 2).

b. Impacts on minority populations. There is no known disproportionate representation of minority populations in occupations using aerosol degreasers. All employees and consumers using aerosol degreasers would benefit from risk reduction.

c. Impacts on children. EPA has concerns for effects on the developing fetus from acute and chronic worker and consumer maternal exposures to TCE. The risk estimates are focused on pregnant women because one of the most sensitive health effects associated with TCE exposure from the use of consumer and commercial aerosol degreasers is adverse effects on the developing fetus. The potential for exposure is significant because approximately half of all pregnancies are unintended. If a pregnancy is not planned before conception, a woman may not be in optimal health for childbearing (Ref. 33). The pregnancy estimate includes women who have live births, induced abortions, and fetal losses (Ref. 2).

EPA also examined acute risks for consumer exposures in residential settings. EPA assumed that affected consumers would be individuals that intermittently use TCE aerosol degreasers in and around their homes, whereas bystanders would be individuals in close proximity to the use activity but not using the product. EPA assumed that consumer users would generally be adults of both sexes (16 years old and older, including women of childbearing age), although exposures to teenagers and even younger individuals may be possible in residential settings as bystanders. However, risk estimates focused on pregnant women. This is because one of the most sensitive health effects associated with TCE exposure is adverse effects on the developing fetus (Ref. 3).

d. Exposures for this use. For consumer exposures, EPA used the Exposure and Fate Assessment Screening Tool Version 2/Consumer Exposure Module to estimate TCE exposures for the consumer use scenarios (Ref. 1). This modeling approach was selected because emissions and monitoring data were not available for the aerosol degreasing TCE uses under consideration. The model used a two-zone representation of a house to calculate potential TCE exposure levels for consumers and bystanders. The modeling approach integrated assumptions and input parameters about exposure duration, the chemical emission rate over time, the volume of the house and the room of use, the air exchange rate and interzonal airflow rate. The model also considered the exposed individual's location as it relates to use, body weight, and inhalation rate during and after the product use (Ref. 1). No respirator scenarios were considered for use by consumers because EPA cannot require use of respirators by consumers under TSCA section 6(a). EPA used both an air exchange rate of 0.45 per hour based on the central tendency ventilation rate for a home in the United States and a higher ventilation rate (1.26 air exchanges per hour, representing the upper 10% of U.S. homes) to represent use of the TCE aerosol degreaser in a well-ventilated space (Refs. 1, 24). EPA also considered a range of concentrations of TCE in the aerosol

degreasers that the consumers used (5% to 90%) (Refs. 1, 24). In the modeling, TCE in the aerosol degreaser entered the room air through overspray of the product and evaporation from a thin film. The inhalation acute dose rates were computed iteratively by calculating the peak concentrations for each simulated 1-second interval and then summing the doses over 24 hours to form a 24-hour dose (Ref. 1).

The high-end inhalation exposure estimates for the consumer scenarios were 2 ppm for users of TCE-containing aerosol degreasers and 0.8 ppm for bystanders of TCE-containing solvent degreasers (Ref. 1).

For exposures in commercial settings, EPA determined baseline exposures using a near-field/far-field modeling approach to estimate airborne concentrations of TCE and Monte Carlo simulation to establish the range and likelihood of exposures (Ref. 23). The near-field/far-field model estimates airborne concentrations in a near field (a zone close to the source of exposure) and a far field (a zone farther from the source of exposure but within the occupational building). EPA used these estimated airborne concentrations to estimate 8-hour time weighted average exposures for workers (*i.e.,* in the near field) and occupational bystanders (*i.e.,* in the far field). A worker is defined as the person performing the task in which TCE is used. Occupational bystanders are defined as other people within the building who are not performing the TCE-based task. Details of the modeling and estimation method for calculating exposure levels during aerosol degreasing are available in the analysis document, *Supplemental Occupational Exposure and Risk Reduction Technical Report in Support of Risk Management Options for Trichloroethylene (TCE) Use in Aerosol Degreasing* (Ref. 23). As discussed in Unit IV.C, this analysis is based on the methodology used in the peer reviewed TCE risk assessment (Ref. 1).

EPA assumed that a worker applies aerosol degreasers 260 days a year, once per hour, and that no applications occur during the first hour of the 8-hour work day. EPA also assumed that aerosol degreasing facilities use 192.2 grams of degreaser per day and for 100% TCE degreaser this would be 27.5 grams of TCE per application. For degreasers with differing concentrations of TCE, the per-application quantity was adjusted accordingly (Refs. 1 and 23).

e. Risks for this use. As discussed in Unit IV.B, TCE is associated with a range of non-cancer adverse health effects in humans and animals and is carcinogenic to humans. MOEs were used in this assessment to estimate non-cancer risks for acute and chronic exposures. Exposure scenarios with MOEs below the benchmark MOE for the individual toxicity endpoints have risks of concern, as explained in detail in the TCE risk assessment (Ref. 1). Cancer risks express the incremental probability of an individual developing cancer over a lifetime as a result of exposure to TCE under specified use scenarios.

The acute inhalation risk assessment used developmental toxicity data to evaluate the acute risks for the TCE use scenarios. As indicated in the TSCA Work Plan Risk Assessment on TCE, EPA's policy supports the use of developmental studies to evaluate the risks of acute exposures. This science-based policy is based on the presumption that a single exposure of a chemical at a critical window of fetal development, as in the case of cardiac malformation, may produce adverse developmental effects (Ref. 34 and 35). EPA reviewed multiple studies for suitability for acute risk estimation including a number of developmental studies of TCE exposure and additional studies of TCE metabolites administered developmentally (Appendix N) (Ref. 1). EPA based its acute risk assessment on the most sensitive health endpoint (*i.e.,* fetal heart malformations; Ref. 1) representing the most sensitive human life stage (*i.e.,* the developing fetus). The acute risk assessment used the physiologically based pharmacokinetic (PBPK)-derived hazard values (HEC50, HEC95, or HEC99; HECXX is the Human Equivalent Concentration at a particular percentile) from the Johnson et al. (2003) (Ref. 36) developmental toxicity study for each aerosol degreaser use scenario. Note that the differences among these hazard values is small and no greater than 3-fold (*i.e.,* 2-fold for HEC50/HEC95 ratios; 3-fold for HEC50/HEC99 ratios; 1.4-fold for HEC95/HEC99 ratios). The TCE IRIS assessment preferred the HEC99 for the non-cancer dose-response derivations because the HEC99 was interpreted to be protective for a sensitive individual in the population. While the HEC99 was used to determine the level of risk to be used in making the preliminary section 6(a) determination, the small variation among HEC50, HEC95 and HEC99 would not result in a different risk determination.

Acute inhalation risks were estimated for all residential exposure scenarios of aerosol degreasing based on concerns for developmental effects. Risks of concern were identified for consumer users and bystanders, regardless of the type of exposure (typical vs. worst case scenario) and whether room ventilation was used. For acute consumer aerosol degreasing exposures, the high end MOE is 0.002 for fetal heart malformations. This means that exposures are estimated to be 5,000 times greater than exposures used to calculate the benchmark MOE of 10. All of the residential use scenarios resulted in MOE values significantly below the benchmark MOE of 10 irrespective of the percentile HEC value used to estimate the MOEs (Refs. 1, 24). Given this significant difference between the benchmark MOEs and the MOEs from the residential use scenarios, EPA has preliminarily determined that the risks TCE present for the consumer aerosol degreasing use are unreasonable risks.

For occupational aerosol degreasing exposures the MOE is 0.003 for fetal heart malformation and is also representative of MOEs for kidney toxicity and immunotoxicity. This equates to estimated exposures that are more than 3,000 times greater than those needed to achieve the benchmark MOE. For chronic occupational aerosol degreasing exposures the baseline cancer risk is 1.6×10^{-2} exceeding standard cancer benchmarks of 10^{-6} to 10^{-4} (Refs. 1, 23). EPA has preliminarily determined that TCE presents unreasonable risks for the occupational aerosol degreasing use.

2. Initial analysis of potential regulatory options. Having identified unreasonable risks from the use of TCE in aerosol degreasing, EPA evaluated whether regulatory options under section 6(a) could reach the risk (non-cancer and cancer) benchmarks.

EPA assessed a number of exposure scenarios associated with risk reduction options in order to determine variations in TCE exposure from aerosol degreasing, including: Material substitution, engineering controls, and use of PPE. EPA also assessed combinations of these options. The material substitution scenarios involved reducing the concentration of TCE in the degreasing formulation, with concentrations varying from 5 to 95 percent by weight in the product. For the engineering controls risk reduction option exposure scenarios, EPA evaluated using local exhaust ventilation to improve ventilation near the worker activity, with estimated 90% reduction in exposure levels. The PPE risk reduction option exposure scenarios evaluated workers and occupational bystanders wearing respirators with an assigned protection factor (APF) varying from 10 to 10,000. Additionally, EPA evaluated all combinations of the above three options: Material substitution plus PPE, material

substitution plus engineering controls such as local exhaust ventilation, PPE plus engineering controls such as local exhaust ventilation, and materials substitution plus PPE plus engineering controls such as local exhaust ventilation.

EPA's inhalation exposure modeling estimated exposures to characterize the range of workplace scenarios. Inhalation exposure level estimate for facilities without local exhaust ventilation ranged from 1.00 ppm to 14.36 ppm as 8-hour TWAs for workers and 0.21 ppm to 13.58 ppm for bystanders. For facilities with local exhaust ventilation which was estimated to have an effectiveness of 90%, EPA's inhalation exposure level estimates were 0.586 ppm for workers and 0.507 ppm for bystanders. This estimate was for the 99th percentile and assumed that the aerosol degreaser was 100% TCE and that no PPE was used. The exposure estimates for wearing PPE combined with facilities having local exhaust ventilation ranged from 0.0000586 ppm to 0.0586 ppm for workers and 0.0000507 ppm to 0.0507 ppm for bystanders. The range represents the 10 to 10,000 range of respirator APFs considered. The exposure estimates for material substitution plus local exhaust ventilation ranged from 0.0293 ppm to 0.556 ppm for workers and 0.0253 ppm to 0.482 ppm for bystanders. The range represents the various TCE concentrations (5% to 95%) considered for material substitution. Additional exposure level estimates for various scenarios are available in the analysis document *Supplemental Occupational Exposure and Risk Reduction Technical Report in Support of Risk Management Options for Trichloroethylene (TCE) Use in Aerosol Degreasing* (Ref. 23).

Overall, EPA evaluated dozens of distinct exposure scenarios. The results indicate that regulatory options such as reducing the concentration of TCE in aerosol degreasers and using local exhaust ventilation to improve ventilation near worker activity, in the absence of PPE could not achieve the target MOE benchmarks for non-cancer endpoints for acute and chronic exposures and standard cancer risk benchmarks for chronic exposures (Refs. 23 and 24). The results also demonstrate that all risk reduction options meeting the benchmark MOEs and cancer benchmarks for TCE aerosol degreasers require the use of a respirator, whether used alone or in conjunction with additional levels of protection. Therefore, EPA found options setting a maximum concentration in products under section 6(a)(2) to not be protective because the options failed—by orders of magnitude—to meet the risk benchmarks. Options found not to meet the risk benchmarks and, therefore, found not to address the identified unreasonable risks are documented in EPA's supplemental technical reports on aerosol degreasing (Refs. 23 and 24).

3. Assessment of regulatory options to determine whether they address the identified unreasonable risks to the extent necessary so that TCE no longer presents such risks. As discussed in Unit V, EPA considered a number of regulatory options under section 6(a) which are reflected in EPA's supporting analysis (Refs. 28 and 29). In assessing these options, EPA considered a wide range of exposure scenarios (Refs. 23, 24, 25). These include both baseline and risk reduction scenarios involving varying factors such as exposure concentration percentiles, local exhaust ventilation use, respirator use, working lifetimes, etc. As part of this analysis, EPA considered the impacts of regulatory options on consumer users and commercial users separately. However, EPA is proposing to address the aerosol degreasing use as a whole rather than as separate consumer and commercial uses given that the differences in the use itself between workers and consumers differ only in the degree of repetition and duration and, furthermore, that not addressing them jointly would facilitate products intended for one segment being intentionally or unintentionally acquired and misused by the other.

The options that had the potential to address the identified unreasonable risks for consumer use, commercial use, or both uses of TCE in aerosol degreasing included: (a) Prohibiting the manufacturing, processing, and distribution in commerce of TCE for use in aerosol degreasing under section 6(a)(2) plus prohibiting the use of TCE in commercial aerosol degreasing under section 6(a)(5) and requiring downstream notification when distributing TCE for other uses under section 6(a)(3); (b) variations on such a supply-chain approach (such as just prohibiting the manufacturing, processing, and distribution in commerce of TCE for use in aerosol degreasing products under section 6(a)(2) or just prohibiting the commercial use of TCE in aerosol degreasing under section 6(a)(5)); (c) prohibiting the manufacturing, processing, and distribution in commerce of TCE for use in consumer aerosol degreasing products under section 6(a)(2) and requiring downstream notification (*e.g.,* via a Safety Data Sheet (SDS)) when distributing TCE for other uses under section 6(a)(3); and (d) requiring the use of PPE in commercial aerosol degreasing operations in which TCE is used under section 6(a)(5) or requiring the use of PPE and engineering controls (local exhaust ventilation) in commercial aerosol degreasing operations in which TCE is used under section 6(a)(5).

The full range of regulatory options considered under section 6(a) is reflected in EPA's supporting analysis (Ref. 29). A discussion of those regulatory options that could reach the risk benchmarks for consumer use, commercial use, or both is provided in this Unit, along with the Agency's evaluation of how well those regulatory options would address the identified unreasonable risks in practice.

a. *Proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for aerosol degreasing and require downstream notification.* As noted previously, the proposed regulatory approach for TCE use in aerosol degreasing would prohibit the manufacturing, processing, and distribution in commerce of TCE for aerosol degreasing under TSCA section 6(a)(2), prohibit the commercial use of TCE for aerosol degreasing under TSCA section 6(a)(5), and require manufacturers, processors, and distributors, except for retailers, to provide downstream notification, *e.g.,* via a Safety Data Sheet (SDS), of the prohibitions under TSCA section 6(a)(3).

As discussed in Unit VI.B.1, the baseline risk for exposure to workers and consumers for aerosol degreasing departs from non-cancer MOE benchmarks for all non-cancer effects (*e.g.,* developmental effects, kidney toxicity, and immunotoxicity) and standard cancer benchmarks. Under this proposed approach, exposures to TCE from use in aerosol degreasing would be completely eliminated. As a result, both non-cancer and cancer risks would be eliminated (Refs. 23 and 24).

The proposed approach would ensure that workers and consumers are no longer at risk from TCE exposure associated with this use. Prohibiting the manufacturing, processing and distribution in commerce of TCE for use in aerosol degreasing would minimize the availability of TCE for aerosol degreasing. The prohibition of the use of TCE in commercial aerosol degreasing would eliminate commercial demand for TCE aerosol degreasing products and significantly reduce the potential for consumer use of commercial products. These complementary provisions would protect both workers and consumers; workers would not be exposed to TCE and the risk to consumers would be

minimized because commercial aerosol degreasing products containing TCE would not be available, so consumers would not be able to divert commercial-use products from the supply chain. The downstream notification of these restrictions ensures that processors, distributors, and other purchasers are aware of the manufacturing, processing, distribution in commerce and use restrictions for TCE in aerosol degreasing, and helps to ensure that the rule is effectively implemented by avoiding off-label use as an aerosol degreaser of TCE manufactured for other uses. Downstream notification also streamlines and aids in compliance and enhances enforcement. Overall, downstream notification facilitates implementation of the rule. This integrated supply chain proposed approach minimizes the risk from TCE in aerosol degreasing. In addition, the proposed approach would provide staggered compliance dates for implementing the prohibition of manufacturing, processing, distribution in commerce, and commercial use in order to avoid undue impacts on the businesses involved.

b. Options that are variations of the proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for aerosol degreasing and require downstream notification. One variation of the proposed approach would be to prohibit manufacture, processing, and distribution in commerce for the consumer and commercial aerosol degreasing uses alone. This option could reach the risk benchmarks for TCE. However, while this option could address the identified unreasonable risks, in practice given the continued availability of TCE for other uses, it would not do so. Without the accompanying prohibition on commercial use and downstream notification that is included in the proposed approach, this option would leave open the likelihood that commercial users or consumers could obtain off-label TCE for aerosol degreasing. For example, if only manufacturing, processing and distribution in commerce for the aerosol degreasing use were prohibited without also prohibiting the commercial use and providing the downstream notice, commercial users or consumers could more easily acquire TCE for degreasing from sources that make it available for other uses. This would be particularly easy for commercial users given that a company may buy a chemical substance for one use and also use it for another. Without downstream notification, unsophisticated purchasers, in particular, are likely to be unfamiliar with the prohibitions regarding this use and mistakenly use TCE for aerosol degreasing and thereby expose themselves and bystanders to unreasonable risks. Thus, under these variations, EPA anticipates that the risk benchmarks would not actually be realized by many users. Therefore, these variations fail to address the identified unreasonable risks, considering the practical limitations of the options.

Another regulatory option that EPA considered was to prohibit only the commercial use of TCE for aerosol degreasing. This approach would eliminate both non-cancer and cancer risks for commercial settings only, but would not eliminate risks to consumers. By prohibiting commercial use alone, without a prohibition on the manufacture, processing, and distribution in commerce for consumer and commercial use, this would not address consumer risks as consumers would still be able to purchase aerosol degreasing products containing TCE, including those products labeled and marketed as ''professional strength'' or ''commercial grade'' products. Consumers would continue to be exposed far above the health benchmarks and would not be protected from the unreasonable risks posed by TCE.

c. Prohibit the manufacturing, processing, and distribution in commerce of TCE for use in consumer aerosol degreasing products under section 6(a)(2) or prohibit the manufacturing, processing, and distribution in commerce of TCE for use in consumer aerosol degreasing products under section 6(a)(2) and require downstream notification when distributing TCE for other uses section 6(a)(3). EPA considered prohibiting the manufacturing, processing, and distribution in commerce of TCE for use in consumer aerosol degreasing products including an option with a requirement for downstream notification of such prohibition. If such a prohibition were effective, this option would mitigate the risks to consumers from TCE use in aerosol degreasing. However, EPA has determined that consumers can easily obtain products labeled for commercial use. Indeed, for many consumers, identifying a product as being for commercial use may imply greater efficacy. Coupled with the fact that many products identified as commercial or professional are readily obtainable in a variety of venues (*e.g.,* the Internet, general retailers, and specialty stores, such as automotive stores), EPA does not find that this option would protect consumers. In addition, this option alone would not address the risks to workers from commercial aerosol degreasing.

d. Require the use of personal protective equipment in commercial aerosol degreasing operations in which TCE is used under section 6(a)(5) or require the use of personal protective equipment and engineering controls in commercial aerosol degreasing operations in which TCE is used under section 6(a)(5). Another regulatory option that EPA considered was to require respiratory protection equipment at commercial aerosol degreasing operations in the form of a full face piece self-contained breathing apparatus (SCBA) in pressure demand mode or other positive pressure mode with an APF of 10,000. EPA's analysis determined that use of a SCBA with an APF of 10,000 for commercial aerosol degreasing uses could control TCE air concentration to levels that allow for meeting the benchmarks for non-cancer and cancer risks for the commercial uses addressed in this proposed rule.

Although respirators could reduce exposures to levels that are protective of non-cancer and cancer risks, there are many documented limitations to successful implementation of respirators with an APF of 10,000. Not all workers can wear respirators. Individuals with impaired lung function, due to asthma, emphysema, or chronic obstructive pulmonary disease for example, may be physically unable to wear a respirator. Determination of adequate fit and annual fit testing is required for a tight fitting full-face piece respirators to provide the required protection. Also, difficulties associated with selection, fit, and use often render them ineffective in actual application, preventing the assurance of consistent and reliable protection, regardless of the assigned capabilities of the respirator. Individuals who cannot get a good face piece fit, including those individuals whose beards or sideburns interfere with the face piece seal, would be unable to wear tight fitting respirators. In addition, respirators may also present communication problems, vision problems, worker fatigue and reduced work efficiency (63 FR 1156, January 8, 1998). According to OSHA, ''improperly selected respirators may afford no protection at all (for example, use of a dust mask against airborne vapors), may be so uncomfortable as to be intolerable to the wearer, or may hinder vision, communication, hearing, or movement and thus pose a risk to the wearer's safety or health.'' (63 FR 1189–1190). Nonetheless, it is sometimes necessary to use respiratory protection to control

exposure. The OSHA respiratory protection standard (29 CFR 1910.134) requires employers to establish and implement a respiratory protection program to protect their respirator wearing employees. This OSHA standard contains several requirements, *e.g.,* for program administration; worksite-specific procedures; respirator selection; employee training; fit testing; medical evaluation; respirator use; respirator cleaning, maintenance, and repair; and other provisions that would be difficult to fully implement in some small business settings where they are not already using respirators.

In addition, OSHA has adopted a hierarchy of industrial hygiene controls established by the industrial hygiene community to be used to protect employees from hazardous airborne contaminants, such as TCE (see, *e.g.,* 29 CFR 1910.134(a)(1); 29 CFR 1910.1000(e), and OSHA's substance-specific standards in 29 CFR 1910, subpart Z). According to the hierarchy, substitution of less toxic substances, engineering controls, administrative controls, and work practice controls are the preferred methods of compliance for protecting employees from airborne contaminants and are to be implemented first, before respiratory protection is used. OSHA permits respirators to be used only where engineering controls and effective work practices are not feasible or during an interim period while such controls are being implemented.

Also for commercial aerosol degreasing uses, EPA considered requiring a combination of local exhaust ventilation and a supplied-air respirator with an APF of 1,000, with a performance based option using an air exposure limit. This option could also reduce risks to the health benchmarks for workers when used properly (Ref. 23). However, while this option has the benefit of incorporating engineering controls and use of a respirator with a lower APF, there are still the limitations to successful implementation of the use of supplied-air respirators in the workplace as discussed previously. Further, this option would also require the use of prescriptive and expensive engineering controls to reach the risk benchmarks, unless the optional use of an air exposure limit is implemented (Ref. 39). Even if the performance-based option of meeting an air concentration level as an exposure limit for TCE were used, this would depend upon the use of both engineering controls and a respirator to meet the exposure limit for TCE.

Furthermore, neither of these variations of relying upon PPE for commercial aerosol degreasing use would do anything to reduce the risks to consumer users. Therefore, considering the practical limitations of PPE for this scenario as well as the unmitigated risks to consumers, this option would not address the unreasonable risks presented by these uses.

Even if either of these approaches were coupled with a section 6(a)(2) prohibition on the manufacture, processing and distribution in commerce of TCE for use in consumer aerosol degreasing products, this would not protect consumers because they would be able to buy and use commercial aerosol degreasing products, *e.g.,* via the Internet.

EPA could also require that TCE products be distributed with a respirator with an appropriate assigned protection factor to protect for the risks from TCE. EPA determined that this option would not address the identified unreasonable risks because simply packaging a respirator with a chemical (or any product) does not mean that a worker or consumer would actually use it properly or even understand how to use it (Refs. 28 and 29).

C. Availability of Substitutes and Impacts of the Proposed and Alternative Regulatory Options

This Unit examines the availability of substitutes for TCE in aerosol degreasing and describes the estimated costs of the proposed and alternative regulatory actions that EPA considered. More information on the benefits and costs of this proposal as a whole can be found in Unit VIII.

Overall, EPA notes that the cost of aerosol degreasing product reformulations are low. Total first-year reformulation costs are estimated to be $416,000 and annualized costs are estimated to be approximately $32,000 per year (annualized at 3% over 15 years) and $41,000 (annualized at 7% over 15 years). A wide variety of effective substitutes are available, as previously noted, and the current existence of non-TCE containing aerosol degreasers indicates that there are no specific aerosol degreasing uses for which TCE is critical. TCE use is limited in aerosol degreasing products intended for consumers due to existing VOC regulations in California and in a number of other states. New Hampshire and Virginia prohibit use of TCE in aerosol adhesives. Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New York, and Rhode Island prohibit the use of TCE in aerosol adhesives, contact adhesives, electrical cleaners, footwear/leather care products, adhesive removers, general purpose degreasers, and graffiti removers (Ref. 15). New Jersey prohibits the use of TCE in all those products and also in brake cleaners, engine degreasers, and carburetor/fuel-injection air intake cleaners. In addition to prohibiting the use of TCE in all those products, California also prohibits the use of TCE in bathroom and tile cleaners, construction and panel/floor covering adhesives; carpet/upholstery cleaner, general purpose cleaners, fabric protectant, multi-purpose lubricant, penetrant, metal polish or cleanser, multi-purpose solvent, oven cleaners, paint thinner, pressurized gas duster, sealant or caulking compound, spot remover, and silicone-based multi-purpose lubricant (Ref. 12). The range of the State-mandated prohibitions demonstrate that other chemicals can be substituted for TCE for a wide range of uses because other chemicals or mixtures of chemicals can impart properties similar to those of TCE. Further, the fact that 10 states and the District of Columbia have specifically prohibited the use of TCE in general purpose degreasers and general purpose degreasers continue to be sold in those jurisdictions, demonstrates that TCE is not critical to the degreasing use and there are efficacious substitutes.

TCE is also prohibited in the European Union in aerosol degreasers (Ref. 16); TCE substitutes are used for aerosol degreasing. These regulations confirm that TCE is not a critical chemical for aerosol degreasing and that substituting alternate chemicals would not be overly difficult. Producers of aerosol degreasing products containing TCE also produce aerosol degreasing products with substitute chemicals. Thus, there is already precedent for producers reformulating products to meet demand in some states and countries. In addition, EPA expects that one effect of a ban on the use of TCE in aerosol degreasing products would be increased technological innovation, resulting in the development of additional alternatives.

1. Proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for aerosol degreasing and require downstream notification. The costs of the proposed approach are estimated to include product reformulation costs, downstream notification costs, recordkeeping costs, and Agency costs. The total first-year costs of aerosol degreasing product reformulations are estimated to be $416,000 and annualized costs are estimated to be

approximately $32,000 per year (annualized at 3% over 15 years) and $41,000 (annualized at 7% over 15 years). The cost for reformulation includes a variety of factors such as identifying the substitute for TCE, assessing the efficacy of the new formulation and determining shelf-life. The costs to users of aerosol degreasers are negligible as substitute products are currently available on the market and are similarly priced. The first-year costs of downstream notification and recordkeeping are estimated to be $51,000 and on an annualized basis over 15 years are $3,900 and $5,000 using 3% and 7% discount rates respectively (Ref. 2). Agency costs for enforcement are estimated to be approximately $112,000 and $109,000 annualized over 15 years at 3% and 7%, respectively. Annual recurring costs to the Agency for enforcement are estimated to be $121,000 per year. The total cost of the proposed approach for aerosol degreasing use is estimated to be $37,000–$40,000 and $46,000–$49,000 annualized over 15 years at 3% and 7%, respectively.

2. Options that require personal protective equipment. Given equipment costs and the requirements associated with establishing a respiratory protection program which involves training, respirator fit testing and the establishment and maintenance of a medical monitoring program, EPA anticipates that companies would choose to switch to substitute chemicals instead of adopting a program for PPE, including with a performance based option of meeting an air concentration level as an exposure limit for TCE. The estimated annualized costs of switching to a respiratory protection program requiring PPE of APF 10,000 are $8,300 at 3% and $9,100 at 7% per aerosol degreasing facility over 15 years. The estimated annualized costs of switching to a respiratory protection program requiring PPE of APF 1,000 are $5,400 at 3% and $5,500 at 7% per facility over 15 years. In addition, there would be higher EPA administration and enforcement costs with a respiratory protection program than there would be with an enforcement program under the proposed approach. Further, even if cost were not an impediment, in addition to cost, there are many limitations to the successful implementation of respirators with an APF of 10,000 in a workplace.

3. Options that exclude downstream notification. EPA was unable to monetize the extent to which enforcement costs would vary by regulatory option so EPA assumed monetized enforcement costs to be the same under all options for the purpose of this proposed rulemaking. The proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for aerosol degreasing and require downstream notification is relatively easy to enforce because key requirements are directly placed on a small number of suppliers and because the supply chain approach minimizes to the greatest extent the potential for TCE products to be intentionally or unintentionally misdirected into the prohibited uses. Enforcement under the other options would be much more difficult since the key requirements are directly placed on the large number of product users (Ref. 40). Under these other options, enforcement activities must target firms that might perform the activity where a TCE use is restricted or prohibited. Identifying which establishments might use aerosol degreasers is difficult because aerosol degreasing is not strictly specific to any industry (Ref. 2). Therefore, while EPA considers downstream notification to be a critical component of this proposal, EPA also finds that incorporating downstream notification reduces the burden on society by easing implementation, compliance, and enforcement (Ref. 41).

D. Summary

The proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for aerosol degreasing and require downstream notification is necessary to ensure that TCE no longer presents unreasonable risks for all users. This option does not pose an undue burden on industry because comparably effective and priced substitutes to TCE for aerosol degreasing are readily available. The supply chain approach ensures protection of consumers from the identified unreasonable risks by precluding the off-label purchase of commercial products by consumers. The downstream notification (*e.g.,* via SDS) component of the supply chain approach provides notice of the prohibition throughout the supply chain and, while slightly more costly to upstream entities, helps to ensure that the use no longer presents unreasonable risks because it streamlines and aids in compliance and enhances enforcement.

VII. Regulatory Assessment of TCE Use for Spot Cleaning in Dry Cleaning Facilities

This Unit describes the current use of TCE for spot cleaning in dry cleaning facilities, the unreasonable risks presented by this use, and how EPA preliminarily determined which regulatory options are necessary to address the identified unreasonable risks.

A. Description of the Current Use

TCE was first introduced as a dry cleaning solvent in the United States in the 1930s (Ref. 2). It was never widely used as a primary dry cleaning solvent; however, TCE is still used for spot cleaning in dry cleaning facilities to remove oily-type stains, including fats, waxes, grease, cosmetics, and paints. Stained fabrics are typically ''pre-spotted'' with spot treatment products, which are often solvent-based such as those containing TCE, prior to being placed in dry cleaning machines (Refs. 42, 43). TCE is one of many available spotting agents used in dry cleaning facilities. A range of alternative spotting agents are used in dry cleaning facilities including certain halogenated solvents, such as perchloroethylene, 1-bromopropane, and methylene chloride; water- and soy-based spotting agents; hydrocarbon/mineral spirits; glycol ethers; and others (Ref. 2). TCE is applied by a squirt bottle directly onto the stain on the garment (Ref. 1). Squirt bottles are hand filled from larger volume containers of the spotting agent. After application, the TCE-based spotting agent is patted with a brush to break up the stain without harming fabric and suction vacuumed from the garment, which is then placed in the dry cleaning machine. The TCE spotting agent from the vacuum is collected as hazardous waste. Concentrations of TCE in commercial spotting agents vary from 10% to 100% (Refs. 42, 43).

EPA estimates that there are approximately 61,000 dry cleaning facilities in the United States, with an estimated 210,000 workers. Approximately 32,000 to 52,000 of those dry cleaning facilities are estimated to be using TCE in spot cleaning, with an estimated 105,000 to 168,000 workers and occupational bystanders (Ref. 2). Less than 1% of the total 225 million pounds of TCE used in the United States is for dry cleaning with approximately 50% to 80% of dry cleaners estimated to be using TCE for spot cleaning in dry cleaning facilities (Ref. 2). A typical dry cleaning facility uses 0.84 to 8.4 gallons per year of TCE for spot cleaning operations (Ref. 1).

There are currently a wide variety of comparably effective substitutes on the market and in use in dry cleaning operations that are similarly priced to TCE (Ref. 2), including substitute water-based cleaners (Ref. 44), methyl esters (soy) cleaners, hydrocarbon/mineral spirits, glycol ethers, perchloroethylene, methylene chloride, and 1-bromopropane (Ref. 32). Chemical

substitutes that would most likely be used are water-based cleaners, methyl esters (soy) cleaners, hydrocarbon/mineral spirits, glycol ethers, perchloroethylene, 1-bromopropane, methylene chloride, and others. EPA estimates that 5% of users will switch to aqueous cleaners, 25% will switch to perchloroethylene and 1-bromopropane, and 70% will switch to other alternatives (Ref. 2). In general, substitutes are less toxic than TCE (Refs. 32, 44). Thus, considering similar exposure potentials for substitutes, the overall risk potential for the substitutes will be less than for TCE (Ref. 32).

B. Analysis of Regulatory Options

In this Unit, EPA explains how it determined whether the regulatory options considered would address the unreasonable risks presented by this use. First, EPA characterizes the unreasonable risks associated with the current use of TCE for spot cleaning in dry cleaning facilities. Then, the Agency describes its initial analysis of which regulatory options have the potential to achieve non-cancer and cancer benchmarks. The levels of acute and chronic exposures estimated to present low risk for non-cancer effects also results in low risk for cancer. Lastly, this Unit evaluates how well those regulatory options would address the identified unreasonable risks in practice.

1. *Risks associated with the current use.* a. *General impacts.* The TCE risk assessment identified non-cancer risks and cancer risks for chronic exposures of workers and occupational bystanders in dry cleaning facilities that use TCE for spot cleaning (Ref. 1). EPA also identified acute non-cancer risks for workers and occupational bystanders (Ref. 1). The size of the potentially exposed population is approximately 105,000–168,000 workers and occupational bystanders in dry cleaning operations (Ref. 2).

b. *Impacts on minority populations.* In dry cleaning facilities, Asian and Hispanic populations are over-represented. 13% of dry cleaning workers are Asian, compared to 5% of the national population. Also, 30% of dry cleaning workers are Hispanic (of any race) compared to 16% of the national population (Ref. 2). Because minority populations are disproportionately over-represented in this industry they are disproportionately exposed; thus, there would be disproportionately positive benefits for these populations from the regulatory approach set forth in this proposal.

c. *Impacts on children.* EPA has concern for effects on the developing fetus from acute and chronic maternal exposures to TCE in dry cleaning facilities. The risk estimates are focused on pregnant women because adverse effects on the developing fetus is one of the most sensitive health effects associated with TCE exposure. Of the up to 168,000 workers and occupational bystanders in dry cleaning operations who make up the exposed population, 3.2% are estimated to be pregnant women. Thus, up to approximately 5,400 pregnant women are estimated to be exposed to TCE in spot cleaning in dry cleaning facilities each year. The pregnancy estimate includes women who have live births, induced abortions, and fetal losses (Ref. 2). The potential for exposure is significant because approximately half of all pregnancies are unintended. If a pregnancy is not planned before conception, a woman may not be in optimal health for childbearing (Ref. 33).

d. *Exposures for this use.* TCE exposures for this use are through the inhalation route. EPA used readily available information from a 2007 study on spotting chemicals, prepared for the California EPA and EPA, to estimate releases of TCE and associated inhalation exposures to workers from spot cleaning operations in dry cleaning facilities (Ref. 1). The near field/far field mass balance model, which has been extensively peer-reviewed, was used for this estimation of workplace exposure levels during spot cleaning (Ref. 1). The near-field/far-field model estimates airborne concentrations in a near field (a zone close to the source of exposure) and a far field (a zone farther from the source of exposure but within the occupational building). EPA used these estimated airborne concentrations to estimate exposures for the worker applying the spotting agent (*i.e.,* in the near field) and the occupational bystanders (*i.e.,* in the far field). A worker is defined as the person performing the task in which TCE is used. Occupational bystanders are defined as other persons within the dry cleaning facility who are not performing the TCE-based task. EPA assumed that dry cleaning facilities operated 260 days per year for 8 hours a day; that the concentration in the spotting agent ranged from 10 to 100% and that a typical dry cleaning facility used 0.84 to 8.4 gallons of TCE per year for spotting operations. Details of the modeling and estimation method for calculating exposure levels during spot cleaning are available in the TCE risk assessment (Ref. 1).

e. *Risks for this use.* As discussed in Unit IV.B, TCE is associated with a range of non-cancer health effects in humans and animals and is also carcinogenic to humans.

As discussed in Unit IV.B, MOEs were used in this assessment to estimate non-cancer risks for acute and chronic exposures. Exposure scenarios with MOEs below the benchmark MOE have risks of concern and typically, non-cancer adverse effects are more likely to result from exposure scenarios with MOEs below the benchmark MOE. For the use of TCE as a spot cleaner in dry cleaning facilities, the risk estimates for a range of non-cancer effects were below the benchmark MOE of 10 for developmental effects. The MOE for acute developmental effects is 0.002 for fetal heart malformation (Refs. 1, 25). For chronic occupational spot cleaning exposures, the MOE is 0.003 for fetal heart malformation and is similar to MOEs for kidney toxicity and immunotoxicity. In the baseline exposure scenarios, the MOEs are 3,000 times less than the benchmark MOEs (Refs. 1, 25). EPA has preliminarily determined that TCE presents unreasonable non-cancer risks from spot cleaning in dry cleaning facilities.

Cancer risks determine the incremental probability of an individual developing cancer over a lifetime as a result of exposure to TCE. For chronic occupational spot cleaning exposures the baseline cancer risk is 1×10^{-2} which exceeds the standard cancer benchmarks of 10^{-6} to 10^{-4} (Refs. 1 and 25). Accordingly, EPA has preliminarily determined that TCE presents unreasonable cancer risks from spot cleaning in dry cleaning facilities.

2. Initial analysis of potential regulatory options. Having identified unreasonable risks from the use of TCE in spot cleaning in dry cleaning facilities, EPA evaluated whether regulatory options under section 6(a) could reach the risk (non-cancer and cancer) benchmarks.

EPA assessed a number of exposure scenarios associated with risk reduction options in order to determine variations in TCE exposure when spot cleaning in dry cleaning facilities: Material substitution, engineering controls, and use of PPE, as well as combinations. The materials substitution scenarios involved reducing the concentration of TCE in the spot cleaning formulation, with concentrations varying from 5% to 95% total weight of the formulation. For the engineering control risk reduction option exposure scenarios, EPA evaluated using local exhaust ventilation to improve ventilation near the worker activity, with estimated 90% reduction in exposure levels. The PPE risk reduction option exposure scenarios evaluated workers and

occupational bystanders wearing respirators with APF varying from 10 to 10,000. Additionally, EPA evaluated all combinations of the above three options: Material substitution plus PPE; material substitution plus local exhaust ventilation; PPE plus local exhaust ventilation; and material substitution plus PPE plus local exhaust ventilation.

EPA's site-specific inhalation exposure level estimate for facilities without local exhaust ventilation ranged from 0.08 to 19 ppm as 8-hour TWAs. Although relevant exposure monitoring data were limited, EPA identified a study specific to spot cleaning with TCE (Ref. 42). In this study, TWA levels for worker exposure to TCE during spot cleaning (with no local exhaust ventilation) ranged from 2.37 to 3.11 ppm. This range of exposure levels falls within EPA's estimated exposure range of 0.08 to 19 ppm and is within a factor of 10 of EPA's high-end estimate of 19 ppm (Ref. 43).

For facilities with local exhaust ventilation, EPA's inhalation exposure level estimates were 5.0×10^{-1} ppm for workers and 4.2×10^{-1} for bystanders. The exposure estimates for wearing PPE combined with facilities having local exhaust ventilation ranged from 5.0×10^{-5} ppm to 5.0×10^{-2} ppm for workers and 4.2×10^{-5} ppm to 4.2×10^{-2} ppm for bystanders. The exposure estimates for material substitution plus local exhaust ventilation ranged from 2.5×10^{-2} ppm to 4.7×10^{-1} ppm for workers and 2.1×10^{-2} ppm to 4.0×10^{-1} ppm for bystanders. All exposure level estimates for the various scenarios considered are available in the TCE risk assessment (Ref. 1) and *Supplemental Occupational Exposure and Risk Reduction Technical Report in Support of Risk Management Options for Trichloroethylene (TCE) Use in Spot Cleaning* (Ref. 25).

The results indicate that alternate regulatory options such as reducing the concentration of TCE in spot cleaners for dry cleaning facilities and using local exhaust ventilation to improve ventilation near worker activity could not achieve the target MOE benchmarks for non-cancer endpoints for acute and chronic exposures and standard cancer risk benchmarks for chronic exposures. The results also demonstrate that all risk reduction options require the use of a respirator, whether used alone or in conjunction with additional levels of protection, in order to meet the non-cancer and cancer risk benchmarks (Ref. 25). Therefore, EPA found that options setting a maximum concentration in products under section 6(a)(2) did not address the identified unreasonable risks because the options failed—by orders of magnitude—to meet the risk benchmarks. Options found not to meet the risk benchmarks and which, therefore, do not address the identified unreasonable risks are documented in EPA's supplemental technical report on spot cleaning (Ref. 25).

3. Assessment of regulatory options to determine whether they address the identified unreasonable risks to the extent necessary so that TCE no longer presents such risks. As discussed in Unit V., EPA considered a number of regulatory options under section 6(a) to address TCE risks from spot cleaning in dry cleaning facilities which are reflected in EPA's supporting analysis (Ref. 29). In assessing these options, EPA considered a wide range of exposure scenarios (Ref. 25). These include both baseline and risk reduction scenarios involving varying factors such as reduction of TCE content in spot cleaners, exposure concentration percentiles, local exhaust ventilation use, respirator use, working lifetimes, etc. The options that could reduce the risks of TCE use to the benchmark MOE and standard cancer benchmarks for spot cleaning in dry cleaning include (a) prohibiting the manufacture, processing, and distribution in commerce of TCE for use as a spot cleaner in dry cleaning facilities (section 6(a)(2)) plus prohibiting the use of TCE as a spot cleaner in dry cleaning facilities (section 6(a)(5)) and requiring downstream notification when distributing TCE for other uses under section 6(a)(3); (b) variations on such a supply-chain approach (such as just prohibiting the manufacture, processing, distribution in commerce of TCE for use as a spot cleaner in dry cleaning facilities under section 6(a)(2) or just prohibiting the commercial use of TCE as a spot cleaner in dry cleaning facilities under section 6(a)(5)); (c) requiring the use of personal protective equipment in dry cleaning facilities in which TCE is used as a spot cleaner under section 6(a)(5) or requiring the use of personal protective equipment and engineering controls in dry cleaning facilities in which TCE is used as a spotting agent under section 6(a)(5).

The full range of regulatory options considered under section 6(a) is reflected in EPA's supporting analysis (Ref. 29). A discussion of the regulatory options that were determined to have the potential to address the identified unreasonable risks is provided in this Unit, along with the Agency's evaluation of how well those regulatory options would address the unreasonable risks in practice.

a. *Proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for spot cleaning in dry cleaning facilities and require downstream notification.* As noted previously, the proposed regulatory approach uses several elements of TSCA section 6(a) to address the risk of TCE use for spot cleaning in dry cleaning facilities throughout the supply chain. The proposed regulatory approach would prohibit the manufacturing, processing, and distribution in commerce of TCE for spot cleaning in dry cleaning facilities under TSCA § 6(a)(2), prohibit the commercial use of TCE for spot cleaning in dry cleaning facilities under TSCA § 6(a)(5), and require manufacturers, processors, and distributors, except for retailers, to provide downstream notification, *e.g.,* via a SDS, of the prohibitions under TSCA § 6(a)(3).

As discussed in Unit VII.B.1, the MOEs for occupational exposure for spot cleaning in dry cleaning facilities are below the non-cancer MOE benchmarks for all non-cancer effects (*e.g.,* developmental effects, kidney toxicity, and immunotoxicity) and standard cancer benchmarks. Under this proposed approach, exposures to TCE from this use would be completely eliminated. As a result, both non-cancer and cancer risks from exposure to TCE from this use would be eliminated (Ref. 39). All employees in dry cleaning facilities would benefit; and Asian and Hispanic populations, which are over-represented in dry cleaning facilities, would disproportionally benefit from the proposed approach.

The proposed approach would ensure that workers and occupational bystanders are no longer at risk from TCE exposure associated with this use throughout the supply chain. By proposing to prohibit the manufacture, processing and distribution in commerce of TCE for use as a spot cleaner in dry cleaning facilities, EPA would ensure that manufacturers, processors and distributors would not sell TCE for a use that EPA has determined presents an unreasonable risk of injury to health, and the intentional or unintentional availability of TCE for spot cleaning in dry cleaning facilities would be minimized. The proposal to prohibit commercial use of TCE as a spot cleaner in dry cleaning facilities would eliminate commercial demand for TCE-based spot cleaning products and would more effectively protect workers and bystanders than a prohibition only on manufacture, processing or distribution for this use under Section 6(a)(2). The prohibition on commercial use ensures that commercial users would not be able to divert TCE manufactured for other

allowable uses to this prohibited use without consequence. The downstream notification of these restrictions ensures that processors, distributors, and purchasers are aware of the manufacturing, processing, and distribution in commerce and use restrictions for TCE spot cleaner uses in dry cleaning facilities and helps to ensure that the rule is effectively implemented by avoiding off-label use as a spot cleaner of TCE manufactured for other uses. Downstream notification also streamlines and aids in compliance and enhances enforcement. Overall, downstream notification facilitates implementation of the rule. Collectively the proposed approach completely mitigates the risk from TCE in spot cleaners in dry cleaning facilities. In addition, the proposed approach would provide staggered compliance dates for implementing the prohibition of manufacturing, processing, distribution in commerce, and commercial use in order to avoid undue impacts on the businesses involved.

b. Options that are variations of the proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for spot cleaning in dry cleaning facilities and require downstream notification. Another regulatory option that EPA considered was to prohibit only the commercial use of TCE for spot cleaning in dry cleaning facilities under TSCA § 6(a)(5). This option could reach the risk benchmarks for TCE (Ref. 29). While this approach could eliminate non-cancer and cancer risks, in practice it would not address the identified unreasonable risks because users would easily be able to obtain TCE for use in dry cleaning facilities or would likely unknowingly purchase spot agents which contain TCE. If the Agency were to prohibit use alone, without the prohibition on manufacture, processing, and distribution in commerce for the use of TCE for spot cleaning in dry cleaning facilities, there is a greater likelihood that TCE manufactured for non-prohibited uses could be diverted to prohibited uses. Users would likely unknowingly purchase materials that they do not realize contain TCE because they would not be aware of the prohibition, which would result in unreasonable risks for those users. Taking the supply chain approach to addressing the risk of TCE in spot cleaning at commercial dry cleaning facilities helps to ensure that TCE manufactured for other allowed uses would not be used for this prohibited use.

Due to the large number of dry cleaning facilities in the United States (approximately 61,000), EPA is concerned that without the section 6(a)(3) downstream notification requirement, these entities might not become aware of the prohibition on TCE in spot cleaning because they may be unaware that certain products actually contain TCE. Thus, without downstream notification, EPA anticipates that the risk benchmarks would not actually be realized by many users. Therefore, such an option fails to address the identified unreasonable risks, considering the practical limitations.

Another regulatory option that EPA considered was to prohibit only the manufacturing, processing or distribution in commerce of TCE for spot cleaning in dry cleaning facilities under TSCA section 6(a)(2) or, a variation of this option: A prohibition of manufacturing, processing, or distribution in commerce of TCE for spot cleaning in dry cleaning facilities and require downstream notification when distributing TCE for other uses under section 6(a)(3). This option could reach the risk benchmarks for TCE (Ref. 29). However, this option introduces weaknesses, such as likelihood for users to obtain TCE for spot cleaning through other means, and thereby fails to address the identified unreasonable risks. For example, if only manufacturing, processing and distribution in commerce for the spot cleaning use in dry cleaners were prohibited without also prohibiting the use, dry cleaning facilities could go to other sources to acquire TCE for non-prohibited uses and divert those uses to the spot cleaning use without consequence. This would be the case even if the prohibition on manufacturing, processing and distribution in commerce were accompanied by the downstream notification requirement. A combined approach would ensure that the section 6(a) requirements address the identified unreasonable risks.

c. Require the use of personal protective equipment in commercial dry cleaning facilities in which TCE is used as a spot cleaner under section 6(a)(5) or require the use of personal protective equipment and engineering controls in commercial dry cleaning facilities in which TCE is used as a spot cleaner under section 6(a)(5). Another regulatory option that EPA considered was to require the use of respirators in the form of a supplied-air respirator with an APF of 10,000 for workers at risk of exposure to TCE with a performance based option using an air exposure limit. See Unit VI.B.3.d for a discussion of issues and drawbacks of requiring the use of a supplied-air respirator. In addition, while this option could mitigate the risk for workers, dry cleaning facilities are generally small shops and many are co-located in commercial shopping centers where the work goes on in plain view of customers or are co-located with residential buildings. It is highly unlikely that dry cleaning operations would undertake fitting all of their workers with the full face piece SCBA apparatus with accompanying supplied air breathing device necessary to mitigate risk. This approach could have separate economic impacts because consumers may not wish to enter an establishment in which workers are wearing supplied-air respirators. In addition, many dry cleaning establishments are located near residential areas. Local residents may react adversely to an establishment using chemicals which require a supplied-air respirator.

EPA also considered requiring the combination of the use of local exhaust ventilation which achieves 90% reduction in airborne concentrations to improve ventilation near the worker activity and a supplied-air respirator with an APF of 1,000 with a performance based option using an air exposure limit. EPA conducted a risk analysis for both baseline exposures and exposures after implementing risk management options, allowing for a direct comparison of the acute and chronic risks associated with the exposures following application of a risk reduction option. This option would also reduce risks to the health benchmarks for workers when used properly (Ref. 25). While this option has the benefit of incorporating engineering controls and use of a respirator with a lower APF, there are still the limitations to successful implementation of the use of supplied-air respirators in the workplace as discussed previously.

C. Availability of Substitutes and Impacts of the Proposed and Alternative Regulatory Options

This Unit examines the availability of substitutes for TCE as a spot cleaner in dry cleaning facilities and describes the estimated costs of the proposal and the alternatives that EPA considered. More information on the benefits and costs of this proposal as a whole can be found in Unit VIII.

Overall, EPA notes that the costs of dry cleaning spot cleaning product reformulation are low. Total first-year reformulation costs are estimated to be $286,000 and annualized costs are approximately $22,000 per year (annualized at 3% over 15 years) and $28,000 (annualized at 7% over 15 years). A wide variety of effective

substitutes for TCE in spot cleaning applications indicates that producers and users can readily shift from TCE to less hazardous chemical substitutes. Limitations on these or similar uses of TCE are already in place in many states in the United States and internationally. For example, TCE use is prohibited in California for aerosol and non-aerosol consumer spot removers. TCE is also prohibited in the European Union for spot cleaning use in dry cleaning facilities. In addition, according to the Drycleaning and Laundry Institute, a trade association representing more than 4,000 dry cleaning operations in the United States, not all dry cleaning facilities use TCE, and many other alternatives are available and equally effective (Refs. 42, 43). Further, prohibitions in California and the European Union indicate that the transition can be made to substitutes, demonstrating that switching to alternatives would not be overly difficult for users. Producers of spot cleaning products containing TCE also produce spot cleaning products with substitute chemicals. Thus, there is already precedent for producers reformulating products to meet demand in some states and countries. In addition, EPA expects that one effect of a ban on the use of TCE for spot cleaning at dry cleaning facilities would be increased technological innovation, resulting in the development of additional alternatives.

1. Proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for spot cleaning in dry cleaning facilities and require downstream notification. The costs of the proposed approach are estimated to include product reformulation costs, downstream notification and recordkeeping costs, and Agency costs. The total first-year costs of dry cleaning spot cleaning product reformulation are approximately $286,000 and annualized are estimated to be $22,000 per year (at 3% over 15 years) and $28,000 (at 7% over 15 years). The costs to users of dry cleaning spot cleaning products are negligible as substitute products are currently available on the market and are similarly priced. The costs of downstream notification and recordkeeping are estimated to be $51,000 and on an annualized basis over 15 years are $3,900 and $5,000 using 3% and 7% discount rates respectively. Agency costs for enforcement are estimated to be approximately $112,000 and $109,000 annualized over 15 years at 3% and 7%, respectively. Annual recurring costs to the Agency for enforcement are estimated to be $121,000 per year. The total cost of the proposed approach for the dry cleaning spot cleaning use is estimated to be $130,000 to $133,000 and $135,000 to $137,000 annualized at 3% and 7%, respectively, over 15 years.

2. Options that require personal protective equipment. The costs of implementing a respiratory protection program, including a supplied-air respirator and related equipment, training, fit testing, monitoring, medical surveillance, and related requirements, would far exceed the costs of switching to alternatives, on a per facility basis. The estimated annualized costs of switching to a respiratory protection program requiring PPE of 10,000 are $8,200 at 3% and $9,000 at 7% per dry cleaning facility over 15 years. The estimated annualized costs of switching to a respiratory protection program requiring PPE of 1,000 are $5,800 at 3% and $5,800 at 7% per dry cleaning facility over 15 years. In addition, there would be higher EPA administration and enforcement costs with respiratory protection program than there would be with an enforcement program under the proposed approach.

3. Options that exclude downstream notification. EPA was unable to monetize the extent to which enforcement costs would vary by regulatory option so EPA assumed monetized enforcement costs to be the same under all options for the purpose of this proposed rulemaking. The proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for spot cleaning in dry cleaning facilities and require downstream notification is relatively easy to enforce because key requirements are directly placed on a small number of suppliers and because the supply chain approach minimizes to the greatest extent the potential for TCE products to be intentionally or unintentionally misdirected into the prohibited uses. Enforcement under the other options would be much more difficult since the key requirements are directly placed on the large number of product users. Under these other options, enforcement activities must target firms that might perform the activity where a TCE use is restricted or prohibited. For the prohibition on TCE in dry cleaning spot removers, this would include all dry cleaning establishments. (Ref. 2). Therefore, while EPA considers downstream notification to be a critical component of this proposal, EPA also finds that incorporating downstream notification reduces the burden on society by easing implementation, compliance, and enforcement.

D. Summary

The proposed approach to prohibit manufacturing, processing, distribution in commerce, and use of TCE for spot cleaning in dry cleaning facilities and require downstream notification is necessary to ensure that TCE no longer presents unreasonable risks for this use. This option does not pose an undue burden on industry because comparable substitutes to TCE for spot cleaning in dry cleaning facilities are readily available. This approach also protects workers and occupational bystanders from the identified unreasonable risks by providing downstream notification of the prohibition throughout the supply chain and avoiding off-label purchase and use of TCE for the prohibited use. Downstream notification streamlines compliance and aids in compliance and enhances enforcement.

VIII. Other Factors Considered

When issuing a rule under TSCA section 6(a), EPA must consider and publish a statement based on reasonably available information on the:

- Health effects of the chemical substance in question, TCE in this case, and the magnitude of human exposure to TCE;
- Environmental effects of TCE and the magnitude of exposure of the environment to TCE;
- Benefits of TCE for various uses; and the
- Reasonably ascertainable economic consequences of the rule, including the likely effect of the rule on the national economy, small business, technological innovation, the environment, and public health, the costs, benefits, and cost-effectiveness of the rule and of the one or more primary alternatives that EPA considered.

TSCA section 6(c)(2)(B) instructs EPA, when selecting among prohibitions and other restrictions under 6(a) to factor in, to the extent practicable, these considerations. This Unit provides more information on the benefits, costs, and cost-effectiveness of this proposal and the alternatives that EPA considered.

As discussed in Unit IV.B, TCE exposure is associated with a wide array of adverse health effects. These health effects include developmental toxicity (*e.g.,* cardiac malformations, developmental immunotoxicity, developmental neurotoxicity, fetal death), toxicity to the kidney (kidney damage and kidney cancer), immunotoxicity (such as systemic autoimmune diseases *e.g.,* scleroderma) and severe hypersensitivity skin

disorder, non-Hodgkin's lymphoma, endocrine and reproductive effects (*e.g.,* decreased libido and potency), neurotoxicity (*e.g.,* trigeminal neuralgia), and toxicity to the liver (impaired functioning and liver cancer) (Ref. 1). TCE may cause fetal cardiac malformations that begin in utero. In addition, fetal death, possibly resulting from cardiac malformation, can be caused by exposure to TCE. Cardiac malformations can be irreversible and impact a person's health for a lifetime. Other effects, such as damage to the developing immune system, may first manifest when a person is an adult and can have long-lasting health impacts. Certain effects that follow adult exposures, such as kidney and liver cancer, may develop many years after initial exposure. The point during a lifetime when the effect manifests itself and the expected impacts to a person during her/his lifetime are important factors in determining the benefits of mitigating and preventing TCE exposure.

Based on EPA's analysis of worker and consumer populations' exposure to TCE, EPA has determined that there are significant cancer and non-cancer risks (acute and chronic) from TCE exposure, which can result in developmental effects, kidney toxicity, immunotoxicity, reproductive toxicity, neurotoxicity, and liver toxicity. These risks are unreasonable risks because the chemical exposures predicted for the various scenarios assessed are above what would be necessary to achieve the MOE benchmarks for cardiac defects, kidney toxicity, immunotoxicity, liver toxicity, neurotoxicity and endocrine and reproductive toxicity. For commercial use scenarios of aerosol degreasing and use of TCE for spot cleaning in dry cleaning facilities, as well as for all the residential use scenarios, exposures are far beyond what would be necessary to achieve the MOE benchmark for cardiac defects. For example, the 99th percentile of the upper end exposure use scenario for aerosol degreasing has a MOE of 0.003 for chronic exposures and 0.002 for acute exposures. Thus, for this aerosol degreasing use scenario, people are exposed at a level that is 3,000 times higher than what EPA determines is protective for the non-cancer health effect.

The number of people at risk for the developmental effects is estimated to be up to approximately 5,400 pregnant women in dry cleaning operations and approximately 900 pregnant women exposed to TCE during the use of aerosol degreasers. The potential for exposure is significant because approximately half of all pregnancies are unintended. If a pregnancy is not planned before conception, a woman may not be in optimal health for childbearing (Ref. 33).

Given the large differential between the benchmark MOE and the MOEs resulting from EPA's estimates of exposures, people exposed to TCE in aerosol degreasing and during dry cleaning operations are at significant risk for the multiple adverse non-cancer health effects caused by TCE and the impacts discussed below on many facets of their life that these adverse health effects cause. These risks are significant even when considered alone. However, workers may be also be impacted by the significant risks for several types of cancer. The cancer risks to workers using TCE in aerosol degreasing and for spot cleaning in dry cleaning facilities are 1.6×10^{-2} or more than one and one-half cases in one hundred for aerosol degreasing and 1.4×10^{-2} or more than one case in one hundred for use of TCE for spot cleaning in dry cleaning facilities.

The risk reduction from preventing TCE exposure cannot be comprehensively quantified or monetized even though the adverse effects are well-documented, the TCE risk assessment estimating these risks has been peer-reviewed, and the benefits of reducing the risk of these health endpoints can be described. It is relatively straightforward to monetize the benefits of reducing the risk of cancer (kidney cancer, liver cancer, non-Hodgkin's lymphoma) due to TCE exposure. The estimated value of the annualized benefit is estimated to be $9.3 million to $25.0 million at 3% and $4.5 million to $12.8 million at 7% over 15 years. It is currently not possible to monetize the benefits of reducing the risks of the costs of non-cancer effects (all developmental toxicity, kidney toxicity, immunotoxicity, reproductive toxicity, neurotoxicity, and liver toxicity) of TCE exposure. There are two reasons for this. First, dose response information and concentration response functions in humans are not available, which would allow EPA to estimate the number of population-level non-cancer cases that would be avoided by reducing exposures to levels corresponding with MOE benchmarks. Second, even it were possible to calculate the number of cases avoided, EPA may not be able to monetize the benefits of these avoided cases due to limitations in data needed to apply established economic methodologies. However, being unable to quantitatively assess individual risk and population-level non-cancer cases avoided from TCE exposure does not negate the impact of these effects. Similarly, the inability to monetize an adverse effect does not reflect the severity of the effect, the lifetime nature of the impact, or the magnitude of the benefit in preventing the adverse impact from TCE exposure, such as a cardiac malformation, on a person. In considering the benefits of preventing TCE exposure, EPA considered the type of effect, the severity of the effect, the duration of the effect, and costs and other monetary impacts of the health endpoint.

The health endpoints associated with TCE exposure are serious. The following is a discussion of the impacts of the most significant cancer and non-cancer effects associated with TCE exposure, including the severity of the effect, the manifestation of the effect, and how the effect impacts a person during their lifetime. While TCE can cause a variety of adverse health effects, the general population incidences of these adverse health outcomes are not due solely to TCE.

A. Benefits of the Proposed Rule and the Alternatives That EPA Considered

1. *Developmental effects.* The TCE risk assessment (and EPA's 2011 IRIS Assessment) identified developmental effects as the critical effect of greatest concern for both acute and chronic non-cancer risks. There are increased health risks for developmental effects to the approximately 900 pregnant women exposed to TCE during the use of aerosol degreasers and approximately 5,400 pregnant women working in dry cleaning operations (Ref. 2). Specifically, these assessments identified fetal cardiac malformations in the offspring of mothers exposed to TCE during gestation as the critical effect. Although fetal cardiac defects is the most sensitive endpoint and is the focus of the discussion in this Unit, TCE exposures can result in other adverse developmental outcomes, including prenatal (*e.g.,* spontaneous abortion and perinatal death, decreased birth weight, and congenital malformations) and postnatal (*e.g.,* growth, survival, developmental neurotoxicity, developmental immunotoxicity, and childhood cancers) effects. Developmental TCE exposure results in qualitatively different immunotoxicity effects than adult exposure. These effects influence the development of the immune system and result in impairment of the immune system to respond to infection whereas adult exposures result in more pronounced immune response related to autoimmune responses.

Cardiac defects, which can result from very low level exposure to TCE, affect

the structural development of a baby's heart and how it works. The defects impact how blood flows through the heart and out to the rest of the body. The impact can be mild (such as a small hole in the heart) or severe (such as missing or poorly formed septal wall and valves of the heart). While diagnosis for some cardiac defects can occur during pregnancy, for other cardiac defects, detection may not occur until after birth or later in life, during childhood or adulthood. These cardiac defects can be occult or life- threatening with the most severe cases causing early mortality and morbidity. While the incidences in the following paragraphs reflect adverse health outcomes beyond just exposure to TCE, the general population numbers provide a context for understanding the impact of the adverse health effects that TCE can cause.

Nearly 1% or about 40,000 births per year in the United States are affected by cardiac defects (Ref. 46). About 25% of those infants with a cardiac defect have a critical defect. Infants with critical cardiac defects generally need surgery or other procedures in their first year of life. Some estimates put the total number of individuals (infants, children, adolescents, and adults) living with cardiac defects at 2 million (Ref. 46). Cardiac defects can be caused by genetics, environmental exposure, or an unknown cause.

Infant deaths resulting from cardiac defects often occur during the neonatal period. One study indicated that cardiac defects accounted for 4.2% of all neonatal deaths. Of infants born with a non-critical cardiac defect, 97% are expected to survive to the age of one, with 95% expected to survive to 18 years of age. Of infants born with a critical cardiac defect, 75% are expected to survive to one year of age, with 69% expected to survive to 18 years of age (Ref. 47). A child with a cardiac defect is 50% more likely to receive special education services compared to a child without birth defects (Ref. 46).

Treatments for cardiac defects vary. Some affected infants and children might need one or more surgeries to repair the heart or blood vessels. In other instances, a heart defect cannot be fully repaired, although treatments have advanced such that infants are living longer and healthier lives. Many children are living into adulthood and lead independent lives with little or no difficulty. Others, however, may develop disability over time which is hard to predict and for which it is difficult to quantify impacts.

Even though a person's heart defect may be repaired, for many people this is not a cure. They can still develop other health problems over time, depending on their specific heart defect, the number of heart defects they have, and the severity of their heart defect. For example, some related health problems that might develop include irregular heart beat (arrhythmias), increased risk of infection in the heart muscle (infective endocarditis), or weakness in the heart (cardiomyopathy). In order to stay healthy, a person needs regular checkups with a cardiologist. They also might need further operations after initial childhood surgeries (Ref. 46).

Depending upon the severity of the defect, the costs for surgeries, hospital stays, and doctor's appointments to address a baby's cardiac defect can be significant. The costs for the defects may also continue throughout a person's lifetime. In 2004, hospital costs in the United States for individuals with a cardiac defect were approximately $1.4 billion (Ref. 46).

Beyond the monetary cost, the emotional and mental toll on parents who discover that their child has a heart defect while *in utero* or after birth will be high (Ref. 47). They may experience anxiety and worry over whether their child will have a normal life of playing with friends and participating in sports and other physical activities, or whether their child may be more susceptible to illness and be limited in the type of work and experiences they can have. In addition, parents can be expected to experience concerns over potential unknown medical costs that may be looming in the future, lifestyle changes, and being unable to return to work in order to care for their child.

The emotional and mental toll on a person throughout childhood and into adolescence with a heart defect also should be considered (Ref. 47). Cardiac patients who are children may feel excluded from activities and feel limited in making friends if they have to miss school due to additional surgeries, or may not be able to fully participate in sports or other physical exercise. Children may feel self-conscious of the scars left by multiple surgeries. This, in turn, adds emotional and mental stress to the parents as they observe their child's struggles.

As a person with a heart defect enters adulthood, the emotional or mental toll of a cardiac defect may continue or in other instances the problem may only surface as the person becomes an adult. If a cardiac defect impacts a person's ability to enter certain careers, this could take a monetary as well as emotional toll on that person and on their parents or families who may need to provide some form of financial support. The monetary, emotional, and mental costs of heart defects can be considerable, and even though neither the precise reduction in individual risk of developing a cardiac defect from reducing TCE exposure or the total number of cases avoided can be estimated, their impact should be considered.

2. *Kidney toxicity.* The TCE risk assessment identified kidney toxicity as a significant concern for non-cancer risk from TCE exposure with the risk being from chronic exposure. There are increased health risks for kidney toxicity to the approximately 10,800 workers and occupational bystanders at commercial aerosol degreasing operations and the up to approximately 168,000 workers and occupational bystanders in dry cleaning operations (Ref. 2).

Exposure to TCE can lead to changes in the proximate tubules of the kidney. This damage may result in signs and symptoms of acute kidney failure that include: Decreased urine output, although occasionally urine output remains normal; fluid retention, causing swelling in the legs, ankles or feet; drowsiness, shortness of breath, fatigue, confusion, nausea, seizures or coma in severe cases; and chest pain or pressure. Sometimes acute kidney failure causes no signs or symptoms and is detected through lab tests done for another reason.

Kidney toxicity means the kidney(s) has suffered damage that can result in a person being unable to rid their body of excess urine and wastes. In extreme cases where the kidney(s) is impaired over a long period of time, the kidney(s) could be damaged to the point that it no longer functions. When a kidney(s) no longer functions, a person needs dialysis and ideally a kidney transplant. In some cases, a non-functioning kidney(s) can result in death. Kidney dialysis and kidney transplantation are expensive and incur long-term health costs if kidney function fails (Ref. 48).

Approximately 31 million people, or 10% of the adult population, in the United States have chronic kidney disease. In the United States, it is the ninth leading cause of death. About 93% of chronic kidney disease is from known causes, including 44% from diabetes and 28.4% from high blood pressure. Unknown or missing causes account for about 6.5% of cases, or about 2 million people (Ref. 49).

The monetary cost of kidney toxicity varies depending on the severity of the damage to the kidney. In less severe cases, doctor visits may be limited and hospital stays unnecessary. In more

severe cases, a person may need serious medical interventions, such as dialysis or a kidney transplant if a donor is available, which can result in high medical expenses due to numerous hospital and doctor visits for regular dialysis and surgery if a transplant occurs. The costs for hemodialysis, as charged by hospitals, can be upwards of $100,000 per month (Ref. 50).

Depending on the severity of the kidney damage, kidney disease can impact a person's ability to work and live a normal life, which in turn takes a mental and emotional toll on the patient. In less severe cases, the impact on a person's quality of life may be limited while in instances where kidney damage is severe, a person's quality of life and ability to work would be affected. While neither the precise reduction in individual risk of developing kidney toxicity from reducing TCE exposure or the total number of cases avoided can be estimated, these costs must still be considered because they can significantly impact those exposed to TCE.

Chronic exposure to TCE can also lead to kidney cancer. The estimated value of the annualized benefit is $276,000 to $661,000 for aerosol degreasing and $1.4 million to $5.5 million for spot cleaning in dry cleaning facilities at 3% over 15 years; and $135,000 to $349,000 for aerosol degreasing and $677,000 to $2.9 million for spot cleaning in dry cleaning facilities at 7% over 15 years. Kidney cancer rarely shows signs or symptoms in its early stages. As kidney cancer progresses, the cancer may grow beyond the kidney spreading to lymph nodes or distant sites like the liver, lung or bladder increasing the impacts on a person and the costs to treat it. This metastasis is highly correlated with fatal outcomes. Impacts of kidney cancer that are not monetized include the emotional, psychological impacts and the impacts of treatment for the cancer on the well-being of the person.

3. *Immunotoxicity. a. Non-cancer chronic effects.* The TCE risk assessment identified immunotoxicity as a chronic non-cancer risk from TCE exposure. There are increased health risks for immunotoxicity to the approximately 10,800 workers and occupational bystanders at commercial aerosol degreasing operations and the up to approximately 168,000 workers and occupational bystanders in dry cleaning operations (Ref. 1).

Human studies have demonstrated that TCE exposed workers can suffer from systemic autoimmune diseases (*e.g.,* scleroderma) and severe hypersensitivity skin disorder. Scleroderma is a chronic connective tissue disease with autoimmune origins. The annual incidence is estimated to be 10 to 20 cases per 1 million persons (Ref. 51), and the prevalence is four to 253 cases per 1 million persons (Ref. 52). About 300,000 Americans are estimated to have scleroderma. About one third of those people have the systemic form of scleroderma. Since scleroderma presents with symptoms similar to other autoimmune diseases, diagnosis is difficult. There may be many misdiagnosed or undiagnosed cases (Ref. 52).

Localized scleroderma is more common in children, whereas systemic scleroderma is more common in adults. Overall, female patients outnumber male patients about 4-to-1. Factors other than a person's gender, such as race and ethnic background, may influence the risk of getting scleroderma, the age of onset, and the pattern or severity of internal organ involvement. The reasons for this susceptibility are not clear. Although scleroderma is not directly inherited, some scientists believe there is a slight predisposition to it in families with a history of rheumatic diseases (Ref. 53).

The symptoms of scleroderma vary greatly from person-to-person with the effects ranging from very mild to life threatening. If not properly treated, a mild case can become much more serious. Relatively mild symptoms are localized scleroderma, which results in hardened waxy patches on the skin of varying sizes, shapes and color. The more life threatening symptoms are from systemic scleroderma, which can involve the skin, esophagus, gastrointestinal tract (stomach and bowels), lungs, kidneys, heart and other internal organs. It can also affect blood vessels, muscles and joints. The tissues of involved organs become hard and fibrous, causing them to function less efficiently.

Severe hypersensitivity skin disorder includes exfoliative dermatitis, mucous membrane erosions, eosinophilia, and hepatitis. Exfoliative dermatitis is a scaly dermatitis involving most, if not all, of the skin. Eosinophilia on the other hand is a chronic disorder resulting from excessive production of a particular type of white blood cells. If diagnosed and treated early a person can lead a relatively normal life (Ref. 51).

The monetary costs for treating these various immunotoxicity disorders will vary depending upon whether the symptoms lead to early diagnosis and early diagnosis can influence whether symptoms progress to mild or life threatening outcomes. For mild symptoms, doctors' visits and outpatient treatment could be appropriate while more severe immunotoxicity disorders, may require hospital visits. Treatments for these conditions with immune modulating drugs also have countervailing risks.

These disorders also take an emotional and mental toll on the person as well as on their families. Their quality of life may be impacted because they no longer have the ability to do certain activities that may affect or highlight their skin disorder, such as swimming. Concerns over doctor and hospital bills, particularly if a person's ability to work is impacted, may further contribute to a person's emotional and mental stress. While neither the precise reduction in individual risk of developing this disorder from TCE exposure or the total number of cases avoided can be estimated, this should be considered.

b. *Non-Hodgkin's Lymphoma.* EPA's 2011 IRIS assessment for TCE found that TCE is carcinogenic. Chronic exposure to TCE, by all routes of exposure, can result in non-Hodgkin's lymphoma (NHL), one of the three cancers for which the EPA TCE IRIS assessment based its cancer findings. There are increased health risks for NHL for the approximately 10,800 workers and occupational bystanders at commercial aerosol degreasing operations and the up to approximately 168,000 workers and occupational bystanders in dry cleaning operations (Ref. 2).

NHL is a form of cancer that originates in a person's lymphatic system. For NHL, there are approximately 19.7 new cases per 100,000 men and women per year with 6.2 deaths per 100,000 men and women per year. NHL is the seventh most common form of cancer (Ref. 53). Some studies suggest that exposure to chemicals may be linked to an increased risk of NHL. Other factors that may increase the risk of NHL are medications that suppress a person's immune system, infection with certain viruses and bacteria, or older age (Ref. 54).

Symptoms are painless, swollen lymph nodes in the neck, armpits or groin, abdominal pain or swelling, chest pain, coughing or trouble breathing, fatigue, fever, night sweats, and weight loss. Depending on the rate at which the NHL is advancing, the approach may be to monitor the condition, while more aggressive NHL could require chemotherapy, radiation, stem cell transplant, medications that enhance a person's immune system's ability to fight cancer, or medications that deliver radiation directly to cancer cells.

Treatment for NHL will result in substantial costs for hospital and doctors' visits in order to treat the cancer. The treatments for NHL can also have countervailing risks and can lead to higher susceptibility of patients for secondary malignancies (Ref. 55). The emotional and mental toll from wondering whether a treatment will be successful, going through the actual treatment, and inability to do normal activities or work will most likely be high. This emotional and mental toll will extend to the person's family and friends as they struggle with the diagnosis and success and failure of a treatment regime. If a person has children, this could affect their mental and emotional well-being and may impact their success in school. A discussion of the monetized benefits associated with reducing risk of NHL is located in Unit VIII.B. The estimated value of the annualized benefit is $759,000 to $1.2 million for aerosol degreasing and $3.9 million to $10.1 million for spot cleaning in dry cleaning facilities at 3% over 15 years; and $355,000 to $601,000 for aerosol degreasing and $1.8 million to $5.0 million for spot cleaning in dry cleaning facilities at 7% over 15 years.

4. Reproductive and endocrine effects. The TCE risk assessment identified chronic non-cancer risks for reproductive effects for workers and bystanders exposed to TCE. There are increased health risks for reproductive effects for the approximately 10,800 workers and occupational bystanders at commercial aerosol degreasing operations and the up to approximately 168,000 workers and occupational bystanders in dry cleaning operations (Ref. 2).

The reproductive effect for both females and males can be altered libido. The prevalence of infertility is estimated at about 10–15% of couples with a decreased libido among the factors of infertility (Ref. 56). For females, there can be reduced incidence of fecundability (6.7 million women ages 15 to 44 or 10.9% affected) (Ref. 57), increase in abnormal menstrual cycle, and amenorrhea (the absence of menstruation). Reproductive effects on males can be decreased potency, gynaecomastia, impotence, and decreased testosterone levels, or low T levels. Approximately 2.4 million men age 40 to 49 have low T levels, with a new diagnosis of about 481,000 androgen deficiency cases a year. Other estimates propose a hypogonadism prevalence of about 13 million American men (Ref. 58). Low T levels are associated with aging; an estimated 39% of men 45 or older have hypogonadism, resulting in low T levels (Ref. 59). Hormone therapy and endocrine monitoring may be required in the most severe cases. Low T levels are associated with aging; an estimated 39% of men 45 or older have hypogonadism, resulting in low T levels (Ref. 59). Hormone therapy and endocrine monitoring may be required in the most severe cases.

The monetary costs of these potential reproductive effects involve doctor's visits in order to try to determine why there is a change. In some instances, a person or couple may need to visit a fertility doctor.

The impact of a reduced sex drive can take an emotional and mental toll on single people as well as couples. For people trying to get pregnant, decreased fertility can add stress to a relationship as the cause is determined and avenues explored to try to resolve the difficulties in conceiving. A person or couples' quality of life can also be affected as they struggle with a reduced sex drive. Similar to effects discussed previously, while neither the precise reduction in individual risk of developing this disorder from reducing TCE exposure or the total number of cases avoided can be estimated, the Agency still considers their impact.

5. Neurotoxicity. The TCE risk assessment identified chronic risks for neurotoxicity for workers and bystanders. There are increased health risks for neurotoxicity to the approximately 10,800 workers and bystanders at commercial aerosol degreasing operations and the up to approximately 168,000 workers and bystanders in dry cleaning operations (Ref. 2).

Studies have also demonstrated neurotoxicity for acute exposure. Neurotoxic effects observed are alterations in trigeminal nerve and vestibular function, auditory effects, changes in vision, alterations in cognitive function, changes in psychomotor effects, and neurodevelopmental outcomes. Developmental neurotoxicity effects are delayed newborn reflexes, impaired learning or memory, aggressive behavior, hearing impairment, speech impairment, encephalopathy, impaired executive and motor function and attention deficit (Ref. 3).

The impacts of neurotoxic effects due to TCE exposure can last a person's entire lifetime. Changes in vision may impact a person's ability to drive, which can create difficulties for daily life. Impaired learning or memory, aggressive behavior, hearing impairment, speech impairment, encephalopathy, impaired executive and motor function and attention deficit can impact a child's educational progression and adolescent's schooling and ability to make friends, which in turn can impact the type of work or ability get work later in life.

Neurotoxicity in adults can affect the trigeminal nerve, the largest and most complex of the 12 cranial nerves, which supplies sensations to the face, mucous membranes, and other structures of the head. Onset of trigeminal neuralgia generally occurs in mid-life and known causes include multiple sclerosis, sarcoidosis and Lyme disease. There is also a co-morbidity with scleroderma and systemic lupus. Some data show that the prevalence of trigeminal neuralgia could be between 0.01% and 0.3% (Ref. 60). Alterations to this nerve function might cause sporadic and sudden burning or shock-like facial pain to a person. One way to relieve the burning or shock-like facial pain is to undergo a procedure where the nerve fibers are damaged in order to block the pain. This treatment can have lasting impact on sensation which may also be deleterious for normal pain sensation. The potential side effects of this procedure includes facial numbness and some sensory loss.

The monetary health costs can range from doctor's visits and medication to surgeries and hospital stays. Depending upon when the neurotoxic effect occurred, the monetary costs may encompass a person's entire lifetime or just a portion.

The personal costs (emotional, mental, and impacts to a person's quality of life) cannot be discounted. Parents of a child with impaired learning, memory, or some other developmental neurotoxic effect may suffer emotional and mental stress related to worries about the child's performance in school, ability to make friends, and quality of the child's life because early disabilities can have compounding effects as they grow into adulthood. The parent may need to take off work unexpectedly and have the additional cost of doctor visits and/or medication.

For a person whose trigeminal nerve is affected there is an emotional and mental toll as they wonder what is wrong and visit doctors in order to determine what is wrong. Depending on the severity of the impact to the nerve they may be unable to work. Doctor visits and any inability to work will have a monetary impact to the person. There are varying costs (emotional, monetary, and impacts to a person's quality of life) from the neurotoxicity effects due to TCE exposure. However, while neither the precise reduction in

individual risk of developing this disorder from reducing TCE exposure or the total number of cases avoided can be estimated, this is not a reason to disregard their impact.

6. Liver toxicity. The TCE risk assessment identified liver toxicity as an adverse effect of chronic TCE exposure. There are increased health risks for liver toxicity to the approximately 10,800 workers occupational bystanders at commercial aerosol degreasing operations and the up to approximately 168,000 workers and occupational bystanders in dry cleaning operations (Ref. 1).

Specific effects to the liver can include increased liver weight, increase in DNA synthesis (transient), enlarged hepatocytes, enlarged nuclei, and peroxisome proliferation (Ref. 1). In addition, workers exposed to TCE have shown hepatitis accompanying immune-related generalized skin diseases, jaundice, hepatomegaly, hepatosplenomegaly, and liver failure (Ref. 1).

Some form of liver disease impacts at least 30 million people, or 1 in 10 Americans (Ref. 61). Included in this number is at least 20% of those with nonalcoholic fatty liver disease (NAFLD) (Ref. 61). NAFLD tends to impact people who are overweight/obese or have diabetes. However, an estimated 25% do not have any risk factors (Ref. 61). The danger of NAFLD is that it can cause the liver to swell, which may result in cirrhosis over time and could even lead to liver cancer or failure (Ref. 61). The most common known causes to this disease burden are attributable to alcoholism and viral infections, such as hepatitis A, B, and C. In 2013, there were 1,781 reported acute cases of viral hepatitis A and the estimated actual cases were 3,500 (Ref. 62). For hepatitis B in 2013 there were 3,050 reported acute cases, while the estimated actual incidence was 19,800, and the estimated chronic cases in the United States is between 700,000 to 1.4 million (Ref. 62). For hepatitis C, in 2013 there were 2,138 reported cases; however, the estimated incidence was 29,700 and the estimated number of chronic cases is between 2.7 to 3.9 million (Ref. 62). These known environmental risk factors of hepatitis infection may result in increased susceptibility of individuals exposed to organic chemicals.

Effects from TCE exposure to the liver can occur quickly. Liver weight increase has occurred in mice after as little as 2 days of inhalation exposure (Ref. 3). Human case reports from eight countries indicated symptoms of hepatitis, hepatomegaly and elevated liver function enzymes, and in rare cases, acute liver failure developed within as little as 2–5 weeks of initial exposure to TCE (Ref. 3).

Chronic exposure to TCE can also lead to liver cancer. There is strong epidemiological data that reported an association between TCE exposure and the onset of various cancers, including liver cancer. The estimated value of the annualized benefit is $493,000 to $811,000 for aerosol degreasing and $2.5 million to $6.7 million for spot cleaning in dry cleaning facilities at 3% over 15 years; and $252,000 to $436,000 for aerosol degreasing and $1.3 million to $3.6 million for spot cleaning in dry cleaning facilities at 7% over 15 years.

Additional medical and emotional costs are associated with non-cancer liver toxicity from TCE exposure, although they cannot be quantified. These costs include doctor and hospital visits and medication costs. In some cases, the ability to work can be affected, which in turn impacts the ability to get proper ongoing medical care. Liver toxicity can lead to jaundice, weakness, fatigue, weight loss, nausea, vomiting, abdominal pain, impaired metabolism, and liver disease. Symptoms of jaundice include yellow or itchy skin and a yellowing of the whites of the eye, and a pale stool and dark urine. These symptoms can create a heightened emotional state as a person tries to determine what is wrong with them.

Depending upon the severity of the jaundice, treatments can range significantly. Simple treatment may involve avoiding exposure to the TCE; however, this may impact a person's ability to continue to work. In severe cases, the liver toxicity can lead to liver failure, which can result in the need for a liver transplant, if a donor is available. Liver transplantation is expensive (with an estimated cost of $575,000) and there are countervailing risks for this type of treatment (Ref. 63). The mental and emotional toll on an individual and their family as they try to determine the cause of sickness and possibly experience an inability to work, as well as the potential monetary cost of medical treatment required to regain health are significant.

7. Disproportionate impacts on environmental justice communities. An additional factor that cannot be monetized is the disproportionate impact on environmental justice communities. Asian and Hispanic populations are disproportionately represented in dry cleaning facilities. 13% of dry cleaning workers are Asian, compared to 5% of the national population, and 30% of dry cleaning workers are Hispanic (of any race), compared to 16% of the national population, indicating that these two populations are over-represented. Because they are disproportionately over-represented in the dry cleaning industry, these populations are disproportionately exposed to TCE during spot cleaning in dry cleaning facilities and disproportionately at risk to the range of adverse non-cancer effects and cancer.

B. Monetized Benefits of the Proposed Rule and the Alternatives That EPA Considered

The benefits that can be monetized from risk reductions due to the proposed prohibitions on manufacture, processing, and distribution in commerce of TCE for aerosol degreasing, and the prohibition on commercial use of TCE in aerosol degreasing are estimated to be $1.5 million to $2.7 million (annualized at 3% over 15 years) and $700,000 to $1.4 million (annualized at 7% over 15 years). The monetized benefits from similar prohibitions to mitigate the risks from TCE for spot cleaning in dry cleaning facilities are estimated to be $7.8 million to $22.3 million (annualized at 3% over 15 years) and $3.7 million to $11.4 million (annualized at 7% over 15 years). The total monetized benefits for the proposed rule range from approximately $9.2 million to $24.8 million on an annualized basis over 15 years at 3% and $4.4 million to $12.6 million at 7%. The alternatives considered are unlikely to result in the same health benefits as the proposed rule for the reasons discussed in Units VI and VII. However, EPA was unable to quantify the differences in benefits that would result from the alternatives.

C. Costs of the Proposed Rule and the Alternatives That EPA Considered

The details of the costs of the proposed approach for use of TCE in aerosol degreasing are discussed in Unit VI.C.1 and the details of the costs of the proposed approach for spot cleaning in dry cleaning facilities are discussed in Unit VII.C.1. Under the proposed option, costs to users of aerosol degreasers are negligible as substitute products are currently available on the market and are similarly priced. Total costs of aerosol degreasing product reformulations are estimated to be approximately $416,000 in the first year and $32,000 per year (annualized at 3% over 15 years) and $41,000 (annualized at 7% over 15 years). Costs of downstream notification and recordkeeping are estimated to be $51,000 in the first year and on an

annualized basis over 15 years are $3,900 and $5,000 using 3% and 7% discount rates respectively. Agency costs for enforcement are estimated to be approximately $112,000 and $109,000 annualized over 15 years at 3% and 7%, respectively. The total cost of the proposed approach for the aerosol degreasing use is estimated to be $37,000 to $40,000 and $46,000 to $49,000 annualized over 15 years at 3% and 7%, respectively. Annual recurring costs to the Agency for enforcement are estimated to be $121,000 per year.

Under the proposed approach, dry cleaners are expected to switch to alternatives because they are readily available at similar cost and performance. Blenders of TCE spot cleaners are expected to reformulate their products. Total costs of reformulation are estimated to be $286,000 in the first year and annualized costs are approximately $22,000 per year (annualized at 3% over 15 years) and $28,000 (annualized at 7% over 15 years). Costs of downstream notification and recordkeeping are estimated to be $51,000 in the first-year and on an annualized basis over 15 years are $3,900 and $5,000 using 3 and 7 percent discount rates respectively. Agency costs for enforcement are estimated to be approximately $112,000 to $109,000 annualized over 15 years at 3% and 7%. Annual recurring costs to the Agency for enforcement are estimated to be $121,000 per year. The total cost of the proposed approach for the dry cleaning spotting use is estimated to be $130,000–$133,000 and $135,000–$137,000 annualized over 15 years at 3% and 7%, respectively.

Total costs of the proposed rule for both uses are estimated to be $170,000 annualized over 15 years at 3% and $183,000 annualized over 15 years at 7%.

Alternatives that EPA considered include the use of PPE as well as an option that would prohibit the use of TCE in aerosol degreasing and as a spot cleaner at dry cleaning facilities, without the companion prohibition on manufacture, processing, or distribution in commerce for these uses or the downstream notification requirements. As discussed in Unit VI., EPA assumed that no users would adopt PPE because the per-facility costs were prohibitively expensive. The estimated annualized costs of switching to a respiratory protection program requiring PPE of 10,000 are $8,200 at 3% and $9,000 at 7% per dry cleaning facility and $8,300 at 3% and $9,100 at 7% per aerosol degreasing facility over 15 years. EPA also found that a use prohibition alone without downstream notification requirements would not address the identified unreasonable risks. EPA estimated the costs of this option to be $166,000 annualized over 15 years at 3% and $178,000 annualized over 15 years at 7%.

D. Comparison of Benefits and Costs

The monetized benefits for preventing the risks resulting from TCE exposure from both these uses significantly outweigh the estimated costs. Even though simply comparing the costs and monetized benefits of prohibiting the manufacture, processing, and distribution in commerce of TCE as an aerosol degreaser; prohibiting its use as an aerosol degreaser; and requiring downstream notification demonstrates that the monetized benefits of this proposed action outweigh the costs, EPA believes that the balance of costs and benefits cannot be fairly described without considering the additional, non-monetized benefits of mitigating the non-cancer adverse effects as well as cancer. As discussed previously, the multitude of potential adverse effects associated with TCE exposure can profoundly impact an individual's quality of life. Some of the adverse effects associated with TCE exposure can be immediately experienced and can affect a person from childhood throughout a lifetime (*e.g.,* cardiac malformations, developmental neurotoxicity, and developmental immunotoxicity). Others (*e.g.,* adult immunotoxicity, kidney and liver failure or cancers) can have impacts that are experienced for a shorter portion of life, but are nevertheless significant in nature.

While the risk of non-cancer health effects associated with TCE exposure cannot be quantitatively estimated, the qualitative discussion highlights how some of these non-cancer effects occurring much earlier in life from TCE exposure may be as severe as cancer's mortality and morbidity and thus just as life-altering. These effects include not only medical costs but also personal costs such as emotional and mental stress that are impossible to accurately measure.

While the impacts of non-cancer effects cannot be monetized, EPA considered the impacts of these effects in making its determination about how best to address the unreasonable risks presented by TCE use in aerosol degreasing and as a spot cleaner in dry cleaning facilities. Considering only monetized benefits would significantly underestimate the impacts of TCE-induced non-cancer adverse outcomes on a person's quality of life to perform basic skills of daily living, including the ability to earn a living, the ability to participate in sports and other activities, and the impacts on a person's family and relationships.

Thus, considering costs, benefits that can be monetized (risk of cancer), and benefits that cannot be quantified and subsequently monetized (risk of developmental toxicity, kidney toxicity, immunotoxicity, reproductive toxicity, neurotoxicity, and liver toxicity), including benefits related to the severity of the effects and the impacts on a person throughout her/his lifetime in terms of medical costs, effects on earning power and personal costs, emotional and psychological costs, and the disproportionate impacts on Asian and Hispanic communities, the benefits of preventing TCE exposure outweigh the costs. Further, if EPA were to consider only the benefits that can be monetized in comparison to the cost, the monetized benefits from preventing kidney and liver cancer and non-Hodgkin's lymphoma from the use of TCE in aerosol degreasing (the annualized monetized benefits on a 15 year basis range from approximately $1.5 million to $2.7 million at 3% and $700,000 to $1.4 million at 7%) and the use of TCE in spot cleaners in dry cleaning facilities (the annualized monetized benefits on a 15 year basis range from approximately $7.8 million to $22.3 million at 7% and $3.7 million to $11.4 million at 3%) far outweigh the costs of the proposed approaches for use of TCE in aerosol degreasing (the annualized costs on a 15 year basis range from approximately $37,000 to $40,000 at 3% and $46,000 to $49,000 at 7%) and for use of TCE in spot cleaners in dry cleaning facilities (the annualized costs on a 15 year basis range from approximately $130,000 to $133,000 at 3% and $135,000 to $137,000 at 7%).

IX. Overview of Uncertainties

A discussion of the uncertainties associated with this proposed rule can be found in the TCE risk assessment (Ref. 1) and in the supplemental analysis (Refs. 23, 24, 25) for use of TCE in aerosol degreasing and use of TCE for spot cleaning in dry cleaning facilities. A summary of these uncertainties follows.

EPA used a number of assumptions in the TCE risk assessment and supporting analysis to develop estimates for occupational and consumer exposure scenarios and to develop the hazard/dose-response and risk characterization. EPA recognizes that the uncertainties may underestimate or overestimate actual risks. These uncertainties include: (1) Releases of and exposures to

TCE can vary from one aerosol degreasing activity to the next. EPA attempted to quantify this uncertainty by evaluating multiple scenarios to establish a range of releases and exposures. In estimating the risk from aerosol degreasing, there are uncertainties in the number of workers exposed to TCE and in the inputs to the models used to estimate exposures. (2) Although EPA found information about TCE products intended for consumer use, there is some general uncertainty regarding the nature and extent of the consumer use of aerosol products containing TCE. (3) Releases of and exposures to TCE can vary from one dry cleaning facility to the next. EPA attempted to quantify this uncertainty by evaluating multiple scenarios to establish a range of releases and exposures. There is also uncertainty in the number of workers exposed to TCE for spot cleaning in dry cleaning facilities. There are uncertainties in the model and inputs used to model the exposures to TCE from these uses.

In addition to the uncertainties in the risks, there are uncertainties in the cost and benefits. The uncertainties in the benefits are most pronounced in estimating the benefits from preventing the non-cancer adverse effects because these benefits generally cannot be monetized due to the lack of concentration response functions in humans leading to the ability to estimate the number of population-level non-cancer cases and limitations in established economic methodologies. Additional uncertainties in benefit calculations include the reliance on professional judgment to estimate the alternatives that users might choose to adopt and the potential risks for adverse health effects that the alternatives may pose. While there are some products that have comparable risks, there are a number of alternatives that are likely to be of lower risk, although EPA is unable to estimate the incremental change in the risk. To account for this uncertainty, EPA includes a lower and a higher estimate for the benefits from eliminating exposure to TCE. The lower benefits estimate does not include any benefits for firms that switch to anything other than water-based, methyl ester (soy-based) cleaners, or acetone degreasers. The higher benefits estimate includes the benefit from entirely eliminating TCE exposure for all alternative compliance strategies and assumes that no risks are introduced by alternatives. This inability to adequately account for adverse health effects of alternatives in the benefits analysis is expected to contribute most to the uncertainty in the estimates.

There are also uncertainties in the estimates of the number of affected facilities, particularly those for the aerosol degreasing use and for numbers of processors and distributors of TCE-containing products not prohibited by the proposed rule who are required to provide downstream notification and/or maintain records. The estimate for number of facilities using TCE-containing aerosol degreasers is based on EPA calculations using data derived from the California Air Resources Board Initial Statement of Reasons for the Proposed Airborne Toxic Control Measure for Emissions of Chlorinated Toxic Air Contaminants from Automotive Maintenance and Repair Activities (Ref. 2). To estimate the number of processors, EPA relied on public 2012 CDR data. The number of sites is reported in the CDR data as a range. The midpoint of the reported ranges was used to estimate the total number of sites using the chemical. Furthermore, the CDR data only include processors immediately downstream of those reporting to CDR. Finally, EPA estimated the number of wholesaler firms distributing products containing TCE by taking a ratio of the number of Chemical and Allied Products Merchant Wholesaler firms to Basic Chemical Manufacturing firms and applying it to the estimated number of manufacturers and processors of TCE (Ref. 2).

Another uncertainty concerns the estimate for the cost of reblending products and the time required to reblend those products. EPA used a study on the automotive aftermarket parts products industry that provided a range of costs for product reformulation and used the mean value of $26,000 from that study. EPA contacted both dry cleaners and blenders of aerosol degreasing products for additional information and received a few estimates from the aerosol degreasing product blenders which ranged from $15,000 to $30,000. However, EPA received no information from dry cleaning spot cleaning product blenders, so there is some uncertainty as to how representative the estimate is for that industry.

EPA also assumes that companies are generally able to reblend products within 6 months following publication of the final rule; however, it is not certain whether they may experience additional costs if they are not able have a product available to market at that time.

EPA will consider additional information received during the public comment period, including comments on implementation timeframes. This includes public comments, scientific publications, and other input submitted to EPA during the comment period.

X. Analysis Under Section 9 of TSCA (Other Authorities) for Aerosol Degreasing and Spot Cleaning in Dry Cleaning Facilities and TSCA Section 26(h) Considerations

A. Section 9 Analysis

1. Section 9(a) analysis. Section 9(a) of TSCA provides that, if the Administrator determines in her discretion that unreasonable risks may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by EPA, the Administrator must submit a report to the agency administering that other law that describes the risk and the activities that present such risk. If the other agency responds by declaring that the activities described do not present unreasonable risks or if that agency initiates action under its own law to protect against the risk, EPA is precluded from acting against the risk under sections 6 or 7 of TSCA.

Section 9(d) of TSCA instructs the Administrator to consult and coordinate TSCA activities with other Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burden of duplicative requirements. For today's proposed rule, EPA has consulted with CPSC and OSHA.

CPSC protects the public from unreasonable risks of injury or death associated with the use of consumer products under the agency's jurisdiction. There are no CPSC regulations on use of TCE in aerosol degreasers and for spot cleaning at dry cleaning facilities (Ref. 64).

OSHA assures safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. OSHA adopted an eight-hour time weighted average PEL of 100 ppm along with a ceiling limit in 1971 shortly after the agency was formed. It was based on the American Conference of Governmental Industrial Hygienists (ACGIH) recommended occupational exposure limit that was in place at that time. OSHA recognizes that the TCE PEL and many other PELs issued shortly after adoption of the OSHA Act in 1970 are outdated and inadequate for ensuring protection of worker health. OSHA recently published a Request for Information on approaches to updating PELs and other strategies to managing chemicals in the workplace (Ref. 9).

OSHA's current regulatory agenda does not include revision to the TCE PEL or other regulations addressing the risks EPA has identified when TCE is used in aerosol degreasing or for spot cleaning in dry cleaning facilities (Ref. 9).

EPA has determined that risks from the use of TCE in aerosol spray degreasers and as a spot cleaner in dry cleaning facilities are best managed by regulation under TSCA rather than by referral to other agencies. Today's proposed rule addresses risk from TCE exposure to populations in both workplaces and consumer settings. With the exception of TSCA, there is no Federal law that provides authority to prevent or sufficiently reduce these cross-cutting exposures. No other Federal regulatory authority, when considering the exposures to the populations and within the situations in its purview, can evaluate and address the totality of the risk that EPA is addressing in this proposed rulemaking under TSCA. For example, OSHA may set exposure limits for workers but its authority is limited to the workplace and does not extend to consumer uses of hazardous chemicals. Further, OSHA does not have direct authority over state and local employees, and it has no authority at all over the working conditions of state and local employees in states that have no OSHA-approved State Plan under 29 U.S.C. 667. Other Federal regulatory authorities, such as CPSC, have the authority to only regulate pieces of the TCE risk, such as consumer products. And neither agency has authority to bar the manufacture, processing or distribution for these uses and require downstream notification of restrictions like EPA proposes to do.

Moreover, recent amendments to TSCA, Public Law 114–182, alter both the manner of identifying unreasonable risk under TSCA and EPA's authority to address unreasonable risk under TSCA, such that risk management under TSCA is increasingly distinct from analogous provisions of the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), or the OSH Act. These changes to TSCA reduce the likelihood that an action under the CPSA, FHSA, or the OSH Act would reduce the risk of these uses of TCE so that the risks are no longer unreasonable under TSCA. Whereas (in a TSCA section 6 rule) an unreasonable risk determination sets the objective of the rule in a manner that excludes cost considerations, 15 U.S.C. 2605(b)(4)(A), subject to time-limited conditional exemptions for critical chemical uses and the like, 15 U.S.C. 2605(g), a consumer product safety rule under the CPSA must include a finding that ''the benefits expected from the rule bear a reasonable relationship to its costs.'' 15 U.S.C. 2058(f)(3)(E). Additionally, recent amendments to TSCA reflect Congressional intent to ''delete the paralyzing 'least burdensome' requirement,'' 162 Cong. Rec. S3517 (June 7, 2016). However, a consumer product safety rule under the CPSA must impose ''the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.'' 15 U.S.C. 2058(f)(3)(F). Analogous requirements, also at variance with recent revisions to TSCA, affect the availability of action under the FHSA relative to action under TSCA. 15 U.S.C. 1262. Gaps also exist between OSHA's authority to set workplace standards under the OSH Act and EPA's amended obligations to sufficiently address chemical risks under TSCA. To set PELs for chemical exposure, OSHA must first establish that the new standards are economically feasible and technologically feasible. (79 FR 61387, October 10, 2014). But under TSCA, EPA's substantive burden under TSCA section 6(a) is to demonstrate that, as regulated, the chemical substance no longer presents an unreasonable risk, with unreasonable risk being determined without consideration of cost or other non-risk factors.

TSCA is the only regulatory authority able to prevent or reduce risk from these uses of TCE to a sufficient extent across the range of uses and exposures of concern. In addition, these risks can be addressed in a more coordinated, efficient and effective manner under TSCA than under two or more different laws implemented by different agencies. Accordingly, EPA determines that referral to other Federal authorities for risk management would not necessarily address the unreasonable risk. As noted previously, there are key differences between the newly amended finding requirements of TSCA and those of the OSH Act, CPSA, and the FHSA. For these reasons, in her discretion, the Administrator does not determine that unreasonable risks from these uses of TCE may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA.

2. Section 9(b) analysis. If EPA determines that actions under other Federal authorities administered in whole or in part by EPA may eliminate or sufficiently reduce unreasonable risks, section 9(b) of TSCA instructs EPA to use these other statutes unless the Administrator determines in the Administrator's discretion that it is in the public interest to protect against such risk under TSCA. In making such a public interest determination, section 9(b)(2) of TSCA states: ''the Administrator shall consider, based on information reasonably available to the Administrator, all relevant aspects of the risk . . . and a comparison of the estimated costs and efficiencies of the action to be taken under this title and an action to be taken under such other law to protect against such risk.''

Although several EPA statutes have been used to limit TCE exposure, as discussed in Unit III.A, regulations under these EPA statutes have limitations because they largely regulate releases to the environment, rather than direct human exposure. SDWA only applies to drinking water. CAA does not apply directly to worker exposures or consumer settings where TCE is used. Under RCRA, TCE that is discarded may be considered a hazardous waste and subject to requirements designed to reduce exposure from the disposal of TCE to air, land and water. RCRA does not address exposures during use of products containing TCE. Only TSCA provides EPA the authority to regulate the manufacture (including import), processing, and distribution in commerce, and use of chemicals substances.

B. Section 26(h) Considerations

In proposing this rule under section 6 of TSCA, the EPA has made a decision based on science. EPA has used scientific information, technical procedures, measures, methods, protocols, methodologies, and models consistent with the best available science. Specifically, EPA based its preliminary determination of unreasonable risk presented by the use of TCE in aerosol degreasing products and as a spot cleaner in dry cleaning facilities on the completed risk assessment, which followed a peer review and public comment process, as well as using best available science and methods (Ref. 1). Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's response to comments, can be found on EPA's Assessments for TSCA Work Plan Chemicals Web page at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/assessments-tsca-work-plan-chemicals.*

The scientific information and technical measures and models used in the risk assessment and supplemental analyses are consistent with the intended use for risk reduction by regulation under section 6 of TSCA. The degree of clarity and completeness of

the science used in the risk assessment and supplemental analyses are described in the risk assessment (Ref. 1) and Unit IX. Similarly, the variability and uncertainty in the information or models and methods used are described in the risk assessment (Ref. 1) and Unit IX.

XI. Major Provisions of the Proposed Rule

A. Prohibitions on TCE Manufacturing, Processing, Distribution in Commerce, and Commercial Use

The rule would prohibit (1) the manufacture, processing, distribution in commerce, and commercial use of TCE in aerosol degreasers; and (2) the manufacture, processing, distribution in commerce, and use of TCE for spot cleaning in dry cleaning facilities.

B. Downstream Notification

EPA has authority under section 6 of TSCA to require that a substance or mixture or any article containing such substance or mixture be marked with or accompanied by clear and adequate minimum warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities. Many TCE manufacturers and processors are likely to manufacture or process TCE or TCE containing products for other uses that would not be regulated under this proposed rule. Other companies may be strictly engaged in distribution in commerce of TCE, without any manufacturing or processing activities, to customers for uses that are not regulated. EPA is proposing a requirement for downstream notification by manufacturers, processors, and distributors of TCE for any use to ensure compliance with the prohibition on manufacture, processing, distribution in commerce, and commercial use of TCE for spot cleaning in dry cleaning facilities and in aerosol degreasers. Downstream notification is necessary for effective enforcement of the rule because it provides a record, in writing, of notification on use restrictions throughout the supply chain, likely via modifications to the Safety Data Sheet. Downstream notification also increases awareness of restrictions on the use of TCE for spot cleaning in dry cleaning facilities and in aerosol degreasers, which is likely to decrease unintentional uses of TCE by these entities. Downstream notification represents minimal burden and is necessary for effective enforcement of the rule. The estimated cost of downstream notification is $51,000 in the first year and $3,900 and $5,000 on an annualized basis over 15 years using 3 and 7 percent discount rates respectively.

C. Enforcement

Section 15 of TSCA makes it unlawful to fail or refuse to comply with any provision of a rule promulgated under section 6 of TSCA. Therefore, any failure to comply with this proposed rule when it becomes effective would be a violation of section 15 of TSCA. In addition, section 15 of TSCA makes it unlawful for any person to: (1) Fail or refuse to establish and maintain records as required by this rule; (2) fail or refuse to permit access to or copying of records, as required by TSCA; or (3) fail or refuse to permit entry or inspection as required by section 11 of TSCA.

Violators may be subject to both civil and criminal liability. Under the penalty provision of section 16 of TSCA, any person who violates section 15 could be subject to a civil penalty for each violation. Each day of operation in violation of this proposed rule when it becomes effective could constitute a separate violation. Knowing or willful violations of this proposed rule when it becomes effective could lead to the imposition of criminal penalties for each day of violation and imprisonment. In addition, other remedies are available to EPA under TSCA.

Individuals, as well as corporations, could be subject to enforcement actions. Sections 15 and 16 of TSCA apply to ''any person'' who violates various provisions of TSCA. EPA may, at its discretion, proceed against individuals as well as companies. In particular, EPA may proceed against individuals who report false information or cause it to be reported.

XII. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

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XIII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is a significant regulatory action because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866 (58 FR 51735, October 4, 1993). Accordingly, EPA submitted the action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and Executive Order 13563 (76 FR 3821, January 21, 2011), and any changes made in response to OMB recommendations have been documented in the docket. EPA prepared an economic analysis of the potential costs and benefits associated with this action, which is available in the docket and summarized in Unit VIII. (Ref. 2).

B. Paperwork Reduction Act (PRA)

The information collection requirements in this proposed rule have been submitted to OMB for review and comment under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by the EPA has been assigned the EPA ICR number 2541.01. You can find a copy of the ICR in the docket for this proposed rule, and it is briefly summarized here.

The information collection activities required under the proposed rule include a downstream notification requirement and a recordkeeping requirement. The downstream notification would require companies that ship TCE to notify companies downstream in the supply chain of the prohibitions of TCE in the proposed rule. The proposed rule does not require the regulated entities to submit information to EPA. The proposed rule also does not require confidential or sensitive information to be submitted to EPA or downstream companies. The recordkeeping requirement mandates companies that ship TCE to retain certain information at the company headquarters for two years from the date of shipment. These information collection activities are necessary in order to enhance the prohibitions under the proposed rule by ensuring awareness of the prohibitions throughout the TCE supply chain, and to provide EPA with information upon inspection of companies downstream who purchased TCE. EPA believes that these information collection activities would not significantly impact the regulated entities.

Respondents/affected entities: TCE manufacturers, processors, and distributors.

Respondent's obligation to respond: Mandatory.

Estimated number of respondents: 697.

Frequency of response: On occasion.

Total estimated burden: 348.5 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $16,848 (per year).

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 the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to EPA using the docket identified at the beginning of this proposed rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *oira_submission@omb.eop.gov*, Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than January 17, 2017. The EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are blenders of TCE-containing dry cleaning spot removers and aerosol degreasers, users of dry cleaning spot removers and aerosol degreasers, and manufacturers, processors, and distributors of non-prohibited TCE-containing products. Users of these products are not expected to experience costs as there are currently a number of alternatives available that are similar in performance and cost. There are no small governmental jurisdictions or non-profits expected to be affected by the proposed rule. Overall, EPA estimates there are approximately 51,000 small entities affected by the proposed rule.

Comparing the total annualized compliance cost for companies to their revenue, the Agency has estimated that all companies are expected to have cost impacts of less than one percent of their revenues, ranging from an estimated high of 0.3 percent of revenues to a low of 0.01 percent of revenues. Details of this analysis are presented in the Economic Analysis for this proposed rule (Ref. 2).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The requirements of this action would primarily affect manufacturers, processors, and distributors of TCE. The total estimated annualized cost of the proposed rule is approximately

$170,000 at 3% and $183,000 at 7% (Ref. 2).

E. Executive Order 13132: Federalism

The EPA has concluded that this action has federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because regulation under TSCA section 6(a) may preempt state law. EPA provides the following preliminary federalism summary impact statement. The Agency consulted with state and local officials early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. EPA invited the following national organizations representing state and local elected officials to a meeting on May 13, 2015, in Washington DC: National Governors Association; National Conference of State Legislatures, Council of State Governments, National League of Cities, U.S. Conference of Mayors, National Association of Counties, International City/County Management Association, National Association of Towns and Townships, County Executives of America, and Environmental Council of States. A summary of the meeting with these organizations, including the views that they expressed, is available in the docket (Ref. 65). Although EPA provided these organizations an opportunity to provide follow-up comments in writing, no written follow-up was received by the Agency.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rulemaking would not have substantial direct effects on tribal government because TCE is not manufactured, processed, or distributed in commerce by tribes. TCE is not regulated by tribes, and this rulemaking would not impose substantial direct compliance costs on tribal governments. Thus, E.O. 13175 does not apply to this action. EPA nevertheless consulted with tribal officials during the development of this action, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes.

EPA met with tribal officials in a national informational webinar held on May 12, 2015 concerning the prospective regulation of TCE under TSCA section 6, and in another teleconference with tribal officials on May 27, 2015 (Ref. 66). EPA also met with the National Tribal Toxics Council (NTTC) in Washington, DC and via teleconference on April 22, 2015 (Ref. 66). In those meetings, EPA provided background information on the proposed rule and a summary of issues being explored by the Agency. These officials expressed concern for TCE contamination on tribal lands and supported additional regulation of TCE.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866. This action's health and risk assessment of TCE exposure on children are contained in Units VI.B.1.c and VII.B.1.c of this preamble. Supporting information on the exposures and health effects of TCE exposure on children is also available in the Toxicological Review of Trichloroethylene (Ref. 3) and the TCE risk assessment (Ref. 1).

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

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution in commerce, or use. This rulemaking is intended to protect against risks from TCE, and does not affect the use of oil, coal, or electricity.

I. National Technology Transfer and Advancement Act (NTTAA)

This proposed rulemaking does not involve technical standards.

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 health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the U.S. Units VI.B., VII.B, and VIII. of this preamble address public health impacts from TCE. EPA has determined that there would not be a disproportionately high and adverse health or environmental effects on minority, low income, or indigenous populations from this proposed rule.

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export notification, Hazardous substances, Import certification, Trichloroethylene, Recordkeeping.

Dated: December 6, 2016,

Gina McCarthy,

Administrator.

■ Therefore, it is that 40 CFR chapter I, subchapter R, is proposed to be amended by adding a new part 751 to read as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

Subpart A—General Provisions

Sec.
751.1 Purpose.
751.5 Definitions.
751.7 Exports and imports.
751.9 Enforcement and Inspections.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Trichloroethylene

751.301 General.
751.303 Definitions.
751.305 Aerosol Degreasing.
751.307 Spot Cleaning in Dry Cleaning Facilities.
751.309 [Reserved].
751.311 Downstream Notification.
751.313 Recordkeeping.

Authority: 15 U.S.C. 2605.

Subpart A—General Provisions

§ 751.1 Purpose.

This part sets forth requirements, such as prohibitions concerning the manufacture (including import), processing, distribution in commerce, uses, and/or disposal of certain chemical substances and mixtures under section 6(a) of the Toxic Substances Control Act, 15 U.S.C. 2605(a).

§ 751.5 Definitions.

The definitions in section 3 of the Toxic Substances Control Act, 15 U.S.C. 2602, apply to this part except as otherwise established in any subpart under this part.

Act or TSCA means the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*

CASRN means Chemical Abstracts Service Registry Number.

EPA means the U.S. Environmental Protection Agency.

Person means any natural person, firm, company, corporation, joint venture, partnership, sole proprietorship, association, or any other business entity; any State or political

subdivision thereof; any municipality; any interstate body; and any department, agency, or instrumentality of the Federal Government.

§ 751.7 Exports and imports.

(a) *Exports.* Persons who intend to export a chemical substance identified in any subpart under this part, or in any proposed rule which would amend any subpart under this part, are subject to the export notification provisions of section 12(b) of the Act. The regulations that interpret section 12(b) appear at 40 CFR part 707, subpart D.

(b) *Imports.* Persons who import a substance identified in any subpart under this part are subject to the import certification requirements under section 13 of the Act, which are codified at 19 CFR 12.118 through 12.127. See also 19 CFR 127.28.

§ 751.9 Enforcement and Inspections.

(a) *Enforcement.* (1) Failure to comply with any provision of this part is a violation of section 15 of the Act (15 U.S.C. 2614).

(2) Failure or refusal to establish and maintain records or to permit access to or copying of records, as required by the Act, is a violation of section 15 of the Act (15 U.S.C. 2614).

(3) Failure or refusal to permit entry or inspection as required by section 11 of the Act (15 U.S.C. 2610) is a violation of section 15 of the Act (15 U.S.C. 2614).

(4) Violators may be subject to the civil and criminal penalties in section 16 of the Act (15 U.S.C. 2615) for each violation.

(b) *Inspections.* EPA will conduct inspections under section 11 of the Act (15 U.S.C. 2610) to ensure compliance with this part.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—Trichloroethylene

§ 751.301 General.

This subpart sets certain restrictions on the manufacture (including import), processing, distribution in commerce, and uses of trichloroethylene (TCE) (CASRN 79–01–6) to prevent unreasonable risks to health associated with human exposure to TCE for the specified uses.

§ 751.303 Definitions.

The definitions in subpart A of this part apply to this subpart unless otherwise specified in this section. In addition, the following definitions apply:

Aerosol degreasing means the use of a chemical in aerosol spray products applied from a pressurized can to remove contaminants.

Distribute in commerce has the same meaning as in section 3 of the Act, except that the term does not include retailers for purposes of § 751.311 and § 751.313.

Dry cleaning facility means an establishment with one or more dry cleaning systems.

Dry cleaning system means a dry-to-dry machine and its ancillary equipment or a transfer machine system and its ancillary equipment.

Retailer means a person who distributes in commerce a chemical substance, mixture, or article to consumer end users.

Spot cleaning means use of a chemical to clean stained areas on materials such as textiles or clothing.

§ 751.305 Aerosol Degreasing.

(a) After [*Date 180 calendar days after the date of publication of the final rule*], all persons are prohibited from manufacturing, processing, and distributing in commerce TCE in aerosol degreasing products and TCE for use in aerosol degreasing products.

(b) After [*Date 270 calendar days after the date of publication of the final rule*], all persons are prohibited from commercial use of TCE in aerosol degreasing products.

§ 751.307 Spot Cleaning at Dry Cleaning Facilities.

(a) After [*Date 180 calendar days after the date of publication of the final rule*], all persons are prohibited from manufacturing, processing, and distributing in commerce TCE for spot cleaning at dry cleaning facilities.

(b) After [*Date 270 calendar days after the date of publication of the final rule*], all persons are prohibited from commercial use of TCE for spot cleaning at dry cleaning facilities.

§ 751.309 [Reserved]

§ 751.311 Downstream Notification.

Each person who manufactures, processes, or distributes in commerce TCE for any use after [*Date 45 calendar days after the date of publication of the final rule*] must, prior to or concurrent with the shipment, notify companies to whom TCE is shipped, in writing, of the restrictions described in this subpart.

§ 751.313 Recordkeeping.

(a) Each person who manufactures, processes, or distributes in commerce any TCE after [*Date 45 calendar days after the date of publication of final rule*] must retain in one location at the headquarters of the company documentation of:

(1) The name, address, point of contact, and telephone number of companies to whom TCE was shipped; and

(2) The amount of TCE shipped.

(3) Downstream notification.

(b) The documentation in (a) must be retained for 2 years from the date of shipment.

[FR Doc. 2016–30063 Filed 12–15–16; 8:45 am]

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Part IX

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1

Federal Acquisition Regulations; Interim and Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2016–0051, Sequence No. 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–93; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of interim and final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–93. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see the separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–93 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755.

RULES LISTED IN FAC 2005–93

Item	Subject	FAR Case	Analyst
I	Paid Sick Leave for Federal Contractors (Interim)	2017–001	Delgado.
II	Fair Pay and Safe Workplaces; Injunction	2014–025	Delgado.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–93 amends the FAR as follows:

Item I—Paid Sick Leave for Federal Contractors (FAR Case 2017–001) (Interim)

This interim rule amends the FAR to implement Executive Order (E.O.) 13706 and a Department of Labor final rule issued on September 30, 2016, both entitled ''Establishing Paid Sick Leave for Federal Contractors.'' The interim rule requires contractors to allow all employees performing work on or in connection with a contract covered by the E.O. to accrue and use paid sick leave in accordance with E.O. 13706 and 29 CFR part 13. Contracting officers will include a clause in covered contracts.

Item II—Fair Pay and Safe Workplaces; Injunction (FAR Case 2014–025)

This final rule amends the FAR to include caveats on sections of FAR Case 2015–024, Fair Pay and Safe Workplaces, that were enjoined indefinitely as of October 24, 2016, by court order. FAR Case 2015–024 was published as a final rule in the **Federal Register** at 81 FR 58562 to implement Executive Order (E.O.) 13673, as amended by E.O.s 13683 and 13737. The rule had an effective date of October 25, 2016. On October 7, 2016, the Associated Builders and Contractors of Southeast Texas, Inc., the Associated Builders and Contractors, Inc., and the National Association of Security Companies, filed a lawsuit in the United States District Court for the Eastern District of Texas, seeking to overturn the final rule, Civil Action No. 1:16–CV–425. The District Court issued a ''Memorandum and Order Granting Preliminary Injunction'' on October 24, 2016. The Court Order on page 31 stated that ''Defendants are enjoined from implementing any portion of the FAR Rule or DOL Guidance relating to the new reporting and disclosure requirements regarding labor law violations as described in Executive Order 13673 and implemented in the FAR Rule and DOL Guidance. Further, Defendants are enjoined from enforcing the restriction on arbitration agreements.'' The Court did not enjoin implementation of those sections of, or the clause in, the FAR rule addressing the E.O.'s paycheck transparency requirements. To ensure compliance with the Court Order, the FAR Council issued a memorandum on October 25, 2016, subject ''Court Order Enjoining Certain Sections, Provisions, and Clauses in Federal Acquisition Circular (FAC) 2005–90, Implementing Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces.''

Dated: December 9, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2005–93 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–93 is effective December 16, 2016 except for item II, which is effective January 1, 2017.

Dated: December 8, 2016.

Frank Kendall,

Under Secretary of Defense for Acquisition, Technology and Logistics.

Dated: December 9, 2016.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: December 7, 2016.

William P. McNally,

Assistant Administrator, Office of Procurement National Aeronautics and Space Administration.

[FR Doc. 2016–30089 Filed 12–15–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 11, 22, and 52

[FAC 2005–93; FAR Case 2017–001, Item I; Docket No. 2017–0001; Sequence No. 1]

RIN 9000–AN27

Federal Acquisition Regulation; Paid Sick Leave for Federal Contractors

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Executive Order, Establishing Paid Sick Leave for Federal Contractors, and a final rule issued by the Department of Labor.

DATES: *Effective:* January 1, 2017.

Applicability:

• This rule applies to solicitations issued on or after January 1, 2017, and resultant contracts.

• Applicability of the clause at 52.222–62, Paid Sick Leave Under Executive Order 13706, to existing contracts is as follows—

(1) Contracting officers shall include the clause in bilateral modifications extending the contract when such modifications are individually or cumulatively longer than six months.

(2) In accordance with FAR 1.108(d)(3), contracting officers are strongly encouraged to include the clause in existing indefinite-delivery indefinite-quantity contracts, if the remaining ordering period extends at least six months and the amount of remaining work or number of orders expected is substantial.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before February 14, 2017 to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005–93, FAR Case 2017–001 by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''FAR Case 2017–001'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''FAR Case 2017–001''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''FAR Case 2017–001'' on your attached document.

• *Mail:* General Services Administration, Regulatory Secretariat Division, ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405–0001.

Instructions: Please submit comments only and cite ''FAC 2005–93, FAR Case 2017–001'' in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–93, FAR Case 2017–001.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the FAR to implement Executive Order (E.O.) 13706, Establishing Paid Sick Leave for Federal Contractors. The E.O. was signed September 7, 2015, and published in the **Federal Register** at 80 FR 54697 on September 10, 2015. The E.O. seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid sick leave for family care. The E.O. directed the Department of Labor (DOL) to issue regulations by September 30, 2016, and for the FAR Council to issue regulations within 60 days of the DOL regulations.

The Wage and Hour Division of DOL published a final rule in the **Federal Register** at 81 FR 67598, on September 30, 2016, also entitled ''Establishing Paid Sick Leave for Federal Contractors,'' which added a new part 13 to title 29 Code of Federal Regulation (CFR). The DOL rule applies to FAR acquisitions (as described in FAR 1.104) that are covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and also applies to contracts for concessions, and to contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, even if such contracts are not governed by the FAR. Although the DOL rule covers both FAR-based contracts, and non-FAR-based contracts and contract-like instruments, this interim rule only applies to FAR-based contracts.

II. Discussion and Analysis

FAR implementation of the DOL rule by DoD, GSA, and NASA is discussed below, as well as those instances where the FAR rule differs from the DOL rule, and the rationale for those differences.

A. FAR Subpart 22.21, Paid Sick Leave for Federal Contractors

1. Definitions (22.2101).

a. *Employee.* The DOL definition of ''employee'' (29 CFR 13.2) is incorporated at FAR 22.2101, updating the statutory references to reflect the recodification of titles 40 and 41 of the United States Code (see FAR 1.110).

b. *New contract.* The term ''new contract'' is defined in 29 CFR 13.2, Definitions. The FAR rule does not adopt this definition because not all the elements of the definition apply to or are consistent with FAR principles. When FAR rules apply to existing contracts, application is addressed in the Effective Date/Applicability section of the preamble, not in the CFR, and treatment of bilateral modifications to existing contracts is also addressed in the Applicability section at the beginning of the preamble. See the discussion in Section II.A.3. below. In discussing treatment of existing contracts, DOL stated in the preamble of its rule, ''if the parties bilaterally negotiate a modification that is outside the scope of the contract, the agency will be required to create a new contract, triggering solicitation and/or justification requirements, and thus such a modification after January 1, 2017, will constitute a 'new contract' subject to the Executive Order's paid sick leave requirements.'' We understand this to refer to the long-standing requirement for any out-of-scope modification to be addressed as a new procurement and conducted in accordance with the requirements of FAR part 6, Competition Requirements.

c. *United States.* The DOL regulations at 29 CFR 13.2 define ''United States'' in a geographic sense consistent with the basic FAR definition of ''United States'' in FAR 2.101 (*i.e.,* the 50 states and the District of Columbia). Therefore, this definition is not included at FAR 22.2101, but is included in the clause at FAR 52.222–62.

d. *Other definitions.* The definitions from the DOL rule for ''accrual year,'' ''multiemployer plan,'' and ''paid sick

leave'' were added in full text at FAR 22.2101. The definitions for ''health care provider'' and ''certification issued by a health care provider'' are incorporated by reference from 29 CFR 13.2.

2. Policy (FAR 22.2102).

a. FAR 22.2102(a) states the policy of E.O. 13706, which requires contractors to allow all employees performing work on or in connection with a contract covered by the E.O. to accrue and use paid sick leave in accordance with E.O. 13706 and 29 CFR part 13.

b. FAR 22.2102(b) and (c) address interaction with other laws and paid time off policies (29 CFR 13.5(f)).

3. Applicability (FAR 22.2103). This section provides applicability of FAR subpart 22.21 to contracts that are covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are performed in whole or in part in the United States; and to employees performing on or in connection with such contracts whose wages are governed by the Wage Rate Requirements (Construction) statute, the Service Contract Labor Standards statute, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions (29 CFR 13.3).

4. Exclusions (FAR 22.2104). This section delineates exclusions for certain employees from the general applicability in accordance with 29 CFR 13.4(e) and (f). It also clarifies that an option renewal of contracts that do not contain the 52.222–62 clause will not trigger automatic application of the clause.

5. Paid sick leave for Federal contractors and subcontractors (FAR 22.2105). This section provides information regarding some of the basic paid sick leave requirements in accordance with 29 CFR 13.5.

6. Prohibited acts (FAR 22.2106). This section addresses the prohibited acts set forth at 29 CFR 13.6 (*i.e.,* interference, discrimination, and failure to make and maintain or to make available required records, or any other failure to comply with 29 CFR 13.25).

7. Waiver of rights (FAR 22.2107). This section states that an employee cannot waive, nor can a contractor induce an employee to waive, rights under E.O. 13706 and 29 CFR part 13 (29 CFR 13.7).

8. Multiemployer plans or other funds, plans, or programs (FAR 22.2108). This section explains how contractors may fulfill their obligations through a multiemployer plan or through other funds, plans, or programs (29 CFR 13.8).

9. Enforcement (FAR 22.2109). This section provides information on enforcement authority, filing complaints, reporting and investigating complaints, remedies and sanctions, and retroactive inclusion of the contract clause when an agency fails to include the clause in a contract to which E.O. 13706 applies (29 CFR 13.11, 13.41, and 13.44).

10. Clause prescription (FAR 22.2110). The prescription for use of the clause at FAR 52.222–62 is consistent with the applicability specified in FAR 22.2103 (29 CFR 13.3). The prescription requires use of the clause when a contract includes 52.222–6, Construction Wage Rate Requirements, ($2,000 threshold), or 52.222–41, Service Contract Labor Standards, ($2,500 threshold) and performance is in whole or in part in the United States.

B. FAR Clause 52.222–62 Paid Sick Leave Under Executive Order 13706

FAR clause 52.222–62 is substantially based on, and accomplishes the same purposes as, the clause provided in the DOL regulations at appendix A to 29 CFR part 13—Contract Clause, which is required for use in contracts, contract-like instruments, and solicitations to which E.O. 13706 applies, except for procurements subject to the FAR. For contracts subject to the FAR, the clause at FAR 52.222–62 must be used.

- In FAR 52.222–62(a), all definitions are based on 29 CFR 13.2. The definitions for ''employee,'' ''multiemployer plan,'' and ''paid sick leave'' are the same as at 22.2101. The definition of ''United States'' (*i.e.,* the 50 States and the District of Columbia) is also included in full text in the clause, for clarity. Definitions for ''child,'' ''domestic partner,'' ''domestic violence,'' ''individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship,'' ''parent,'' ''sexual assault,'' ''spouse,'' and ''stalking'' are incorporated by reference from 29 CFR 13.2.
- In FAR 52.222–62(b), the statement is added that, if the contract is not performed wholly within the United States the clause applies only with respect to that part of the contract that is performed within the United States (29 CFR 13.3(c)).
- In FAR 52.222–62(f), the term ''contract suspension'' in the heading is changed to ''payment suspension,'' to be consistent with the text of the paragraph.
- Paragraph (h) in the DOL clause, which addresses flowdown to subcontracts, is revised slightly and moved to be the last paragraph of FAR 52.222–62, consistent with FAR drafting conventions. The requirement to include the substance of the clause allows only for ministerial changes to the clause. The substance of the clause will be consistent with the requirements of the clause, and will not permit substantive changes such as to the rights and responsibilities of the parties.
- Paragraph (i) of the DOL clause, ''Certification of Eligibility'' is not included in the FAR clause 52.222–62. This paragraph duplicates coverage in paragraph (p) of FAR clause 52.222–41, Service Contract Labor Standards, for service and 52.222–15, Certification of Eligibility, for construction contracts. 41 U.S.C. 1304 discourages adding certifications to the FAR.
- Paragraph (k) of the DOL clause, Waiver, is not included in the FAR clause 52.222–62, although it is included at FAR 22.2107. The FAR clause requirements become contract requirements, which likewise cannot be waived, thus separate inclusion is unnecessary.

C. Conforming Changes

1. References to the Office of Management and Budget (OMB) clearances for the information collection requirements on the DOL final rule are added at FAR 1.106. The FAR rule does not add any burdens beyond those already approved by the Office of Information and Regulatory Affairs in OMB in connection with the DOL final rule on Paid Sick Leave.

2. FAR 11.500, Scope, in FAR subpart 11.5, Liquidated Damages, is modified to exclude application to liquidated damages related to paid sick leave for Federal contractors (FAR subpart 22.21).

3. FAR 22.403–4, Department of Labor regulations involving construction, is moved to the end of the section, renumbered as 22.403–6, and updated with references to parts 10 and 13, which implement E.O.s 13658 and 13706. New sections 22.403–5 and 22.1002–6 are added, citing E.O. 13706 and referencing the new paid sick leave subpart and clause.

4. The FAR clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, is revised to include 52.222–62, Paid Sick Leave Under Executive Order 13706.

5. The FAR clause at 52.213–4, Terms and Conditions—Simplified Acquisitions (Other than Commercial Items), is revised to include 52.222–62, Paid Sick Leave Under Executive Order 13706.

6. The FAR clause at 52.244–6, Subcontracts for Commercial Items, is revised to address flowdown in clause

52.222–55, Minimum Wages under Executive Order 13658, and to include 52.222–62, Paid Sick Leave Under Executive Order 13706.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule implements E.O. 13706, which does not exempt contracts at or below the SAT or contracts for the acquisition of commercial items. The rule applies to contracts that are covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and meet or exceed the thresholds specified in those statutes. However, since these statutes do not apply to contracts for acquisition of supplies, the rule does not cover acquisitions of COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

E.O. 13706, Establishing Paid Sick Leave for Federal Contractors, directed the Department of Labor (DOL) and the FAR Council to sequentially issue implementing regulations. In the preamble of its final rule (81 FR 67598, September 30, 2016), DOL's Wage and Hour Division published a regulatory impact analysis that included estimates of some major impacts, including transfers and compliance costs, associated with the overall implementation of the E.O. The DOL quantitative estimates are summarized in Table A.

TABLE A—E.O.–WIDE AFFECTED EMPLOYEES AND SELECTED CATEGORIES OF REGULATORY COSTS AND TRANSFERS

[Millions]

	Year 1	Year 2	Year 5	Year 10	Annualized (3%)	Annualized (7%)
Affected employees	0.22	0.45	1.15	1.20	.....	.....
Direct employer costs, including regulatory familiarization, administration, and initial and recurring implementation	$125	$11	$17	$11	$25	$27
Transfers from employers to employees	86	176	457	497	364	350

Due to these impacts, the Office of Management and Budget designated the DOL rule as economically significant and major. Because we determine that the effects of the completed DOL rule are part of the baseline for the FAR's implementing rule at issue here, the incremental effects of this FAR rule itself are not economically significant. More information on the source of these impacts estimates are discussed below.

For FAR-based contracts, the E.O.'s paid sick leave requirements apply ''to covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after . . . January 1, 2017, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council.''

Of the entities with employees potentially affected by the E.O., DOL estimated that 91,878 are prime contractors (with contracts subject to the FAR and listed at *USASpending.gov*) and 24,352 are subcontractors. DOL assumed that regulatory familiarization and initial implementation costs are to be incurred per contractor, with per-contractor labor costs as shown in DOL Table 9. As noted in DOL's analysis, it is necessary to capture regulatory familiarization and implementation costs incurred by entities that do not yet hold federal contracts but will be awarded contracts in the future. As regards FAR-based contracts, these costs are attributable to this interim final rule; however, the associated entities are omitted from the entity-count estimates derived from USASpending.gov, thus contributing to a tendency toward underestimation in the cost totals.

DOL assumes that recurring implementation and administration costs, along with transfers from employers to employees, are a function of the number of affected employees. DOL's Table 3 shows industry-specific estimates of total affected employees and of affected employees working on Federal contracts (as opposed to working for entities operating on federal property). The contract-work percentages derived from Table 3 are applied to the employee estimates in DOL Table 8, yielding an estimate that the FAR rule's recurring implementation and administration costs are 84 percent of the E.O.-wide costs in those categories, and to the transfer estimates in DOL Table 13, yielding an estimate that the FAR rule's transfer impacts are 86 percent of the E.O.-wide transfer impacts. DOL estimates that the effects grow over time according to the pattern shown in DOL Tables 8, 11, and 14.

V. Regulatory Flexibility Act

The DOL final rule included a Regulatory Flexibility Analysis, which concluded that the DOL rule will not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* DoD, GSA, and NASA have prepared an Initial Regulatory Flexibility Analysis (IRFA) of the FAR rule, which is summarized as follows:

This rule is necessary to implement Executive Order (E.O.) 13706, Establishing Paid Sick Leave for Federal Contractors, dated September 7, 2015, and associated Department of Labor (DOL) regulatory requirements at 29 CFR part 13.

The objective of this rule is to allow employees under covered contracts to accrue and use paid sick leave in accordance with E.O. 13706 and 29 CFR part 13.

This rule applies to contracts and subcontracts at all tiers covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute, which require performance in whole or in part within the United States. For procurement contracts where employees' wages are governed by the Fair Labor Standards Act, this rule applies when the contract exceeds the micro-purchase threshold, as defined in FAR 2.101. When performance is in part within and in part outside the United States, the rule applies to the part of the contract or subcontract performed within the United States. Data available through the Federal Procurement

Data System (FPDS) for Fiscal Year 2015, reveals contracts were awarded to 18,874 unique small business vendors for services, which contained the FAR clause at 52.222–41, Service Contract Labor Standards. Additionally, contracts were awarded to 6,753 unique small business vendors for construction, which contained the FAR clause at 52.222–6, Construction Wage Rate Requirements, for a total of 25,627 unique small businesses.

The DOL final rule identifies records to be kept by all firms, including small entities (29 CFR 13.25). Some records are already required under the Fair Labor Standards Act, Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, and their governing regulations. DOL noted in their final rule (81 FR 67598 at 67669) that OMB has assigned control number 1235–0029 for the new recordkeeping requirements related to paid sick leave. The information collection requirement under 1235–0029 includes recordkeeping and regulatory familiarization.

Regarding initial implementation, DOL assumed firms that need to create a sick leave policy will each spend 10 hours of time developing this policy, regardless of the number of employees, and firms with a program in place will spend one hour, regardless of the number of employees. DOL also stated in its final rule that ''Transfers from small contractors and costs to small contractors in Year 1 are less than 0.02 percent of revenues on average and are no more than 0.17 percent in any industry''. Therefore, DOL believes its final rule will not have a significant impact on small businesses. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternatives to the rule that would meet the requirements of the E.O. and DOL regulation and minimize any significant economic impact of the rule on small entities. In its final rule, DOL introduced several changes and clarifications that may ease the compliance burden. For instance, DOL provided greater detail and clarity about how companies with paid time off policies can use those policies to satisfy their obligations under the E.O. In addition, if a collective bargaining agreement (CBA) ratified before September 30, 2016, applies to an employee's work performed on or in connection with a covered contract and provides at least 56 hours of paid sick time each year, the employee will be exempted from the requirements of the E.O. and 29 CFR part 13 until CBA termination or January 1, 2020, whichever is earlier.

The rule was also modified to allow employers to meet the requirements of this rule through multiemployer plans or other funds, plans, or programs. This may ease the burden for those employers in industries with transitory or mobile workforces.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017–001), in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved for the DOL regulations under OMB Control Numbers 1235–0018, Records to be kept by Employers—Fair Labor Standards Act, and 1235–0021, Employment Information Form. OMB assigned control number 1235–0029 for the new recordkeeping requirements related to paid sick leave, Government Contractor Paid Sick Leave (see 81 FR 67669).

VII. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. Section 7 of Executive Order (E.O.) 13706 entitled ''Establishing Paid Sick Leave for Federal Contractors'' requires that the order shall apply to covered contracts where the solicitation for such contracts has been issued on or after January 1, 2017. In addition, section 3 of the order directs the FAR Council to issue this regulation after the DOL issues its own regulations implementing the order. The DOL issued those regulations on September 30, 2016. Thus, it is necessary to publish an interim FAR rule in order to meet the specified applicability date of January 1, 2017.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 11, 22, and 52

Government procurement.

Dated: December 9, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 11, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 11, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 by adding to the table, in numerical sequence, FAR segment ''52.222–62'' and its corresponding OMB Control No. ''1235–0018, 1235–0021, 1235–0029''.

PART 11—DESCRIBING AGENCY NEEDS

■ 3. Revise section 11.500 to read as follows:

11.500 Scope.

(a) This subpart prescribes policies and procedures for using liquidated damages clauses in solicitations and contracts for supplies, services, research and development, and construction.

(b) This subpart does not apply to liquidated damages—

(1) For subcontracting plans (see 19.705–7);

(2) Related to the Contract Work Hours and Safety Standards statute (see subpart 22.3); or

(3) Related to paid sick leave for Federal contractors (see subpart 22.21).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 4. Amend section 22.403 by revising the section heading to read as follows:

22.403 Statutory, Executive order, and regulatory requirements.

22.403–4 [Removed]

■ 5. Remove section 22.403–4.

22.403–5 [Redesignated as section 22.403–4]

■ 6. Redesignate section 22.403–5 as section 22.403–4.

■ 7. Add a new section 22.403–5 to read as follows:

22.403–5 Executive Order 13706.

Executive Order 13706 establishes paid sick leave for employees of certain Federal contractors. See subpart 22.21

and the clause at 52.222–62, Paid Sick Leave under Executive Order 13706.

■ 8. Add section 22.403–6 to read as follows:

22.403–6 Department of Labor regulations involving construction.

(a) Under the statutes and Executive orders referred to in 22.403 and Reorganization Plan No. 14 of 1950 (3 CFR 1949–53 Comp., p. 1007), the Secretary of Labor has issued regulations in title 29, subtitle A, Code of Federal Regulations, prescribing standards and procedures to be observed by the Department of Labor and the Federal contracting agencies. Those standards and procedures applicable to contracts involving construction are implemented in this subpart.

(b) The Department of Labor regulations include—

(1) Part 1, relating to Construction Wage Rate Requirements statute minimum wage rates;

(2) Part 3, relating to the Copeland (Anti-Kickback) Act and requirements for submission of weekly statements of compliance and the preservation and inspection of weekly payroll records;

(3) Part 5, relating to enforcement of the—

(i) Construction Wage Rate Requirements statute;

(ii) Contract Work Hours and Safety Standards statute; and

(iii) Copeland (Anti-Kickback) Act;

(4) Part 6, relating to rules of practice for appealing the findings of the Administrator, Wage and Hour Division, in enforcement cases under the various labor statutes, and by which Administrative Law Judge hearings are held;

(5) Part 7, relating to rules of practice by which contractors and other interested parties may appeal to the Department of Labor Administrative Review Board, decisions issued by the Administrator, Wage and Hour Division, or administrative law judges under the various labor statutes;

(6) Part 10, relating to establishing a minimum wage for Federal contractors; and

(7) Part 13, relating to establishing paid sick leave for Federal contractors.

(c) Refer all questions relating to the application and interpretation of wage determinations (including the classifications therein) and the interpretation of the Department of Labor regulations in this subsection to the Administrator, Wage and Hour Division.

■ 9. Amend section 22.1002 by revising the section heading to read as follows:

22.1002 Statutory and Executive order requirements.

■ 10. Add section 22.1002–6 to read as follows:

22.1002–6 Executive Order 13706.

Executive Order 13706 establishes paid sick leave for employees of certain Federal contractors. See subpart 22.21 and the clause at 52.222–62, Paid Sick Leave under Executive Order 13706.

■ 11. Add subpart 22.21 to read as follows:

Subpart 22.21—Establishing Paid Sick Leave for Federal Contractors

Sec.

22.2100 Scope of subpart.
22.2101 Definitions.
22.2102 Policy.
22.2103 Applicability.
22.2104 Exclusions.
22.2105 Paid sick leave for Federal contractors and subcontractors.
22.2106 Prohibited acts.
22.2107 Waiver of rights.
22.2108 Multiemployer plans or other funds, plans, or programs.
22.2109 Enforcement of Executive Order 13706 paid sick leave requirements.
22.2110 Contract clause.

Subpart 22.21—Establishing Paid Sick Leave for Federal Contractors

22.2100 Scope of subpart.

This subpart prescribes policies and procedures to implement E.O. 13706, Establishing Paid Sick Leave for Federal Contractors, dated September 7, 2015, and Department of Labor implementing regulations at 29 CFR part 13.

22.2101 Definitions.

As used in this subpart (in accordance with 29 CFR 13.2)—

Accrual year means the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours (see 29 CFR 13.5(b)(1)).

Certification issued by a health care provider has the meaning given in 29 CFR 13.2.

Employee—

(1)(i) Means any person engaged in performing work on or in connection with a contract covered by E.O. 13706; and

(A) Whose wages under such contract are governed by the Service Contract Labor Standards statute (41 U.S.C. chapter 67), the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV), or the Fair Labor Standards Act (29 U.S.C. chapter 8);

(B) Including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions; and

(C) Regardless of the contractual relationship alleged to exist between the individual and the employer; and

(ii) Includes any person performing work on or in connection with the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2)(i) An employee performs on a contract if the employee directly performs the specific services called for by the contract; and

(ii) An employee performs in connection with a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Health care provider has the meaning given in 29 CFR 13.2.

Multiemployer plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

Paid sick leave means compensated absence from employment that is required by E.O. 13706 and 29 CFR part 13.

22.2102 Policy.

(a) The Government shall require contractors to allow employees performing work on or in connection with a contract covered by E.O. 13706 to accrue and use paid sick leave in accordance with the E.O. and 29 CFR part 13.

(b) *Interaction with other laws.* Nothing in E.O. 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under E.O. 13706 and 29 CFR part 13. For additional details regarding interaction with the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Family and Medical Leave Act, and State and local paid sick time laws, see 29 CFR 13.5(f)(2) through (4).

(c) *Interaction with paid time off policies.* In accordance with 29 CFR 13.5(f)(5)(i), the paid sick leave requirements of E.O. 13706 and 29 CFR part 13 may be satisfied by a contractor's voluntary paid time off policy, whether provided pursuant to a

collective bargaining agreement or otherwise, where the voluntary paid time off policy meets or exceeds the requirements. For additional details regarding paid time off policies, see 29 CFR 13.5(f)(5)(ii) and (iii).

(d) Unless otherwise provided in this subpart, compliance is the responsibility of the contractor, and enforcement is the responsibility of the Department of Labor.

22.2103 Applicability.

This subpart applies to—

(a) Contracts that—

(1) Are covered by the Service Contract Labor Standards statute (41 U.S.C. chapter 67, formerly known as the Service Contract Act, subpart 22.10), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, Subchapter IV, formerly known as the Davis-Bacon Act, subpart 22.4); and

(2) Require performance in whole or in part within the United States. When performance is in part within and in part outside the United States, this subpart applies to the part of the contract that is performed within the United States; and

(b) Employees performing on or in connection with such contracts whose wages are governed by the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions.

22.2104 Exclusions.

The following are excluded from coverage under this subpart:

(a) Employees performing in connection with contracts covered by the E.O. for less than 20 percent of their work hours in a given workweek. This exclusion is inapplicable to employees performing on contracts covered by the E.O., *i.e.,* those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek (see 29 CFR 13.4(e)).

(b) Until the earlier of the date the agreement terminates or January 1, 2020, employees whose covered work is governed by a collective bargaining agreement ratified before September 30, 2016, that—

(1) Already provides 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year; or

(2) Provides less than 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, provided that each year the contractor provides covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing agreement in accordance with 29 CFR 13.4(f).

(c) The Government's unilateral exercise of a pre-negotiated option to renew an existing contract that does not contain the clause at 52.222–62 will not automatically trigger the application of that clause. (See definition of ''new contract'' at 29 CFR 13.2).

22.2105 Paid sick leave for Federal contractors and subcontractors.

In accordance with 29 CFR 13.5, and by operation of the clause at 52.222–62, Paid Sick Leave Under Executive Order 13706, the following contractor requirements apply:

(a) *Accrual.* (1) Contractors are required to permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a contract covered by the E.O. (see 29 CFR 13.5(a)(1)).

(2) Contractors are required to inform each employee, in writing, of the amount of paid sick leave the employee has accrued but not used no less than once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave, pursuant to 29 CFR 13.5(b)(4) (see 29 CFR 13.5(a)(2)).

(3) Contractors may choose to provide employees with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time (see 29 CFR 13.5(a)(3)).

(b) *Maximum accrual, carryover, reinstatement, and payment for unused leave.* (1) Contractors may limit the amount of paid sick leave employees are permitted to accrue to not less than 56 hours in each accrual year (see 29 CFR 13.5(b)(1)).

(2) Paid sick leave shall carry over from one accrual year to the next. Paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on annual accrual (see 29 CFR 13.5(b)(2)).

(3) Contractors may limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours (see 29 CFR 13.5(b)(3)).

(4) Contractors are required to reinstate paid sick leave for employees only when rehired by the same contractor within 12 months after a job separation (see 29 CFR 13.5(b)(4)).

(5) Nothing in E.O. 13706 or 29 CFR part 13 requires contractors to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. If a contractor nevertheless makes such a payment in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to 29 CFR 13.5(c)(3) had the employee used the paid sick leave, the contractor is relieved of the obligation to reinstate an employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to 29 CFR 13.5(b)(4) (see 29 CFR 13.5(b)(5)).

(c) *Use.* Contractors are required to permit an employee to use paid sick leave in accordance with 29 CFR 13.5(c).

(d) *Request for paid sick leave.* Contractors are required to permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in 29 CFR 13.5(c) and, to the extent reasonably feasible, the anticipated duration of the leave (see 29 CFR 13.5(d)).

(e) *Certification or documentation for leave of 3 or more consecutive full workdays.* Contractors may require certification issued by a health care provider to verify the need for paid sick leave used for a purpose described in 29 CFR 13.5(c)(1)(i), (ii), or (iii), or documentation from an appropriate individual or organization to verify the need for paid sick leave used for a purpose described in 29 CFR 13.5(c)(1)(iv), only if the employee is absent for 3 or more consecutive full workdays (see 29 CFR 13.5(e)).

22.2106 Prohibited acts.

In accordance with 29 CFR 13.6, and by operation of the clause at 52.222–62, Paid Sick Leave Under Executive Order 13706, a contractor may not—

(a) Interfere with an employee's accrual or use of paid sick leave as required by E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.6(a));

(b) Discharge or in any other manner discriminate against any employee for—

(1) Using, or attempting to use, paid sick leave as provided for under E.O. 13706 and 29 CFR part 13;

(2) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under E.O. 13706 or 29 CFR part 13;

(3) Cooperating in any investigation or testifying in any proceeding under E.O. 13706 or 29 CFR part 13; or

(4) Informing any other person about his or her rights under E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.6(b)); or

(c) Fail to make and maintain or to make available to authorized representatives of the Wage and Hour Division records for inspection, copying, and transcription as required by 29 CFR 13.25, or otherwise fail to comply with the requirements of 29 CFR 13.25 (see 29 CFR 13.6(c)).

22.2107 Waiver of rights.

Employees cannot waive, nor may contractors induce employees to waive, their rights under E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.7).

22.2108 Multiemployer plans or other funds, plans, or programs.

Contractors may fulfill their obligations under E.O. 13706 and 29 CFR part 13 jointly with other contractors through a multiemployer plan, or may fulfill their obligations through an individual fund, plan, or program (see 29 CFR 13.8).

22.2109 Enforcement of Executive Order 13706 paid sick leave requirements.

(a) *Authority.* Section 4 of the E.O. grants to the Secretary of Labor the authority for investigating potential violations of, and obtaining compliance with, the E.O. The Secretary of Labor, in promulgating the implementing regulations required by section 3 of the E.O., has assigned this authority to the Administrator of the Wage and Hour Division. Contracting agencies do not have authority to conduct compliance investigations under 29 CFR part 13 as implemented in this subpart. This does not limit the contracting officer's authority to otherwise enforce the terms and conditions of the contract.

(b) *Complaints.* (1) Complaints are filed with the Administrator of the Wage and Hour Division and may be brought by any person (including the employee), entity, or organization that believes a violation of this subpart has occurred.

(2) The identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual, unless otherwise authorized by law.

(3) If the contracting agency receives a complaint or is notified that the Administrator of the Wage and Hour Division has received a complaint, the contracting officer shall report, within 14 days, to the Department of Labor, Wage and Hour Division, Office of Government Contracts, 200 Constitution Avenue NW., Room S3006, Washington, DC 20210, all of the following information that is available without conducting an investigation:

(i) The complaint or description of the alleged violation.

(ii) Available statements by the employee, contractor, or any other person regarding the alleged violation.

(iii) Evidence that clause 52.222–62, Paid Sick Leave Under Executive Order 13706, was included in the contract.

(iv) Information concerning known settlement negotiations between the parties, if applicable.

(v) Any other relevant facts known to the contracting officer or other information requested by the Wage and Hour Division.

(c) *Investigations.* Complaints will be investigated by the Administrator of the Wage and Hour Division, if warranted, in accordance with the procedures in 29 CFR 13.43.

(d) *Remedies and sanctions*—(1) *Withholding or suspending payment.* The contracting officer shall, upon his or her own action or upon written request of the Administrator of the Wage and Hour Division—

(i)(A) Withhold or cause to be withheld from the contractor under the contract covered by the E.O. or any other Federal contract with the same contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of E.O. 13706 or 29 CFR part 13; and

(B) In the event of any such violation, the contracting agency may, after authorization or by direction of the Administrator of the Wage and Hour Division and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased; or

(ii) Take action to cause suspension of any further payment, advance, or guarantee of funds to a contractor that has failed to make available for inspection, copying, and transcription any of the records identified in 29 CFR 13.25.

(2) *Civil actions to recover greater underpayments than those withheld.* (i) If the payments withheld under 29 CFR 13.11(c) are insufficient to reimburse all monetary relief due, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary of Labor, may bring an action against the contractor in any court of competent jurisdiction to recover the remaining amount.

(ii) The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the employees who suffered the violation(s) of 29 CFR 13.6(a) or (b).

(iii) Any sum not paid to an employee because of inability to do so within 3 years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(3) *Termination.* Contracting officers may consider the failure of a contractor to comply with the requirements of E.O. 13706 or 29 CFR part 13 as grounds for termination for default or cause.

(4) *Debarment.* (i) The Department of Labor may initiate debarment proceedings under 29 CFR 13.44(d) and 29 CFR 13.52 whenever a contractor is found to have disregarded its obligations under E.O. 13706 or 29 CFR part 13.

(ii) Contracting officers shall consider notifying the agency suspending and debarring official in accordance with agency procedures when a contractor commits significant violations of contract terms and conditions related to this subpart (see subpart 9.4).

(5) *Remedies for interference.* (i) When the Administrator of the Wage and Hour Division determines that a contractor has interfered with an employee's accrual or use of paid sick leave in violation of 29 CFR 13.6(a), the Administrator of the Wage and Hour Division will notify the contractor and the relevant contracting agency of the interference and request that the contractor remedy the violation.

(ii) If the contractor does not remedy the violation, the Administrator of the Wage and Hour Division shall direct the contractor to provide any appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to 29 CFR 13.51. Such relief may include—

(A) Any pay and/or benefits denied or lost by reason of the violation;

(B) Other actual monetary losses sustained as a direct result of the violation; or

(C) Appropriate equitable or other relief.

(iii) Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator of the Wage and Hour Division because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the E.O. or 29 CFR part 13.

(iv) The Administrator of the Wage and Hour Division may additionally direct that payments due on the contract

or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary of Labor that monetary relief is due, the Administrator of the Wage and Hour Division may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(6) *Remedies for discrimination.* (i) When the Administrator of the Wage and Hour Division determines that a contractor has discriminated against an employee in violation of 29 CFR 13.6(b), the Administrator of the Wage and Hour Division will notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation.

(ii) If the contractor does not remedy the violation, the Administrator of the Wage and Hour Division shall direct the contractor to provide appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to 29 CFR 13.51. Such relief may include, but is not limited to—

(A) Employment;

(B) Reinstatement;

(C) Promotion; and

(D) Restoration of leave, or lost pay and/or benefits.

(iii) Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator of the Wage and Hour Division because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the E.O. or 29 CFR part 13.

(iv) The Administrator of the Wage and Hour Division may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary of Labor that monetary relief is due, the Administrator of the Wage and Hour Division may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(7) *Recordkeeping.* When a contractor fails to make, maintain, or protect records; or produce records when requested by authorized representatives of the Administrator of the Wage and Hour Division, or otherwise comply with the requirements of 29 CFR 13.25 in violation of 29 CFR 13.6(c), the Administrator of the Wage and Hour Division will request that the contractor remedy the violation. If the contractor fails to produce required records upon request, the contracting officer shall, upon his or her own action or upon direction of an authorized representative of the Department of Labor, take such action as may be necessary to cause suspension of any further payment, advance, or guarantee of funds on the contract until such time as the violations are discontinued.

(e) *Inclusion of contract clause.* If a contracting agency fails to include the clause at FAR 52.222–62 in a contract to which the E.O. applies, the contracting officer, on his or her own initiative or within 15 days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination).

22.2110 Contract clause.

Insert the clause at 52.222–62, Paid Sick Leave Under Executive Order 13706, in solicitations and contracts that include the clause at 52.222–6, Construction Wage Rate Requirements, or 52.222–41, Service Contract Labor Standards, where work is to be performed, in whole or in part, in the United States (the 50 States and the District of Columbia).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(9) and (10) as paragraphs (c)(10) and (11), respectively;

■ c. Adding a new paragraph (c)(9);

■ d. Redesignating paragraphs (e)(1)(xviii) through (xx) as paragraphs (e)(1)(xix) through (xxi), respectively;

■ e. Adding a new paragraph (e)(1)(xviii); and

■ f. In Alternate II:

■ i. Revising the date of the alternate;

■ ii. Redesignating paragraphs (e)(1)(ii)(R) and (S) as paragraphs (e)(1)(ii)(S) and (T), respectively; and

■ iii. Adding a new paragraph (e)(1)(ii)(R).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2017)

* * * * *

(c) * * *

__ (9) 52.222–62, Paid Sick Leave Under Executive Order 13706 (JAN 2017) (E.O. 13706).

* * * * *

(e)(1) * * *

(xviii) 52.222–62 Paid Sick Leave Under Executive Order 13706 (JAN 2017) (E.O. 13706).

* * * * *

Alternate II (JAN 2017). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(R) 52.222–62 Paid Sick Leave Under Executive Order 13706 (JAN 2017) (E.O. 13706).

* * * * *

■ 13. Amend section 52.213–4 by—

■ a. Revising the date of the clause and paragraph (a)(2)(viii);

■ b. Redesignating paragraphs (b)(1)(x) through (xx) as paragraphs (b)(1)(xi) through (xxi), respectively; and

■ c. Adding a new paragraph (b)(1)(x).

The revisions and addition read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other than Commercial Items) (JAN 2017)

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (JAN 2017).

(b) * * *

(1) * * *

(x) 52.222–62, Paid Sick Leave Under Executive Order 13706 (JAN 2017) (E.O. 13706) (Applies when 52.222–6 or 52.222–41 are in the contract and performance in whole or in part is in the United States (the 50 States and the District of Columbia.))

* * * * *

■ 14. Add section 52.222–62 to read as follows:

52.222–62 Paid Sick Leave Under Executive Order 13706.

As prescribed at 22.2110, insert the following clause:

Paid Sick Leave Under Executive Order 13706 (JAN 2017)

(a) *Definitions.* As used in this clause (in accordance with 29 CFR 13.2)—

Child, domestic partner, and *domestic violence* have the meaning given in 29 CFR 13.2.

Employee—(1)(i) Means any person engaged in performing work on or in connection with a contract covered by Executive Order (E.O.) 13706; and

(A) Whose wages under such contract are governed by the Service Contract Labor Standards statute (41 U.S.C. chapter 67), the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV), or the Fair Labor Standards Act (29 U.S.C. chapter 8);

(B) Including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions;

(C) Regardless of the contractual relationship alleged to exist between the individual and the employer; and

(ii) Includes any person performing work on or in connection with the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2)(i) An employee performs ''on'' a contract if the employee directly performs the specific services called for by the contract; and

(ii) An employee performs ''in connection with'' a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship has the meaning given in 29 CFR 13.2.

Multiemployer plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

Paid sick leave means compensated absence from employment that is required by E.O. 13706 and 29 CFR part 13.

Parent, sexual assault, spouse, and *stalking* have the meaning given in 29 CFR 13.2.

United States means the 50 States and the District of Columbia.

(b) *Executive Order 13706.* (1) This contract is subject to E.O. 13706 and the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the E.O.

(2) If this contract is not performed wholly within the United States, this clause only applies with respect to that part of the contract that is performed within the United States.

(c) *Paid sick leave.* The Contractor shall—

(1) Permit each employee engaged in performing work on or in connection with this contract to earn not less than 1 hour of paid sick leave for every 30 hours worked;

(2) Allow accrual and use of paid sick leave as required by E.O. 13706 and 29 CFR part 13;

(3) Comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract;

(4) Provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account;

(5) Provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken; and

(6) Be responsible for the compliance by any subcontractor with the requirements of E.O. 13706, 29 CFR part 13, and this clause.

(d) Contractors may fulfill their obligations under E.O. 13706 and 29 CFR part 13 jointly with other contractors through a multiemployer plan, or may fulfill their obligations through an individual fund, plan, or program (see 29 CFR 13.8).

(e) *Withholding.* The Contracting Officer will, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this or any other Federal contract with the same Contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of E.O. 13706, 29 CFR part 13, or this clause, including—

(1) Any pay and/or benefits denied or lost by reason of the violation;

(2) Other actual monetary losses sustained as a direct result of the violation; and

(3) Liquidated damages.

(f) *Payment suspension/contract termination/contractor debarment.* (1) In the event of a failure to comply with E.O. 13706, 29 CFR part 13, or this clause, the contracting agency may, on its own action or after authorization or by direction of the Department of Labor and written notification to the Contractor take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(2) Any failure to comply with the requirements of this clause may be grounds for termination for default or cause.

(3) A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 13.52.

(g) The paid sick leave required by E.O. 13706, 29 CFR part 13, and this clause is in addition to the Contractor's obligations under the Service Contract Labor Standards statute and Wage Rate Requirements (Construction) statute, and the Contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of E.O. 13706 and 29 CFR part 13.

(h) Nothing in E.O. 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under E.O. 13706 and 29 CFR part 13.

(i) *Recordkeeping.* (1) The Contractor shall make and maintain, for no less than three (3) years from the completion of the work on the contract, records containing the following information for each employee, which the Contractor shall make available upon request for inspection, copying, and transcription by authorized representatives of the Administrator of the Wage and Hour Division of the Department of Labor:

(i) Name, address, and social security number of each employee.

(ii) The employee's occupation(s) or classification(s).

(iii) The rate or rates of wages paid (including all pay and benefits provided).

(iv) The number of daily and weekly hours worked.

(v) Any deductions made.

(vi) The total wages paid (including all pay and benefits provided) each pay period.

(vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(2).

(viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests.

(ix) Dates and amounts of paid sick leave taken by employees (unless the Contractor's paid time off policy satisfies the requirements of E.O. 13706 and 29 CFR part 13 as described in 29 CFR 13.5(f)(5), leave shall be designated in records as paid sick leave pursuant to E.O. 13706).

(x) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under 29 CFR 13.5(d)(3).

(xi) Any records reflecting the certification and documentation the Contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee.

(xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave.

(xiii) The relevant contract.

(xiv) The regular pay and benefits provided to an employee for each use of paid sick leave.

(xv) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to 29 CFR 13.5(b)(5), to relieve the Contractor from the obligation to reinstate such paid sick leave as otherwise required by 29 CFR 13.5(b)(4).

(2)(i) If the Contractor wishes to distinguish between an employee's covered and noncovered work, the Contractor shall keep records or other proof reflecting such distinctions. Only if the Contractor adequately segregates the employee's time will time spent on noncovered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if the Contractor adequately segregates the employee's time may the Contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform noncovered work during the time he or she asked to use paid sick leave.

(ii) If the Contractor estimates covered hours worked by an employee who performs work in connection with contracts covered by the E.O. pursuant to 29 CFR 13.5(a)(1)(i) or (iii), the Contractor shall keep records or

other proof of the verifiable information on which such estimates are reasonably based. Only if the Contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with noncovered work be excluded from hours worked counted toward the accrual of paid sick leave. If the Contractor estimates the amount of time an employee spends performing in connection with contracts covered by the E.O., the Contractor shall permit the employee to use his or her paid sick leave during any work time for the Contractor.

(3) In the event the Contractor is not obligated by the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the Fair Labor Standards Act's minimum wage and overtime requirements, and the Contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the Contractor is excused from the requirement in paragraph (i)(1)(iv) of this clause and 29 CFR 13.25(a)(4) to keep records of the employee's number of daily and weekly hours worked.

(4)(i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of E.O. 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents shall also be maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in 29 CFR 1635.9, 41 CFR 60–741.23(d), and 29 CFR 1630.14(c)(1), respectively.

(iii) The Contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

(5) The Contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(6) Nothing in this contract clause limits or otherwise modifies the Contractor's recordkeeping obligations, if any, under the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Fair Labor Standards Act, the Family and Medical Leave Act, E.O. 13658, their respective implementing regulations, or any other applicable law.

(j) *Interference/discrimination.* (1) The Contractor shall not in any manner interfere with an employee's accrual or use of paid sick leave as required by E.O. 13706 or 29 CFR part 13. Interference includes, but is not limited to—

(i) Miscalculating the amount of paid sick leave an employee has accrued;

(ii) Denying or unreasonably delaying a response to a proper request to use paid sick leave;

(iii) Discouraging an employee from using paid sick leave;

(iv) Reducing an employee's accrued paid sick leave by more than the amount of such leave used;

(v) Transferring an employee to work on contracts not covered by the E.O. to prevent the accrual or use of paid sick leave;

(vi) Disclosing confidential information contained in certification or other documentation provided to verify the need to use paid sick leave; or

(vii) Making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the Contractor's operational needs.

(2) The Contractor shall not discharge or in any other manner discriminate against any employee for—

(i) Using, or attempting to use, paid sick leave as provided for under E.O. 13706 and 29 CFR part 13;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under E.O. 13706 and 29 CFR part 13;

(iii) Cooperating in any investigation or testifying in any proceeding under E.O. 13706 and 29 CFR part 13; or

(iv) Informing any other person about his or her rights under E.O. 13706 and 29 CFR part 13.

(k) *Notice.* The Contractor shall notify all employees performing work on or in connection with a contract covered by the E.O. of the paid sick leave requirements of E.O. 13706, 29 CFR part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the Contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

(l) *Disputes concerning labor standards.* Disputes related to the application of E.O. 13706 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 13. Disputes within the meaning of this contract clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the Department of Labor, or the employees or their representatives.

(m) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (m), in all subcontracts, regardless of dollar value, that are subject to the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States.

(End of clause)

■ 15. Amend section 52.244–6 by—

■ a. Revising the date of the clause and paragraph (c)(1)(xii);

■ b. Redesignating paragraphs (c)(1)(xv) through (xvii) as paragraphs (c)(1)(xvi) through (xviii), respectively; and

■ c. Adding a new paragraph (c)(1)(xv).

The revisions and addition read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (JAN 2017)

* * * * *

(c)(1) * * *

(xii) 52.222–55, Minimum Wages under Executive Order 13658 (DEC 2015), if flowdown is required in accordance with paragraph (k) of FAR clause 52.222–55.

* * * * *

(xv) 52.222–62, Paid Sick Leave Under Executive Order 13706 (JAN 2017) (E.O. 13706), if flowdown is required in accordance with paragraph (m) of FAR clause 52.222–62.

* * * * *

[FR Doc. 2016–30090 Filed 12–15–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

[FAC 2005–93; FAR Case 2014–025; Item II; Docket No. 2014–0025; Sequence No. 2]

RIN 9000–AN30

Federal Acquisition Regulation; Fair Pay and Safe Workplaces; Injunction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule; injunction.

SUMMARY: A final rule was published in the **Federal Register** on August 25, 2016 amending the Federal Acquisition Regulation (FAR) to implement the Executive Order (E.O.) on Fair Pay and Safe Workplaces. The E.O. was designed

to promote contracting efficiency by improving compliance with basic labor standards during the performance of federal contracts. Implementation of portions of the E.O. was preliminarily enjoined by an order issued by a Federal District court on October 24, 2016. DoD, GSA, and NASA are amending sections of the FAR that are affected by the Court's preliminary injunction order.

DATES: *Effective:* December 16, 2016.

Applicability Date: October 24, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–93, FAR Case 2014–025; Injunction.

SUPPLEMENTARY INFORMATION:

A. Background

1. The Final Rule and Court Order

On August 25, 2016, DoD, GSA, and NASA published a final rule in the **Federal Register** at 81 FR 58562 to implement Executive Order (E.O.) 13673, as amended by E.O. 13683 and 13738 (hereinafter designated as the ''E.O.''). The E.O. was designed to promote contracting efficiency by improving contractor compliance with basic labor standards during the performance of Federal contracts. The rule, which added coverage in FAR parts 1, 4, 9, 17, 22, 42, and 52, had an effective date of October 25, 2016.

On October 7, 2016, the Associated Builders and Contractors of Southeast Texas, Inc., the Associated Builders and Contractors, Inc., and the National Association of Security Companies filed a lawsuit in the United States District Court for the Eastern District of Texas (Civil Action No. 1:16–CV–425) seeking to overturn the final rule. On October 13, 2016, the plaintiffs filed an ''Emergency Motion for Temporary Restraining Order and Preliminary Injunction.''

The District Court issued a ''Memorandum and Order Granting Preliminary Injunction'' on October 24, 2016. The Court Order on page 31 states that ''Defendants are enjoined [from] implementing any portion of the FAR Rule or Department of Labor Guidance relating to the new reporting and disclosure requirements regarding labor law violations as described in Executive Order 13673 and implemented in the FAR Rule and DOL Guidance. Further, Defendants are enjoined from enforcing the restriction on arbitration agreements.''

On October 25, 2016, the Federal Acquisition Regulatory Council issued a memorandum to the Chief Acquisition Officers, Senior Procurement Executives, Defense Acquisition Regulations Council, and Civilian Agency Acquisition Council directing that all steps necessary be taken to ensure the enjoined sections, provisions, and clauses of the final rule are not implemented until such time as the injunction is terminated. The Council enumerated specific steps to be taken at a minimum, including the following:

1. Ensure new solicitations do not include representations or clauses that the enjoined coverage of the rule would have required—*i.e.,* the representation at FAR 52.222–57 and its commercial items version at paragraph (s) of 52.212–3, and 52.222–58 and the clause at 52.222–59, to direct disclosure of labor law violation decisions by offerors or contractors, or clause 52.222–61, that would require an offeror or contractor to agree to restrict use of mandatory pre-dispute arbitration agreements.

2. If a solicitation has been issued with representations or clauses listed in the previous paragraph 1, amend those solicitations immediately to remove those representations and clauses. Additionally, agencies shall not take any action on information, if any, submitted in response to those representations and clauses.

3. Ensure contracting officers do not implement the procedures in FAR 22.2004–2, 22.2004–3, 22.2004–4, or associated changes in FAR parts 9 and 42.

The FAR Council requested that agencies share its instructions widely among their workforces. It posted the Memorandum at *https://www.acquisition.gov/fair-pay-eo* and the Department of Labor re-posted the Memorandum at the top of its information page on the Fair Pay and Safe Workplaces E.O. at *https://www.dol.gov/asp/fairpayandsafeworkplaces/.*

As an additional step to ensure full awareness of, and compliance with, the Court Order, DoD, GSA, and NASA, on behalf of the FAR Council, are taking this more comprehensive administrative action to amend the final rule to include caveats throughout the rule for each section, provision, and clause that was enjoined by the terms of the Court Order. The caveat explains that the affected regulatory coverage has been enjoined as of October 24 and is enjoined indefinitely, but will become effective immediately if the injunction is terminated. At that time, DOD, GSA, and NASA will take an additional administrative action to remove the caveats added by this final rule.

In further compliance with the terms of the Court Order, as explained by the FAR Council in its October 25 Memorandum, GSA's Integrated Award Environment has halted actions to release the changes for the System for Award Management (SAM) that would support bidder and contractor submission of information on labor law violation decisions as well as the changes that would support public disclosure of this information in the Federal Awardee Performance and Integrity Information System (FAPIIS).

2. Paycheck Transparency

The final rule issued on August 25 also included coverage addressing the paycheck transparency requirements in section 5 of the E.O. Section 5(a) of the E.O. requires contractors and subcontractors performing covered contracts or subcontracts to provide wage statements to covered workers, giving them information concerning their hours worked, overtime hours pay, and any additions to or deductions made from their pay. Section 5(b) requires contractors and subcontractors performing covered contracts or subcontracts to provide a document to individuals performing work under the contract or subcontract as independent contractors informing them of their status as independent contractors. These requirements are implemented in FAR 22.2005, FAR 22.2007(d), and the clause at FAR 52.222–60, and further reflected in several other FAR clauses. The Court Order does not enjoin implementation of the coverage on paycheck transparency. On page 31 of the Order, the Court explains that ''[t]he court does not find that Plaintiffs have established a substantial likelihood of success on their claims regarding the 'paycheck transparency requirement' and have failed to establish that they will suffer irreparable harm as to the implementation of those provisions, which do not take effect until January 1, 2017. See 81 FR at 58713. Therefore, the court declines to enjoin enforcement of the paycheck provisions.'' Accordingly, the paycheck transparency clause language at FAR 52.222–60, 52.244–6(c)(1)(xiv), 52.212–5(b)(36), (e)(1)(xvii) and Alternate II(e)(1)(ii)(Q) take effect for new solicitations issued on or after January 1, 2017, as stated in the final rule.

A number of other provisions in FAR parts 9, 22 and clause language in part 52 that make minor editorial changes or technical references are also not affected by the Court Order and, for this reason, do not appear in this final rule.

B. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). The final rule issued August 25, 2016, was a significant regulatory action subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, and a major rule under 5 U.S.C. 804. The action published today is amending the FAR to show enjoined sections as being enjoined indefinitely.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule is an administrative action that does not require publication for public comment.

List of Subjects in 48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

Government procurement.

Dated: December 9, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore DoD, GSA, and NASA amend 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. Amend section 1.106 by adding a Note to the section to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

Note to 1.106: By a court order issued on October 24, 2016, FAR segments ''52.222–57'', ''52.222–58'', and ''52.222–59'' and their corresponding OMB Control Number ''9000–0195'' are enjoined indefinitely as of the date of the order. The enjoined segments will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.1202 by adding a Note to paragraph (a)(21) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(21) * * *

Note to paragraph (a)(21): By a court order issued on October 24, 2016, this paragraph (a)(21) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 4. Amend section 9.104–4 by adding a Note to paragraph (b) to read as follows:

9.104–4 Subcontractor responsibility.

* * * * *

(b) * * *

Note to paragraph (b): By a court order issued on October 24, 2016, this paragraph (b) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

■ 5. Amend section 9.104–5 by adding a Note to paragraph (d) to read as follows:

9.104–5 Representation and certifications regarding responsibility matters.

* * * * *

(d) * * *

Note to paragraph (d): By a court order issued on October 24, 2016, this paragraph (d) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

■ 6. Amend section 9.104–6 by adding Notes to paragraphs (b)(4) and (6) to read as follows:

9.104–6 Federal Awardee Performance and Integrity Information System.

* * * * *

(b) * * *

(4) * * *

Note to paragraph (b)(4): By a court order issued on October 24, 2016, the second sentence of this paragraph (b)(4) is enjoined indefinitely as of the date of the order. The enjoined sentence will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

(6) * * *

Note to paragraph (b)(6): By a court order issued on October 24, 2016, this paragraph (b)(6), is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

■ 7. Amend section 9.105–1 by adding a Note to paragraph (b)(4) to read as follows:

9.105–1 Obtaining information.

* * * * *

(b) * * *

(4) * * *

Note to paragraph (b)(4): By a court order issued on October 24, 2016, this paragraph (b)(4) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

■ 8. Amend section 17.207 by adding a Note to paragraph (c)(8) to read as follows:

17.207 Exercise of options.

* * * * *

(c) * * *

(8) * * *

Note to paragraph (c)(8): By a court order issued on October 24, 2016, this paragraph (c)(8) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 9. Amend section 22.102–2 by adding a Note to paragraph (c)(3) to read as follows:

22.102–2 Administration and enforcement.

* * * * *

(c) * * *

(3) * * *

Note to paragraph (c)(3): By a court order issued on October 24, 2016, this paragraph (c)(3) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 10. Amend section 22.104 by adding Notes to paragraphs (b)(1) and (d) to read as follows:

22.104 Agency labor advisors.

* * * * *

(b) * * *

(1) * * *

Note to paragraph (b)(1): By a court order issued on October 24, 2016, the words ''agency labor compliance advisors (ALCAs) (as defined at 22.2002)'' in this paragraph (b)(1) are enjoined indefinitely as of the date of the order. The enjoined words will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

(d) * * *

Note to paragraph (d): By a court order on October 24, 2016, this paragraph (d) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 11. Amend section 22.2000 by adding a Note to the section to read as follows:

22.2000 Scope of subpart.

* * * * *

Note to 22.2000: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 12. Amend section 22.2002 by adding a Note to the section to read as follows:

22.2002 Definitions.

* * * * *

Note to 22.2002: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 13. Amend section 22.2003 by adding a Note to section to read as follows:

22.2003 Policy.

* * * * *

Note to 22.2003: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 14. Amend section 22.2004–1 by adding a Note to the section to read as follows:

22.2004–1 General.

* * * * *

Note to 22.2004–1: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 15. Amend section 22.2004–2 by adding a Note to the section to read as follows:

22.2004–2 Preaward assessment of an offeror's labor law violations.

* * * * *

Note to 22.2004–2: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 16. Amend section 22.2004–3 by adding a Note to the section to read as follows:

22.2004–3 Postaward assessment of a prime contractor's labor law violations.

* * * * *

Note to section 22.2004–3: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 17. Amend section 22.2004–4 by adding a Note to the section to read as follows:

22.2004–4 Contractor preaward and postaward assessment of a subcontractor's labor law violations.

* * * * *

Note to 22.2004–4: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 18. Amend section 22.2006 by adding a Note to the section to read as follows:

22.2006 Arbitration of contractor employee claims.

* * * * *

Note to 22.2006: By a court order issued on October 24, 2016, this section is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 19. Amend section 22.2007 by adding Notes to paragraphs (a), (b), (c) and (e) to read as follows:

22.2007 Solicitation provisions and contract clauses.

(a) * * *

Note to paragraph (a): By a court order issued on October 24, 2016, this paragraph (a) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

(b) * * *

Note to paragraph (b): By a court order issued on October 24, 2016, this paragraph (b) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

(c) * * *

Note to paragraph (c): By a court order issued on October 24, 2016, this paragraph (c) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

(e) * * *

Note to paragraph (e): By a court order issued on October 24, 2016, this paragraph (e) is enjoined indefinitely as of the date of

the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 20. Amend section 42.1502 by adding a Note to paragraph (j) to read as follows:

42.1502 Policy.

* * * * *

(j) * * *

Note to paragraph (j): By a court order issued on October 24, 2016, this paragraph (j) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 21. Amend section 42.1503 by adding Notes to paragraphs (a)(1)(i) and (ii) and (h)(5) introductory text to read as follows:

42.1503 Procedures.

(a)(1) * * *

(i) * * *

Note to paragraph (a)(1)(i): By a court order issued on October 24, 2016, the words ''agency labor compliance advisor (ALCA) office (see subpart 22.20)'' in this paragraph (a)(1)(i) are enjoined indefinitely as of the date of the order. The enjoined words will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

(ii) * * *

Note to paragraph (a)(1)(ii): By a court order issued on October 24, 2016, the word ''ALCA'' in this paragraph (a)(1)(ii) is enjoined indefinitely as of the date of the order. The enjoined word will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

(h) * * *

(5) * * *

Note to paragraph (h)(5) introductory text: By a court order issued on October 24, 2016, this paragraph (h)(5) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 22. Amend section 52.204–8 by—

■ a. Revising the date of the provision; and

■ b. Adding a Note to paragraph (c)(1)(xv).

The revision and addition reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (DEC 2016)

* * * * *

(c)(1) * * *

(xv) * * *

Note to paragraph (c)(1)(xv): By a court order issued on October 24, 2016, 52.222–57 is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

■ 23. Amend section 52.212–3 by—

■ a. Revising the date of the provision; and

■ b. Adding Notes to paragraphs (a) and (s).

The revision and addition reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (DEC 2016)

* * * * *

(a) * * *

Note to paragraph (a): By a court order issued on October 24, 2016, the following definitions in this paragraph (a) are enjoined indefinitely as of the date of the order: ''Administrative merits determination'', ''Arbitral award or decision'', paragraph (2) of ''Civil judgment'', ''DOL Guidance'', ''Enforcement agency'', ''Labor compliance agreement'', ''Labor laws'', and ''Labor law decision''. The enjoined definitions will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

(s) * * *

Note to paragraph (s): By a court order issued on October 24, 2016, this paragraph (s) is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

■ 24. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Adding Notes to paragraphs (b)(35) and (e)(1)(xvi); and

■ c. Amending Alternate II by—

■ 1. Revising the date of the Alternate; and

■ 2. Adding a Note to paragraph (e)(1)(ii)(P) of Alternate II.

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DEC 2016)

* * * * *

(b) * * *

(35) * * *

Note to paragraph (b)(35): By a court order issued on October 24, 2016, 52.222–59 is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

(e)(1) * * *

(xvi) * * *

Note to paragraph (e)(1)(xvi): By a court order issued on October 24, 2016, 52.222–59 is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

Alternate II (**DEC 2016**). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(P) * * *

Note to paragraph (e)(1)(ii)(P): By a court order issued on October 24, 2016, 52.222–59 is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

■ 25. Amend section 52.222–57 by revising the date of the provision and adding a Note to the section to read as follows:

52.222–57 Representation Regarding Compliance with Labor Laws (Executive Order 13673).

* * * * *

Representation Regarding Compliance With Labor Laws (Executive Order 13673) (DEC 2016)

* * * * *

Note to 52.222–57: By a court order issued on October 24, 2016, 52.222–57 is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 26. Amend section 52.222–58 by revising the date of the provision and adding a Note to the section to read as follows:

52.222–58 Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).

* * * * *

Subcontractor Responsibility Matters Regarding Compliance With Labor Laws (Executive Order 13673) (DEC 2016)

* * * * *

Note to 52.222–58: By a court order issued on October 24, 2016, 52.222–58 is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 27. Amend section 52.222–59 by revising the date of the clause and adding a Note to the section to read as follows:

52.222–59 Compliance with Labor Laws (Executive Order 13673).

* * * * *

Compliance With Labor Laws (Executive Order 13673) (DEC 2016)

* * * * *

Note to 52.222–59: By a court order issued on October 24, 2016, 52.222–59 is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 28. Amend section 52.222–61 by revising the date of the clause and adding a Note to the section to read as follows:

52.222–61 Arbitration of Contractor Employee Claims (Executive Order 13673).

* * * * *

Arbitration of Contractor Employee Claims (Executive Order 13673) (DEC 2016)

* * * * *

Note to 52.222–61: By a court order issued on October 24, 2016, 52.222–61 is enjoined indefinitely as of the date of the order. The enjoined section will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

■ 29. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Adding a Note to paragraph (c)(1)(xiii).

The revision and addition read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (DEC 2016)

* * * * *

(c)(1) * * *

(xiii) * * *

Note to paragraph (c)(1)(xiii): By a court order issued on October 24, 2016, 52.222–59 is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DoD, GSA, and NASA will publish a document in the **Federal Register** advising the public of the termination of the injunction.

* * * * *

[FR Doc. 2016–30091 Filed 12–15–16; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2016–0051, Sequence No. 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–93; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2005–93, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–93, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov.*

DATES: December 16, 2016.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005–93 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755.

RULES LISTED IN FAC 2005–93

Item	Subject	FAR case	Analyst
I*	Paid Sick Leave for Federal Contractors (Interim)	2017–001	Delgado.
II	Fair Pay and Safe Workplaces; Injunction	2014–025	Delgado.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–93 amends the FAR as follows:

Item I—Paid Sick Leave for Federal Contractors (FAR Case 2017–001) (Interim)

This interim rule amends the FAR to implement Executive Order (E.O.) 13706

and a Department of Labor final rule issued on September 30, 2016, both entitled ''Establishing Paid Sick Leave for Federal Contractors.'' The interim rule requires contractors to allow all employees performing work on or in connection with a contract covered by the E.O. to accrue and use paid sick leave in accordance with E.O. 13706 and 29 CFR part 13. Contracting officers will include a clause in covered contracts.

Item II—Fair Pay and Safe Workplaces; Injunction (FAR Case 2014–025)

This final rule amends the FAR to include caveats on sections of FAR Case 2015–024, Fair Pay and Safe Workplaces, that were enjoined indefinitely as of October 24, 2016, by court order. FAR Case 2015–024 was published as a final rule in the **Federal Register** at 81 FR 58562 to implement Executive Order (E.O.) 13673, as amended by E.O.s 13683 and 13737. The rule had an effective date of October 25, 2016. On October 7, 2016, the Associated Builders and Contractors of Southeast Texas, Inc., the Associated Builders and Contractors, Inc., and the National Association of Security Companies, filed a lawsuit in the United States District Court for the Eastern District of Texas, seeking to overturn the final rule, Civil Action No. 1:16–CV–425. The District Court issued a ''Memorandum and Order Granting Preliminary Injunction'' on October 24, 2016. The Court Order on page 31 stated that ''Defendants are enjoined from implementing any portion of the FAR Rule or DOL Guidance relating to the new reporting and disclosure requirements regarding labor law violations as described in Executive Order 13673 and implemented in the FAR Rule and DOL Guidance. Further, Defendants are enjoined from enforcing the restriction on arbitration agreements.'' The Court did not enjoin implementation of those sections of, or the clause in, the FAR rule addressing the E.O.'s paycheck transparency requirements. To ensure compliance with the Court Order, the FAR Council issued a memorandum on October 25, 2016, subject ''Court Order Enjoining Certain Sections, Provisions, and Clauses in Federal Acquisition Circular (FAC) 2005–90, Implementing Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces.''

Dated: December 9, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2016–30092 Filed 12–15–16; 8:45 am]

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